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A
TREATISE
ON
CRIMES AND MISDEMEANORS.

BY SIR WILLIAM OLDNALL RUSSELL, KNT.,
LATE CHIEF JUSTICE OF BENGAL.

BY CHARLES SPRENGEL GREAVES, ESQ.,
ONE OF HER MAJESTY'S COUNSEL.

Sixth American, from the Fourth London Edition,
WITH THE NOTES AND REFERENCES CONTAINED IN THE FORMER EDITIONS,
AND WITH
ADDITIONAL NOTES AND REFERENCES TO ENGLISH AND AMERICAN DECISIONS,

BY GEORGE SHARSWOOD, LL.D.

IN THREE VOLUMES.
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A TREATISE ON CRIMES AND MISDEMEANORS.

BOOK THE FIRST.

OF PERSONS CAPABLE OF COMMITTING CRIMES, OF PRINCIPALS AND ACCESSORIES, AND OF INDICTABLE OFFENCES.

CHAPTER THE FIRST.

GENERAL PROVISIONS.

THERE are certain general enactments applicable to many offences, which are collected in this chapter in order that, instead of being frequently repeated at length, and thereby increasing the size of the work, they may be referred to in this place whenever it may be necessary.

By the 14 & 15 Vict. c. 100, s. 9, "if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

Under this clause the defendant can only be convicted of the attempt to commit the very offence with which he is charged. Upon an indictment for breaking and entering the house of M. Fowler, and stealing therein eight spoons, one dress, &c., it appeared that the prisoner broke and entered the house, but that all the articles mentioned in the indictment had been stolen from the house before the time when the prisoner so broke and entered it; there were, however, other goods of the prosecutor's in the house at that time; and it was held that the prisoner [*2] could not be convicted of an attempt under this clause; for such an attempt must be to do that which if successful would amount to the felony or misdemeanor charged in the indictment; and here the attempt could not have succeeded, as the things which the indictment charged the prisoner with stealing had been previously removed.(a)¹

(a) Reg. v. M'Pherson, 1 D. & B. 197.

¹ The principle that to make a crime of an attempt to commit a crime, there must have been a present ability to perpetrate the crime intended, applies only to the act itself. If the act is in itself efficient to produce the effect intended, the offence is complete, although the effect be defeated by something extrinsic to the act: *State v. Wilson*, 30 Conn. 500. See *People v. Lawton*, 56 Barb. 126.

Upon a trial for felony the jury can only convict of an attempt which is a misdemeanor, and not of an attempt which is made felony by statute. Thus, on an indictment for murder with poison, the prisoner cannot be convicted of feloniously administering poison to the deceased with intent to murder him. (b)

Each of the Consolidation Acts 24 & 25 Vict. c. 96, s. 115; c. 97, s. 72; c. 98, s. 50; c. 99, s. 36; and c. 100, s. 68, contains the following clause:—

“All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed ‘on the high seas.’ Provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty’s land or naval forces.”

The Coin Act, c. 99, which extends to Scotland, in sec. 36, adds “Where any of the crimes and offences or high crimes and offences mentioned in this Act, shall be committed at sea, and the vessel in which the same shall be committed shall be registered in Scotland, or touch at any part thereof, the Courts of Criminal Law of Scotland may inquire, try, and determine the same in the same manner as if such crime and offence, or high crime and offence, had been committed in Scotland.”

These enactments were framed on the similar clauses contained in the 7 & 8 Geo. 4, c. 29, s. 77; 7 & 8 Geo. 4, c. 30, s. 43; 9 Geo. 4, c. 31, s. 32; 9 Geo. 4, c. 55, s. 74 (I.); 9 Geo. 4, c. 56, s. 55 (I.); and 10 Geo. 4, c. 34, s. 41 (I.); together with the 7 & 8 Vict. c. 2. Some of these enactments simply provide for the trial of offences committed within the jurisdiction of the Admiralty; whilst others provide in addition, that the offences mentioned in the Act, which shall be committed within the jurisdiction of the Admiralty, shall be deemed to be offences of the same nature, and liable to the same punishments as if they had been committed upon the land in England or Ireland. It seems clear that, wherever an Act creates new offences, this is the proper enactment; for, though in the case of offences against the laws of nature and nations, such as murder or piracy committed *3] *on the seas, the general course of legislation has been simply to provide for their trial, and no doubt correctly, because, in the eye of the law of England, they were offences of the same nature as if they had been committed on land in England, yet it may well be doubted whether that be sufficient in the case of newly-created offences; and it is certainly much safer to have the provision with which this clause commences.

The 39 Geo. 3, c. 37, s. 1, no doubt provides generally, that every offence committed upon the high seas shall be of the same nature, &c., as if it had been committed on shore, but it is by no means clear that that enactment applies to any offence created by a subsequent statute, and it was much better not to leave the matter open to any such question.

Under these clauses the Court of Quarter Sessions has authority to try any offender apprehended or in custody within their local jurisdiction for any offence committed on the sea, which they might have tried if it had been committed within that jurisdiction. A prisoner committed a larceny on board the British vessel *Candia* whilst on the high seas, and was apprehended within the borough and county of Southampton, and it was held that the Court of Quarter Sessions for that borough and county had authority to try him for that offence. (c)

By the 7 & 8 Geo. 4, c. 28, s. 8, “every person convicted of any felony, for which no punishment hath been or hereafter may be specially provided, shall be deemed to be punishable under this Act, and shall be liable, at the discretion of the Court, to be transported(cc) beyond the seas for the term of seven years, or to

(b) *Reg. v. Connell*, 6 Cox C. C. 178, *Williams and Talfourd, JJ.*

(c) *Reg. v. Peel*, 1 L. & C. 231.

(cc) Penal servitude. See the next page.

be imprisoned for any term not exceeding two years, and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment."

By sec. 9, "where any person shall be convicted of any offence punishable under this Act, for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or to be imprisoned and kept to hard labor, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for the whole or any portion or portions of such imprisonment, or of such imprisonment with hard labor, as to the Court in its discretion shall seem meet."

But by the 1 Vict. c. 90, s. 5, "it shall not be lawful for any Court to direct that any offender shall be kept in solitary confinement, for any longer periods than one month at a time, or than three months in the space of one year."

Where a prisoner is sentenced to solitary confinement under these clauses, the sentence should specify the time at which such confinement is to commence as well as the term for which it is to last.

An opinion at one time prevailed that it was expedient to award to certain offences fixed terms of transportation or imprisonment, and many statutes were passed containing such fixed terms. That opinion afterwards was abandoned, and in consequence the 9 & 10 Vict. c. 24, s. 1, was passed, which, after *reciting [*4 that "in certain cases of felony the Court is not empowered by law to award a sentence of transportation for a less period than the term of the offender's life or some long term of years, or sentence of imprisonment for any shorter term than two years; but it is desirable that some such offenders should suffer transportation or imprisonment for a shorter period respectively, at the discretion of the Court before which they are convicted," enacts that "in all cases where the Court is now (26th June 1846) empowered or required to award a sentence of transportation exceeding seven years, it shall be lawful for such Court, at its discretion, to award a sentence of transportation for a term of years, not less than seven years, or to award such sentence of imprisonment for any period not exceeding two years, with or without hard labor, as shall to the Court in its discretion appear just under all the circumstances."

By the 16 & 17 Vict. c. 99, penal servitude was introduced in lieu of transportation in certain cases and under certain regulations; but sec. 1, 2, 3, and 4 of that Act which made these provisions were repealed by the 20 & 21 Vict. c. 3, s. 1, and by sec. 2 of this Act, "no person shall be sentenced to transportation; and any person who [if the 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3, had not been passed] might have been sentenced to transportation, shall be liable to be sentenced to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if the said [Acts] had not been passed; and in every case where at the discretion of the Court one of any two or more terms of transportation might have been awarded, the Court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorized to be awarded instead of such terms of transportation: Provided always, that any person who might at the discretion of the Court have been sentenced either to transportation for any term or to any period of imprisonment shall be liable at the discretion of the Court to be sentenced either to penal servitude for the same term or to the same period of imprisonment; and in any case in which before the passing of the (16 & 17 Vict. c. 99) sentence of seven years' transportation might have been passed, it shall be lawful for the Court at its discretion to pass a sentence of penal servitude of not less than three years."

The 27 & 28 Vict. c. 47 recites the 16 & 17 Vict. c. 99, and 20 & 21 Vict. c. 3, and by sec. 1, "this Act shall be construed as one with the above mentioned Acts."

Sec. 2. "No person shall be sentenced to penal servitude in respect to any offence committed after the passing of this Act for a period of less than five years; and where under any Act now in force a period of less than five years is the utmost sentence of penal servitude that can be awarded, a period of five years shall, in respect to any offence committed after the passing of this Act, in such Act be substituted for the less period; and where under any Act now in force a period of

either less or more than five years may be awarded as a sentence of penal servitude, the least sentence of penal servitude that can be awarded under that act, shall, in respect to any offence committed after the passing of this Act, be a period of five years; and where any person shall on indictment be convicted of any crime or offence punishable with penal servitude, after having been previously convicted of felony, or, in Scotland, of any crime (whether such previous conviction shall have taken place upon an indictment or under the provisions of the Act passed in the eighteenth and nineteenth of Victoria, chapter one hundred and twenty-six), the least sentence of penal servitude that can be awarded in such case shall be a period of seven years."

Sec. 4. If any holder of a license granted in the form in the schedule is convicted, either by verdict of a jury or upon his own confession, of any offence for which he is indicted, his license shall be forthwith forfeited by virtue of such conviction, or if any holder of a license granted under any of the Penal Servitude Acts shall, unless prevented by illness or other unavoidable cause, fail to report himself personally, if in Great Britain to the chief police station of the borough or police division, and if in Ireland to the constabulary station of the locality, to which he may go within three days after his arrival therein, and being a male subsequently once in each month at such time and place, in such manner and to such person as the chief officer of the constabulary force to which such station belongs shall appoint, or shall change his residence from one police district to another without having previously notified the same to the police or constabulary station to which he last reported himself, he shall be deemed guilty of a misdemeanor, and may be summarily convicted thereof, and his license shall be forthwith forfeited by virtue of his conviction, but he shall not be liable to any other punishment by virtue of such conviction.

Sec. 5. "If any holder of a license granted in the form set forth in the said Schedule (A.)—

"1. Fails to produce his license when required to do so by any judge, justice of the peace, sheriff, sheriff substitute, police or other magistrate before whom he may be brought charged with any offence, or by any constable or officer of the police in whose custody he may be, and also fails to make any reasonable excuse why he does not produce the same; or

"2. Breaks any of the other conditions of his license by any Act that is not of itself punishable either upon indictment or upon summary conviction; he shall be deemed guilty of an offence punishable summarily by imprisonment for any period not exceeding three months, with or without hard labor."

Sec. 6. Any constable or police officer may, without warrant, apprehend any holder of a license whom he may reasonably suspect of having committed any offence, or of having broken any of the conditions of his license, and may take him before a justice to be dealt with according to law.

Sec. 7. When the holder of a license is convicted of an offence punishable summarily under this or any other Act a certificate thereof is to be forwarded to a secretary of state in Great Britain, or to the lord lieutenant in Ireland, and thereupon the license may be revoked.

Sec. 9. "Where any license granted in the form set forth in the said Schedule (A.) is forfeited by a conviction of any indictable offence, or is revoked in pursuance of a summary conviction under this Act or any other Act of Parliament, the person whose license is forfeited or revoked shall, after undergoing any other punishment to which he may be sentenced for the offence in consequence of which his license is forfeited or revoked, further undergo a term of penal servitude equal to the portion of his term of penal servitude that remained unexpired at the time of his license being granted, and shall, for the purpose of his undergoing such last-mentioned punishment, be removed from the prison of any county, borough, or place in which he may be confined, to any prison in which convicts under sentence of penal servitude may lawfully be confined, by warrant under the hand and seal of any justice of the peace of the said county, borough, or place, and shall be liable to be there dealt with in all respects as if such term of penal servitude had formed part of his original sentence."

Sec. 10 empowers Her Majesty or the Lord Lieutenant of Ireland to grant licenses in any other form than that in the schedule and containing different conditions; and such licenses shall be revokable at pleasure by the authority by which they were granted; but a breach of their conditions is not to subject any holder of a license to summary conviction.

This Act appears to have been anything rather than well considered. In the case of larceny and sundry other offences, penal servitude for three years was the highest punishment which could be inflicted, and the effect of this Act is to raise all those punishments to five years penal servitude. Cases may, no doubt, occur where this may be a proper punishment; but there may be others where the offender deserves less than five years penal servitude and more than two years imprisonment, and cases of this kind may occur in every case where penal servitude may be awarded under the Criminal Law Consolidation Acts, for they give penal servitude for not less than three years, or imprisonment not exceeding two years. In a case where a convict deserves more than two years hard labor, and less than five years penal servitude, no Court will ever pass more than the convict deserves, and consequently it must pass less than he deserves; this is a very palpable mistake in the statute.

Each of the Consolidation Acts, 24 & 25 Vict. c. 96, s. 118; c. 97, s. 74; c. 98, s. 52; c. 99, s. 39, and c. 100, s. 69, contains the following clause:—

“Whenever imprisonment, with or without hard labor, may be awarded for any indictable offence under this Act, the Court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labor, in the common gaol or house of correction.”

Each of the Consolidation Acts, 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 98, s. 53; c. 99, s. 40, and c. 100, s. 70, contains the following clause:—

“Whenever solitary confinement may be awarded for any indictable offence under this Act, the Court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labor, not *exceeding one month at any one time, and not exceeding three months in any one year.”

Each of the Consolidation Acts 24 & 25 Vict. c. 96, s. 119; c. 97, s. 75; c. 100, s. 70, contains the following clause:—

“Whenever whipping may be awarded for any indictable offence under this Act, the Court may sentence the offender to be once privately whipped; and the number of strokes, and the instrument with which they shall be inflicted, shall be specified by the Court in the sentence.”

Each of the Consolidation Acts 24 & 25 Vict. c. 96, s. 117; c. 97, s. 73; c. 98, s. 51; c. 99, s. 38, and c. 100, s. 71, contains the following clause:—

“Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the Court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behavior; and in case of any felony punishable under this Act, (a) the Court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace in addition to any punishment by this Act authorized: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year.”

Each of the Consolidation Acts 24 & 25 Vict. c. 96, s. 98; c. 97, s. 56; c. 98, s. 49; c. 99, s. 35, and c. 100, s. 67, enacts that “In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (b) shall be liable to be imprisoned for any

(a) The Offences Against the Person Act, s. 71, here adds, “Otherwise than with death.”

(b) Accessories after the fact to murder and the receivers of stolen goods are excepted.

term not exceeding two years, with or without hard labor, and with or without solitary confinement;(c) and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act shall be liable to be proceeded against, indicted, and punished as a principal offender."(d)

*6].

*CHAPTER THE SECOND.

OF PERSONS CAPABLE OF COMMITTING CRIMES.

It is a general rule that no person shall be excused from punishment for disobedience to the laws of the country, unless he be expressly defined and exempted by the laws themselves.(a) The inquiry, therefore, as to those who are capable of committing crimes, will best be disposed of by considering the several pleas and excuses which may be urged on behalf of a person who has committed a forbidden act, as grounds of exemption from punishment.

Those pleas and excuses must be founded upon the want or defect of *will* in the party by whom the act has been committed. For without the consent of the *will*, human actions cannot be considered as culpable; nor where there is no will to commit an offence, is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offences.(b) The cases of want or defect of will seem to be reducible to four heads:—I. Infancy. II. *Non compos mentis*. III. Subjection to the power of others. IV. Ignorance.

I. The full age of man or woman by the law of England is twenty-one years:(c) under which age a person is termed an *infant*, and is exempted from punishment in some cases of misdemeanors and offences that are not capital.(d) But the nature of the offence will make differences which should be observed. Thus, if it be any notorious breach of the peace, as a riot, battery, or the like, an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one;(e) and if an infant judicially perjure himself in point of age, or otherwise, he shall be punished for the perjury; and he may be indicted for cheating with false dice, &c.:(f) but if the offence charged by the indictment be a mere non-feazance (unless it be of such a thing as the party be bound to by reason of tenure or the like, as to repair a bridge, &c.)(g), there, in some cases, he shall be privileged by his non-age, if under twenty-one, though above fourteen years; because laches in such a case shall not be imputed to him.(h)¹

It is said that if an infant of the age of eighteen years be convicted of a disseisin with force, yet he shall not be imprisoned;(i) and the law is said to be, that *7] though an infant at the age of *eighteen or even fourteen, by his own acts may be guilty of a forcible entry, and may be fined for the same, yet he cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion; and it is not particularly mentioned in the statute against forcible entries, that he shall be committed for such fine.(j) An infant cannot, however, be guilty

(c) The Offences Against the Person Act and Coin Act omit solitary confinement.

(d) This clause is omitted in the Coin Act, but the 24 & 25 Vict. c. 94, s. 8, supplies the omission. *Post*, p. 70.

(a) 4 Blac. Com. 20.

(b) 1 Hale 14.

(c) It is the full age of male or female according to common speech: Lit. s. 104, 259.

(d) 1 Hale 20.

(e) 4 Blac. Com. 23; 1 Hale 20; Co. Lit. 247 b.

(f) Bac. Abr. Inf. (H.) Sid. 258.

(g) 2 Inst. 703; Rex. v. Sutton, 3 Ad. & E. 597 (30 E. C. L. R.), *post*, Bridges.

(h) 1 Hale 20; Bac. Abr. Inf. (H.)

(i) 1 Hale 21.

(j) Bac. Abr. Inf. (H.); Dalt. 422; Co. Lit. 357. And see 1 Hawk. P. C. c. 64, s. 35, that the infant ought not to be imprisoned because he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named.

¹ An infant only a year or two old, upon whose land a nuisance is created, cannot be made criminally answerable for it: *People v. Townsend*, 3 Hill 479.

of a forcible entry or disseisin by barely commanding one, or by assenting to one to his use; because every command or assent of this kind by a person under such incapacity is void: but an actual entry by an infant into another's freehold gains the possession and makes him a disseisor.^(k)

With regard to capital crimes the law is more minute and circumspect; distinguishing with greater nicety the several degrees of age and discretion: though the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment.^(l) But within the age of *seven years* an infant cannot be punished for any capital offence, whatever circumstances of a mischievous discretion may appear; for *ex presumptione juris* such an infant cannot have discretion; and against this presumption no averment shall be admitted.^(m)

An infant under the age of seven years cannot be guilty of felony; and therefore a defendant cannot justify taking such an infant into custody and taking him before a magistrate upon the ground that he had been caught stealing a piece of wood.^(mm)

On the attainment of *fourteen years* of age, the criminal actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil, and therefore subjects them to capital punishments as much as if they were of full age.⁽ⁿ⁾ But during the interval *between fourteen years and seven*, an infant shall be *primâ facie* deemed to be *doli incapax*, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction; but if it appear to the Court and jury that the offender was *doli capax*, and could discern between good and evil, he may be convicted and suffer death.^(o) Thus, it is said that an infant of eight years old may be guilty of murder, and shall be hanged for it:^(p) and where an infant between eight and nine years old was indicted, and found guilty of burning two barns, and it appeared, upon examination, that he had *malice, revenge, craft, and cunning, he had judgment to be hanged, and was exe- [*8 cuted accordingly.^(q)

An infant of the age of nine years, having killed an infant of the like age, confessed the felony; and, upon examination, it was found that he hid the blood and the body. The justices held that he ought to be hanged; but they respited the execution that he might have a pardon.^(r) Another infant, of the age of ten years, who had killed his companion and hid himself, was, however, actually hanged; upon the ground that it appeared by his hiding that he could discern between good and evil; and *malitia supplet ætatem*.^(s) And a girl of thirteen was burnt for killing her mistress.^(t) Whenever a person under the age of fourteen is charged with committing a felony, the proper course is to leave the case to the

(k) Bac. Abr. Inf. (H.); Co. Lit. 357; 1 Hawk. P. C. c. 64, s. 35.

(l) 4 Blac. Com. 23.

(m) 1 Hale 27, 28; 1 Hawk. c. 1, s. 1, note (1); 4 Bla. Com. 23. A pardon was granted to an infant within the age of seven years, who was indicted for homicide; the jury having found that he did the act before he was seven years old. 1 Hale 27 (edit. 1800), note (g).

(mm) *Marsh v. Loader*, 14 C. B. (N. S.) 535 (108 E. C. L. R.).

(n) Dr. & Stu. c. 26; Co. Lit. 79, 171, 247; Dalt. 476, 505; 1 Hale 25; Bac. Abr. Inf. A. & H.

(o) 1 Hale 25, 27; 4 Blac. Com. 23. The civil law, as to capital punishments, distinguished the ages, into four ranks: 1. *Ætas pubertatis plena*, which is eighteen years. 2. *Ætas pubertatis*, or *pubertas* generally, which is fourteen years, at which time persons were likewise presumed to be *doli capaces*. 3. *Ætas pubertatis proxima*; but in this the Roman lawyers were divided, some assigning it to ten years and a half, others to eleven; before which the party was not presumed to be *doli capax*. 4. *Infantia*, which lasts till seven years, within which age there can be no guilt of a capital offence: 1 Hale 17-19.

(p) Dalt. Just. c. 147.

(q) Dean's case, 1 Hale 25, note (u).

(r) 1 Hale 27; F. Corone, 57; B. Corone, 133.

(s) Spigurnal's case, 1 Hale 26; Fitz. Rep. Corone 118.

(t) Alice de Waldborough's case, 1 Hale 26.

jury to say whether, at the time of committing the offence, such person had guilty knowledge that he was doing wrong.(n)

In the case of *rape*, the law presumes that an infant under the age of fourteen years is unable to commit the crime; and therefore he cannot be guilty of it.(u) So also, for the like reason, such an infant cannot be guilty of an assault with intent to commit a rape,(v) or of carnally knowing a girl under ten years of age.(w) And this presumption cannot be rebutted, and evidence is not admissible to prove that the infant is in fact competent to commit any such offence.(x) But this presumption is upon the ground of impotency rather than the want of discretion; for he may be a principal in the second degree, as aiding and assisting in this offence as well as in other felonies, if it appear by sufficient circumstances that he had a mischievous discretion.(y)¹

In 1748, W. York, a boy of ten years of age, was convicted for the murder of a girl of about five years of age; but Willes, C. J., out of regard to the tender years of the prisoner, respited execution till he could take the opinion of the rest of the judges, whether it was proper to execute him or not.

The boy and girl were parish children, under the care of a parishioner; and on the day of the murder he and his wife went out to their work, and left the children in bed together. When they returned, the girl was missing; and the boy, being asked what was become of her, answered that he had helped her up and put on her clothes, and she had gone he knew not whither. Upon this, strict search was made for the child. During this search, the man observed that a heap of dung near the house had been newly turned up; and, upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery,

*9] the boy, who was the only person capable of *committing the fact, that was left at home with the child, was charged with the fact, which he stiffly denied. When the coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said that the child had been used to foul herself in bed; that she did so that morning (which was not true, for the bed was searched and found to be clean), that thereupon he took her out of the bed and carried her to the dung-heap, and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung-heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighboring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment, until the boy should have an opportunity of recollecting himself. Accordingly he warned him of the danger he was in if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself: and then ordered him into a room where none of the crowd that attended should have access to him. When the boy had been some hours in this room where victuals and drink were provided for

(n) *Rex v. Owen*, 4 C. & P. 236 (19 E. C. L. R.), Littledale, J.; *Reg. v. Smith*, 1 Cox C. C. 260, Erle, J.

(u) *Rex v. Groombridge*, 7 C. & P. 582 (32 E. C. L. R.). Gaselee, J., after consulting Lord Abinger, C. B., as to whether the words "every person" in the 9 Geo. 4, c. 31, s. 16, altered the former law.

(v) *Rex v. Eldershaw*, 3 C. & P. 396 (14 E. C. L. R.), Vaughan, J.; *Reg. v. Philips*, 8 C. & P. 736 (34 E. C. L. R.), Patterson, J.

(w) *Reg. v. Jordan*, 9 C. & P. 118 (38 E. C. L. R.), Williams, J.

(x) *Reg. v. Philips*, and *Reg. v. Jordan*, *supra*.

(y) 1 Hale 630.

¹ The common-law presumption that a boy under fourteen is incapable of committing rape, is liable to be overcome by clear proof of maturity: *State v. Pugh*, 7 Jones (Law) 61; *People v. Randolph*, 2 Parker C. R. 174; *Williams v. State*, 14 Ohio 222; *State v. Sam*, 1 Wis. 300. A boy over fourteen is presumed to be capable: *State v. Handay*, 4 Harring. 566.

him, he was brought a second time before the justice, and then he repeated his former confession :—upon which he was committed to gaol. On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice of the peace; and of many declarations to the same purpose which the boy made to other people after he came to gaol, and even down to the day of his trial; for he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted. The judges having taken time to consider this report, unanimously agreed; 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That, supposing the boy to have been guilty of this fact, there were so many circumstances stated in the report which were undoubtedly tokens of what Lord Hale calls a *mischievous discretion*, that he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought that children may commit such atrocious crimes with impunity. That there are many crimes of the most heinous nature, such as (in the present case) the murder of young children, poisoning parents or masters, burning houses, &c., which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore, though the taking away the life of a boy of ten years old might savour of cruelty, yet, as the example of that boy's punishment might be a means of deterring other children from the like offences, and as the sparing the boy, *merely on account of his age*, would probably have a quite contrary tendency; in justice to the public, the law ought to take its course; unless there remained any doubt touching his guilt. In this general principle all the judges concurred: [*10 but two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner; suggesting that it might possibly appear, on further inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice. Accordingly the chief justice granted one or two more reprieves; and desired the justice of the peace who took the boy's examination, and also some other persons, in whose prudence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length he, receiving no further light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but, before the expiration of that reprieve, execution was respite till further order, by warrant from one of the secretaries of state: and at the summer assizes, 1757, the prisoner had the benefit of His Majesty's pardon, upon condition of his entering immediately into the sea service.(z)

It is said that an act making a new felony does not extend to an infant under the age of discretion, namely, fourteen years old(a) and that general statutes which give corporal punishment are not to extend to infants; and that, therefore, if an infant be convicted in ravishment of ward, he shall not be imprisoned, though the statute of Merton, c. 6, be general in that case(b). But this must be understood, where the corporal punishment is, as it were, but collateral to the offence, and not the direct intention of the proceeding against the infant for his misdemeanor; in many cases of which kind the infant under the age of twenty-one shall be spared, though possibly the punishment be enacted by Parliament.(c)

But where a fact is made felony or treason, it extends as well to infants, if above fourteen years, as to others. And this appears by several Acts of Parliament, as by 1 Jac. 1, c. 11,(d) of felony for marrying two wives, in which there was a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years; so that if the marriage were above the age of consent, though within the age of twenty-one years, it was not exempted from the penalty.

(z) York's case, Fost. 70, *et seq.*

(a) 1 Hale 706; Eyston and Studde's case, Plowd. Com. 465, a. And see 1 Hale 21, 22; Bac. Abr. Infancy (H).

(b) Bac. Abr. Infancy (H); Plowd. 364; 1 Hale 21.

(c) Bac. Abr. Infancy (H); 1 Hale 21.

(d) Repealed, 9 Geo. 4, c. 31, s. 1.

So by the 21 Hen 8, c. 7.(e) concerning felony by servants that embezzle their masters' goods delivered to them, there was a special provision that it should not extend to servants under the age of eighteen years, who certainly had been within the penalty, if above the age of discretion, namely, fourteen years, though under eighteen years, unless there had been a special provision to exclude them. And so by the 12 Ann. c. 7.(e) (by which it was made felony without benefit of clergy to steal goods to the value of 40s. out of a house, though the house were not broken open), where apprentices who should rob their masters were excepted out of the Act.(f)

*11] In many cases of crimes committed by infants, the judges will *in prudence respite the execution in order to get a pardon: and it is said that if an infant apparently wanting discretion be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon.(g) But this authority to dismiss him, must be understood of a reprieve before judgment; or of a case where the jury find the prisoner within the age of seven years, or not of sufficient discretion to judge between good and evil.(h)

II. It has been considered, that there are four kinds of persons who may be said to be *non compos*: 1. An idiot. 2. One made *non compos* by sickness. 3. A lunatic. 4. One that is drunk.(i) But it should be observed, that every person at the age of discretion is presumed sane, unless the contrary is proved: and if a lunatic has lucid intervals, the law presumes the offence of such person to have been committed in a lucid interval, unless it appears to have been committed in the time of his distemper.(k)

An *idiot* is a fool or madman from his nativity, and one who never has any lucid intervals: and such an one is described as a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, &c.: but these are mentioned as instances only; for whether idiot or not is a question of fact for the jury.(l) One who is *surdus et mutus a nativitate* is in presumption of law an idiot, and the rather because he has no possibility to understand what is forbidden by law to be done, or under what penalties: but if it appear that he has the use of understanding, which many of that condition discover by signs to a very great measure, then he may be tried and suffer judgment and execution, though great caution should be used in such a proceeding.(m)

(e) Repealed, 7 & 8 Geo. 4. c. 27.

(f) Bac. Abr. Infancy (H); Co. Lit. 147: 1 Hale 21, 22.

(g) 35 Hen. 6, 11 and 12.

(h) 1 Hale 27; 1 Hawk. P. C. c. 1, s. 8. And, *quære*, whether in any case of an infant convicted by a jury, the judge would take upon himself to dismiss him. It is submitted that the regular course would be to respite execution, and recommend the prisoner for a pardon.

(i) Co. Lit. 247; Beverley's case, 4 Co. 124.

(k) 1 Hale 33, 34.

(l) Bac. Abr. Idiots, &c. (A.); Dy. 25; Moor 4, pl. 12; Bro. Idiot 1; F. N. B. 233.

(m) 1 Hale 34. And see the note (o) where it is said that according to 43 Assis. pl. 30, and 8 Hen. 4, c. 2, if a prisoner stands mute, it shall be inquired whether it be wilful, or by the act of God; from whence Crompton infers that if it be by the act of God, the party shall not suffer: Crompt. Just. 29, a. But if one who is both deaf and dumb, may discover by signs, that he hath the use of understanding, much more may one who is only dumb, and consequently such a one may be guilty of felony. It may be observed, that from the humane exertions of many ingenious and able persons, and from the extensive charitable institutions for the instruction of the deaf and dumb, many of those unfortunate people have at the present day a very perfect knowledge of right and wrong. In Steel's case, 1 Leach 451, a prisoner who could not hear, and could not be prevailed upon to plead, was found mute by the visitation of God, and then tried, found guilty, and sentenced to be transported. And in Jones's case, 1 Leach 102, where the prisoner (who was indicted on 12 Ann. c. 7, for stealing in a dwelling-house) on being put to the bar appeared to be deaf and dumb, and the jury found a verdict, "Mute by the visitation of God;" after which a woman was examined upon her oath, to the fact of her being able to make him understand what others said, which she said she could do by means of signs, such prisoner was arraigned, tried, and convicted of the simple larceny. The proper course in such cases is, 1. To swear a jury to determine whether the prisoner be mute of malice or by the visitation of God. 2. Whether he be able to plead. 3. Whether he be sane or not: on which issue the question is, or whether he is of sufficient intellect to comprehend the course of the proceedings on the trial so as to be able to make a proper defence: Rex

*A person made *non compos mentis* by sickness, or, as it has been sometimes expressed, a person afflicted with *dementia accidentalis vel adventitia*, is excused [*12 in criminal cases from such acts as are committed while under the influence of his disorder.(n) Several causes have been assigned for this disorder; such as the distemper of the humors of the body; the violence of a disease, as fever or palsy; or the concussion or hurt of the brain: and, as it is more or less violent, it is distinguishable in kind or degree, from a particular *dementia*, in respect of some particular matters, to a *total alienation* of the mind, or complete madness.(o)

A *lunatic* is one laboring also under a species of the *dementia accidentalis vel adventitia*, but distinguishable in this, that he is afflicted by his disorder only at certain periods and vicissitudes; having intervals of reason. Such a person during his frenzy is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent.(p) The name of *lunacy* was taken from the influence which the moon was supposed to have in all disorders of the brain; a notion which has been exploded by the sounder philosophy of modern times.

With respect to a person *non compos mentis* from *drunkenness*, a species of madness which has been termed *dementia affectata*, it is a settled rule, that if the drunkenness be voluntary, it cannot excuse a man from the commission of any crime.(q) but on the contrary must be considered as an aggravation of whatever he does amiss.(r) Yet if a person, by the unskillfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes frenzy, this puts him in the same condition with any other frenzy, and equally excuses him; also, if by one or more such practices an habitual or fixed frenzy be caused, though this madness was contracted by the vice and will of the party, yet the habitual and fixed frenzy caused thereby puts the man in the same condition as if it were contracted at first involuntarily.(s) And, though voluntary drunkenness cannot excuse from the commission of crime, yet where as upon a charge of murder, the material question is, whether an act was premeditated or done only with sudden heat and impulse, the fact of the party being intoxicated has been holden to be a circumstance proper to be taken into consideration.(t)¹

v. Pritchard, 7 C. & P. 303 (32 E. C. L. R.), Alderson, B.; Rex v. Dyson, Ibid. 305, n. (a), Parke, B.; s. c. 1 Lewin 64. In Rex v. Pritchard, the jury were sworn on each of the three issues separately. See Rex v. Dyson, for the form of the oath administered to the interpreter. See Thompson's case, 2 Lewin 137, where the prisoner being deaf and dumb, but able to read, the indictment was handed to him with the usual questions written upon paper, and he wrote his plea on paper. The jurors' names were then handed to him, with the question, "whether he objected to any of them?" and he wrote for answer, "No." The judge's note of the evidence of each witness was handed to him, and he was asked in writing, if he had any questions to put. In a case of misdemeanor, after a jury had found that the prisoner was mute by the visitation of God, but was of sound mind, his counsel was permitted to plead not guilty for him, and the trial proceeded in the usual manner, and the evidence was not interpreted to the prisoner: Reg. v. Whitfield, 3 C. & K. 121, Williams, J. Where a prisoner, on being brought up to be arraigned, stands mute, or it appears questionable whether he be sane or not, the proper course is to swear a jury to try the question, as it is for them and not for the court to decide whether the prisoner stands mute of malice, or is insane: Reg. v. Israel, 2 Cox C. C. 263.

(n) 1 Hale 30; Bac. Abr. Idiots (A).

(o) 1 Hale 30.

(p) 4 Co. 125; Co. Lit. 247; 1 Hale 31.

(q) Co. Lit. 247; 1 Hale 32; 1 Hawk. P. C. c. 1, s. 6.

(r) 4 Blac. Com. 26; Plowd. 19; Co. Lit. 247. *Nam omne crimen ebrietas incendit et detegit.* And see Beverley's case, 4 Co. 125.

(s) 1 Hale 32.

(t) By Holroyd, J., in Rex v. Grindley, Worcester Sum. Ass. 1819, MS. But in a case of murder by stabbing with a bayonet, where Rex v. Grindley was relied upon, Park, J. J. A., in the presence of Littledale, J., said, "highly as I respect that late excellent judge (Holroyd), I differ from him, and my brother Littledale agrees with me. He once acted upon that case but afterwards retracted his opinion, and there is no doubt that that case is not law." Rex v. Carroll, 7 C. & P. 145 (32 E. C. L. R.).

¹ The doctrine of the American cases accords with the text, and what follows. Drunkenness is no excuse for crime: State v. Harlowe, 21 Mo. 444; Mercer v. State, 17 Geo. 146; Carter v. State, 12 Texas 500; People v. Robinson, 1 Parker C. R. 649; People v. Willey, 2 Ibid. 19; State v. John, 8 Iredell 330; State v. Bullock, 13 Ala. 413; Schaller

*13] *So in a case of maliciously stabbing, a very learned judge observed, that with regard to the intention, drunkenness might perhaps be adverted to according to the nature of the instrument used. If a man used a stick, a jury would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as they would if he had used a different kind of weapon; but where a dangerous instrument was used, which, if used, must produce grievous bodily harm, drunkenness could have no effect on the consideration of the malicious intent of the party.^(u) So drunkenness is often very material where the question is as to the intent with which an act was done. On an indictment for inflicting a bodily injury dangerous to life, with intent to murder, it appeared that the prisoners were both very drunk at the time, and Patteson, J., told the jury, that "although drunkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence."^(v) So where a prisoner was indicted for shooting with intent to murder, and he was shown to have been intoxicated shortly before he fired the shot; Coleridge, J., told the jury, that "drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention."^(w) And where, on an indictment for attempting to commit suicide, it appeared that the prisoner had thrown herself into a well, and the witness who proved this, stated that at the time she did so, she was so drunk as not to know what she was about; Jervis, C. J., said, "If the prisoner was so drunk as not to know what she was about, how can you say that she intended to destroy herself."^(x) So drunkenness may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober.^(y) So

(u) *Rex v. Meakin*, 7 C. & P. 297 (32 E. C. L. R.), Alderson, B.

(v) *Reg. v. Cruse*, 8 C. & P. 541 (34 E. C. L. R.).

(w) *Reg. v. Monkhouse*, 4 Cox C. C. 55. (z) *Reg. v. Moore*, 3 C. & K. 319.

(y) *Rex v. Thomas*, 7 C. & P. 817 (32 E. C. L. R.), Parke, B.; *Pearson's case*, 2 Lewin 144, Park, J. J. A.

v. State, 14 Mo. 502; *United States v. McGlue*, 1 Curt. 1; *State v. Mullen*, 14 La. Ann. 570; *Tyra v. Comm.*, 2 Met. (Ky.) 1; *Kenny v. People*, 31 N. Y. 330; *Smith v. Comm.*, 1 Duvall 224; *O'Harra v. State*, 14 Ind. 420; *Warren v. Comm.*, 1 Wright 45; *State v. Avery*, 44 N. H. 392; *Nichols v. State*, 8 Ohio (N. S.) 435; *People v. Rogers*, 18 N. Y. 9; *State v. Cross*, 27 Mo. 332; *Gallicker v. Comm.*, 2 Duvall 163; *Bailey v. State*, 26 Ind. 422; *McIntyre v. People*, 38 Ill. 514; *State v. Schingen*, 20 Wis. 74; *State v. Garvey*, 11 Minn. 154; *State v. Hundley*, 46 Mo. 414; *Real v. People*, 42 N. Y. 270; *Friery v. People*, 54 Barb. 319; 2 Keyes 424; *Bradley v. State*, 31 Ind. 492; *Lanergan v. People*, 50 Barb. 266; *Shannahan v. Comm.*, 8 Bush 464.

Yet it is always an element for the consideration of the jury where the law requires deliberation or a particular intent: *Pennsylvania v. McFall*, Add. 247; *Golden v. State*, 25 Geo. 527; *Jones v. State*, 29 Ibid. 594; *Pigman v. State*, 14 Ohio 555; *Kessy v. State*, 35 Ill. 518; *Mooney v. State*, 33 Ala. 419; *Dawson v. State*, 16 Ind. 428; *Pirih v. State*, 4 Humph. 663; *People v. Belencia*, 21 Cal. 544; *People v. King*, 27 Ibid. 507; *People v. Eastman*, 4 Kernan 562; *People v. Robinson*, 2 Parker C. R. 235; *People v. Hammill*, Ibid. 223; *Jones v. Comm.*, 25 P. F. Smith 403; *State v. Bell*, 29 Iowa 316; *Kriel v. Comm.*, 5 Bush 362; *Comm. v. Hart*, 2 Brews. 546; *Roberts v. People*, 19 Mich. 401; *Curry v. Comm.*, 2 Bush 67; *O'Brien v. People*, 48 Barb. 274. It has been held, however, that intoxication at the time of committing a homicide, is not entitled to any weight in determining whether the provocation was such as to reduce the crime from murder to manslaughter: *Comm. v. Hawkins*, 3 Gray 463. But see *State v. McCants*, 1 Spear 384.

When, however, an habitual or fixed frenzy is produced by drunkenness in cases of delirium tremens and mania-a-potu, or whenever there is actual insanity, though the remote cause is drunkenness, the party is not responsible: *United States v. Drew*, 58 Mason 28; *Burnett v. State*, Mart. & Yerg. 133; *Cornwall v. State*, Ibid. 147; *State v. McCants*, 1 Spear 384; *United States v. Forbes*, Crabbe 558; *Carter v. State*, 12 Texas 500; *Macconsky v. State*, 5 Ohio (N. S.) 77; *State v. Sewell*, 3 Jones (Law) 245; *State v. McGonigal*, 5 Harring. 510.

where the question is whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the party uttering them is proper to be considered.^(z) But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded; for it would furnish no excuse.^(z) So upon an indictment for stabbing, *the jury may take into their consideration, [*14 among other circumstances, the fact of the prisoner being drunk at the time, in order to determine whether he acted under a *bonâ fide* apprehension that his person or property was about to be attacked.^(a) So on an indictment for an assault, in considering whether the prisoner apprehended an assault upon himself, the jury may take into consideration the state of drunkenness in which he was.^(b)

But though this subject of *non compos mentis* may be spun out to a greater length, and branched into several kinds and degrees, yet it appears that the prevailing distinction herein in law is between *idiocy* and *lunacy*; the first, a *fatuity a nativitate*, or *dementia naturalis*, which excuses the party as to his acts; the other, accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the name of *lunacy*, and excuses equally with idiocy as to acts done during the frenzy.^(c)

The great difficulty in cases of this kind is to determine where a person shall be said to be so far deprived of his senses and memory as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions.¹ Lord Hale, speaking of partial insanity, says that it is the

(z) *Rex v. Thomas*, *Ibid.*

(a) *Marshall's case*, 1 *Lewin* 76, *Park*, J. J. A.; *Goodier's case*, *Ibid.*, *Parke*, J.

(b) *Reg. v. Gamlen*, 1 *F. & F.* 90, *Crowder*, J.

(c) *Bac. Abr. Idiots*, &c. (A.); 4 *Co.* 125.

¹ See generally, *United States v. Shultz*, 6 *McLean* 121; *People v. Sprague*, 2 *Parker C. R.* 48; *People v. Kleim*, 1 *Edm. S. C.* 13; *People v. Devine*, *Ibid.* 594; *People v. Griffin*, *Ibid.* 126; *State v. Haywood*, *Phill. (Law)* 376; *McFarland's case*, 8 *Abbott Pr. N. S.* 57, 59; *Cole's Trial*, 7 *Ibid.* 321; *People v. Francis*, 38 *Cal.* 183; *United States v. Holmes*, 1 *Cliff.* 98; *State v. Felter*, 25 *Iowa* 67; *State v. Hay*, 22 *La. Ann.* 39; *State v. Granville*, *Ibid.* 587; *State v. Windsor*, 5 *Harring.* 512; *State v. Brandon*, 8 *Jones (Law)* 136; *Fouts v. State*, 4 *Green* 500; *People v. Hobson*, 17 *Cal.* 424; *Chain v. State*, 31 *Geo.* 424; *State v. Shippey*, 10 *Minn.* 223; *Anderson v. State*, 42 *Geo.* 9; *State v. Jones*, 50 *N. H.* 369.

The question is whether the prisoner could distinguish between right and wrong in relation to the particular act committed: *Comm. v. Rogers*, 7 *Metc.* 500; *Clarke v. State*, 12 *Ohio* 483; *Comm. v. Mosten*, 4 *Barr* 264. Weakness of mind and excitement to such an extent that the prisoner did not know what the effect of his act would be is no defence: *People v. Harley*, 8 *Cal.* 390; *Willis v. People*, 32 *N. Y.* 715. Insanity at the time of the offence can only be established by evidence that the prisoner was insane at some period before or afterwards: *People v. March*, 8 *Cal.* 543; *State v. Stark*, 1 *Strobh.* 479.

A question which has created considerable difficulty, especially of late years, is, how far what is termed *monomania*, excuses from the commission of crime. It is the case of a partial derangement arising either from physical or moral causes, producing in the individual a hallucination on some particular subject. An eminent medical writer of our own country, Dr. Ray, who from his official position as superintendent of the main hospital, had very extensive opportunities for observation, had written a book on this subject, entitled, "A Treatise on the Medical Jurisprudence of Insanity," which may be consulted with advantage by the advocate on all cases, when this question arises. He lays it down as a principle which the progress of pathological anatomy during the present century has established beyond the reach of a reasonable doubt, that *mania arises from a morbid affection of the brain*. Insanity then observes the same pathological laws as other diseases, and it is the conclusion of this intelligent writer that "it is the prolonged departure without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder in the mind." He then proceeds to trace this disorder through its different classes of general or partial, intellectual or moral mania. Upon the question of partial insanity or insane delusion on particular subjects, see *Roberts v. State*, 3 *Geo.* 326; *Comm. v. Rogers*, 7 *Metc.* 500; *State v. Spencer*, 1 *N. J.* 196; *State v. Huting*, 21 *Mo.* 464; *Bovard v. State*, 30 *Miss.* 600; *Sauche v. People*, 4 *Parker C. R.* 535; *Scott v. Comm.*, 4 *Metc. (Ky.)* 227; *Smith v. Comm.* 1 *Duval* 224; *State v. Gutt*, 13 *Minn.* 341.

Sanity is always presumed, and the onus of proving insanity is on the prisoner, so that it is not sufficient for him to raise by his evidence a doubt of his sanity. This is the

condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and that this partial insanity seems not to excuse them in the committing of any capital offence. And he says further, "Doubtless most persons that are felons of themselves and others are under a degree of partial insanity when they commit these offences: it is very difficult to define the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or, on the other side, too great an indulgence given to great crimes." And he concludes by saying, "the best measure I can think of is this: such a person as, laboring under melancholy distempers, hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony." (d)

In the case of *Lord Ferrers*, who was tried before the House of Lords for murder, it was proved that his lordship was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. But the murder was deliberate; and it appeared that when he committed the crime he had capacity sufficient to form a design and know its consequences. It was urged, on the part of the prosecution, that complete possession of reason was unnecessary to warrant the judgment of the law, and that it was sufficient if the party had such *15] possession of reason as enabled him to comprehend the *nature of his actions, and discriminate between moral good and evil. And he was found guilty and executed. (e)

In *Arnold's* case, who was tried for maliciously shooting at Lord Onslow, it appeared clearly that the prisoner was, to a certain extent, deranged, and that he had greatly misconceived the conduct of Lord Onslow; but it also appeared that he had formed a regular design, and prepared the proper means for carrying it into effect. Mr. J. Tracey told the jury, that where a person has committed a great offence, the exemption of insanity must be very clearly made out before it is allowed; that it is not every kind of idle and frantic humor of a man, or something unaccountable in his actions, which will show him to be such a madman as is to be

(d) 1 Hale 30.

(e) Lord Ferrers' case, 19 St. Tri. (by Howell), 947.

general current of the decisions, though there are some few which hold that if on the whole evidence the jury have a reasonable doubt of the sanity of the prisoner he is entitled to an acquittal: *Walter v. People*, 32 N. Y. 147; *Loeffner v. State*, 10 Ohio (N. S.) 598; *Fisher v. People*, 23 Ill. 283; *Bonfanti v. State*, 3 Minn. 123; *Comm. v. Heath*, 11 Gray 303; *State v. McCoy*, 34 Mo. 531; *Graham v. Comm.*, 16 B. Mon. 587; *Chase v. People*, 40 Ill. 352; *O'Brien v. People*, 48 Barb. 274; *People v. Robinson*, 1 Parker C. R. 649; *State v. Lawrence*, 57 Maine 574; *Kriel v. Comm.*, 5 Bush 362; *McFarland's case*, 8 Abb. Pr. N. S. 57, 93; *State v. Klinger*, 43 Mo. 127; *People v. Garbutt*, 17 Mich. 9; *Bonsall v. Comm.*, 20 Gratt. 860; *State v. Hundley*, 46 Mo. 414; *State v. Huting*, 21 Ibid. 464; *People v. McCann*, 16 N. Y. 58; *Comm. v. Eddy*, 7 Gray 583; *Smith v. Comm.*, 1 Duvall 224; *People v. Coffman*, 24 Cal. 230; *Hoppe v. People*, 31 Ill. 385; *People v. Myers*, 20 Cal. 518; *Polk v. State*, 19 Ind. 170; *State v. Bartlett*, 43 N. H. 224; *State v. Starling*, 6 Jones (Law) 366; *State v. Felter*, 32 Iowa 49; *McKenzie v. State*, 42 Geo. 334.

In all cases where the act of a party is sought to be avoided on the ground of his mental imbecility, the proof of the fact lies upon him who alleges it, and until the contrary appears sanity is to be presumed. This is taken for granted in all the elementary writers, and in all the adjudged cases, both in law and equity. The rule has its qualifications; one of which is, that after a general derangement has been shown, it is then incumbent on the other side, to show that the party who did the act, was sane at the very time when the act was performed. To say that sanity is not to be presumed, until the contrary is proved, is to say that insanity or fatuity is the natural state of the human mind: *Jackson v. Van Dusen*, 5 Johns. 158-9. See the authorities quoted in this case by Van Ness, J., in delivering the opinion of the court.

Where previous insanity is shown, the burden of the proof is thrown on the party who seeks to establish an act as done in a lucid interval. But proof that the act done was in itself natural and rational will control evidence of habitual insanity: *Griffin v. Griffin*, Charlton 217. Where a prisoner was tried for murder four months after the crime was alleged to have been committed, *held*, that it was competent for the prisoner to prove by professional witnesses that he was insane at the time of the trial, with a view to establish the defence of insanity when the act was done: *Freeman v. People*, 4 Denio 9.

exempted from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, a brute, or a wild beast, he will properly be exempted from justice or the punishment of the law.(f)

In *Parker's* case, who was indicted for aiding the King's enemies, by entering into the French service in time of war between France and this country, the defence was rested upon the ground of insanity; and a witness on his behalf stated, that his general character from a child was that of a person of very weak intellect; so weak that it excited surprise in the neighborhood when he was accepted for a soldier. But the evidence for the prosecution had shown the act to have been done with considerable deliberation and possession of reason; and that the prisoner, who was a marine, having been captured by the French and carried into the Isle of France, after a confinement of about six weeks, entered voluntarily into the French service, and stated to a captive comrade that it was much more agreeable to be at liberty and have plenty of money than remain confined in a dungeon. The Attorney-General replied to this defence of insanity, that before it could have any weight in rebutting a charge so clearly made out, the jury must be properly satisfied that at the time when the crime was committed the prisoner did not really know right from wrong. And the jury, after hearing the evidence summed up, without hesitation pronounced the prisoner guilty.(g)

T. Bowler was tried on the 2d July 1812, for wounding William Burrowes. The defence set up for the prisoner was, insanity occasioned by epilepsy; and it was deposed, by the prisoner's housekeeper, that he was seized with an epileptic fit on the 9th July 1811, and was brought home apparently lifeless, since which time she had perceived a great alteration in his conduct and demeanor; that he would frequently rise at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to the rain; and that his spirits were so dejected that it was necessary to watch him, lest he should destroy himself. The keeper of a lunatic asylum, deposed, that it was *characteristic of insanity occasioned by epilepsy for the patient to imbibe violent antipathies against particular individuals, even his dearest friends, and to have a desire of taking vengeance upon them from causes wholly imaginary, which no persuasion could remove, and that yet the patient might be rational and collected upon every other subject. He had no doubt of the insanity of the prisoner, and said he could not be deceived by assumed appearances. A commission of lunacy was also produced, dated the 17th of June 1812, and an inquisition taken upon it, whereby the prisoner was found insane, and to have been so from the 30th of March last.(h) Mr. J. Le Blanc told the jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong, or under the influence of any *illusion* in respect of the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit: since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an allusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty.(i)

In *Bellingham's* case, who was tried for the murder of Mr. Perceval, a part of the prisoner's defence was insanity; and upon this part of the case, Mansfield, C. J., stated to the jury, that in order to support such a defence it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable

(f) *Arnold's case*, MS; *Collison on Lunacy* 475; 8 St. Tr. 317; 16 St. Tr. (by Howell), 764, 765. The jury found the prisoner guilty; but at Lord Onslow's request he was relieved.

(g) *Parker's case*, 1812, *Collis*. 477.

(h) The report in *Collison* 673, does not state the day on which the prisoner shot at W. Burrowes.

(i) *Bowler's case*, *Collis*. 673, in the note.

of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder, or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong, there would be no excuse for any act of atrocity which he might commit under this description of derangement.^(k)

So where on an indictment for murder, it appeared that the prisoner labored *17] under a notion that the inhabitants of Hadleigh, *and particularly the deceased, were continually issuing warrants against him with intent to deprive him of his liberty and life, the great judge who tried the case told the jury that "they must be satisfied, before they could acquit the prisoner on the ground of insanity, that he did not know, when he committed the act, what the effect of it, if fatal, would be, with reference to the crime of murder. The question was, did he know that he was committing an offence against the laws of God and nature?" and his lordship expressed his complete accordance in the observations of C. J. Mansfield in the last case.^(l)

On the trial of *Oxford* for shooting at the Queen, Lord Denman, C. J., told the jury, "Persons *primâ facie* must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act, and not be responsible. If some controlling disease was, in truth, the acting power within him which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule by which you are to be governed." "On the part of the defence, it is contended that the prisoner was *non compos mentis*, that is (as it has been said), unable to distinguish right from wrong, or, in other words that from the effect of a diseased mind he did not know at the time that the act he did was wrong." "Something has been said about the power to contract and make a will; but I think that those things do not supply any test. The question is, whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequences of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act that it was a crime?"^(m)

J. Hadfield was tried in the Court of King's Bench, in 1800, for high treason, in shooting at the King, in Drury Lane Theatre; and the defence was insanity. He had been a private soldier in a dragoon regiment, and in 1793 received many severe wounds in battle near Lisle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to this country he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind; and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 11th of May preceding his commission

(k) Bellingham's case, Old Bailey, 15th May 1812, Collis. Addend. 636. "I will not refer to Bellingham's case, as there are some doubts as to the mode in which that case was conducted." Per Sir J. Campbell, Atty.-Gen., in *Reg. v. Oxford*, 9 C. & P. 533 (38 E. C. L. R.).

(l) *Rex v. Offord*, 5 C. & P. 168 (24 E. C. L. R.), Lord Lyndhurst, C. B.

(m) *Reg. v. Oxford*, 9 C. & P. 525 (38 E. C. L. R.), Lord Denman, C. J., Alderson, B., and Patteson, J.

of the act in question, his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to *dash his brains out [*18 against the bed-post, and that God had ordered him to do so, and upon his wife screaming, and his friends coming in, he ran into a cupboard and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day, he used many incoherent and blasphemous expressions. On the morning of the 15th of May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the King. He spoke very highly of the King, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of odd fellows; and, after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the Crown, it was proved that he had sat in his place in the theatre nearly three-quarters of an hour before the King entered; that at the moment when the audience rose, on His Majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the King's person, and then let it drop; and when he fired his situation appeared favorable for taking aim, for he was standing upon the second seat from the orchestra in the pit; and he took a deliberate aim, by looking down the barrel, as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that "he knew perfectly well his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed." These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that "his plan was to get rid of it by other means: he did not intend anything against the life of the King; he knew the attempt only would answer his purpose." The counsel for the prisoner (n) in his very able address to the jury, put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for them to be satisfied that the act in question was the immediate unqualified offspring of the disease. And Lord Kenyon held that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet, there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted.(o)

On an indictment for the murder of Mr. Drummond, the defence was insanity, and the medical evidence was that persons of otherwise sound mind might be affected with morbid delusions; that the prisoner was in that condition; that a person laboring under *a morbid delusion might have a moral perception of [*19 right and wrong; but that, in the case of the prisoner, it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had a connection with his delusion; that it was the nature of his disease to go on gradually until it had reached a climax, when it burst forth with irresistible intensity; that a man might go on for years quietly, though at the same time under its influence, but would at once break out into the most extravagant and violent paroxysms. Tiudal, C. J., told the jury, "The question to be determined is, whether, at the time the act in question was committed, the prisoner had or had not the use of his understanding so as to know that he was doing a wrong or wicked act. If the jury should be of opinion that the prisoner was not sensible at

(*) The late Lord Erskine, then at the bar.

(o) Hadfield's case, Collis. 480. The verdict was Not Guilty, on the ground of insanity.

the time he committed the act that he was violating both the laws of God and man, *(p)* then he would be entitled to a verdict in his favor; but if, on the contrary, they were of opinion that, when he committed the act, he was in a sound state of mind, *(q)* then their verdict must be against him." *(r)*

The acquittal in the preceding case, on the ground of insanity, gave rise to a discussion in the House of Lords, and the following questions were put to the judges, and answered by them all, except Mr. Justice Maule, as follows, in June, 1843:—

Q. I. "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

A. I. "Assuming that your lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that notwithstanding the accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land."

Q. II. "What are the proper questions to be submitted to the jury where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example,) and insanity is set up as a defence?"

Q. III. "In what terms ought the question to be left to the jury as to the prisoner's state of mind, at the time when the act was committed?"

*20] A. II. and III. "As these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jury ought to be told in all cases that *every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction*; and that *to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong*. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to *the party's knowledge of right and wrong, in respect to the very act with which he is charged*. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction: whereas, the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. *If the accused was conscious that the act was one that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable*; and the usual course, therefore, has been to leave the question to the jury, whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."

(p) *Quære*, whether this position was not too favorable for the prisoner, as it required the jury to be satisfied that the prisoner was aware *both* of the laws of God and man?

(q) *Quære*, this position also, as a man may not have a *perfectly* sound mind, and yet be criminally responsible?

(r) Reg. v. M'Naghten, 10 Cl. & F. 200.

Q. IV. "If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?"

A. IV. "The answer must, of course, depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment?"

Q. V. "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing *the act, [*21 that he was acting contrary to law, or whether he was laboring under any, and what, delusion at the time?"

A. V. We think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not questions upon a mere matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."(s)

(s) 1 C. & K. 130 (47 E. C. L. R.); 10 C. & F. 200. Maule, J., after expressing the difficulty he felt in answering the questions, because they did not arise out of, and were not put with reference to, a particular case, or for a particular purpose, which might limit or explain the generality of their terms, said, in answer to the first question, "so far as it comprehends the question whether a person circumstanced as stated in the question is for that reason only to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding, and I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. *To render a person irresponsible for crime on account of unsoundness of mind the unsoundness should, according to the law as it has been long understood and held, be such as to render him incapable of knowing right from wrong.* The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind." To the second question the learned judge answered, "If, on a trial such as is suggested in the question, the judge should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question as being, in my opinion, the law on this subject." To the third question the learned judge replied, "There are no terms, which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused." To the fourth question the learned judge replied that the answer to the first question was applicable to this. To the fifth question the learned judge replied, "whether a question can be asked depends, not merely on the questions of fact raised on the record, but on the course of the cause at the time when it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has been present and heard the witnesses; these circumstances of his never having seen the person before, and of his having been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question, which is otherwise lawful, though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect. Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence, it is to be considered whether that is enough to sustain the question; in principle it is open to the objection that as the opinion of the witness is founded on those conclusions of fact, which he forms from the evidence, and as it does not appear what these conclusions are, it may be that the evidence he gives is on such an assumption

The prisoner, who was charged with stealing a cow, had had his cow taken from him under an illegal distress, and with a view of recovering her, he had gone in the night to the close of the *prosecutor, who had purchased her, and taken *22] another cow out of it. Owing to the loss of his cow, and various other losses, the prisoner's mind was affected, and he was under the impression that every one was robbing him. Tindal, C. J., told the jury that, it is not mere eccentricity or singularity of manner that will suffice to establish the plea of insanity; it must be shown that the prisoner had no competent use of his understanding, so as to know that he was doing a wrong thing in the particular act in question."(*t*)

Upon an indictment for murder, by burying a child alive, upon the surgeon, who was called for the prosecution, being asked whether a fracture of the skull was the cause of the death, or whether the child had, after the fracture of the skull, been suffocated by being buried while alive, the prisoner said, in open court, "I put him in alive." Two witnesses stated that the prisoner was of "very weak intellect," and the surgeon of the prison stated that the prisoner was of "very weak intellect, but capable of knowing right from wrong." Maule, J., after adverting to the evidence adduced, said to the jury, "If you are satisfied that the prisoner committed this offence, but you are also satisfied that, at the time of the committing the offence, the prisoner was so insane that he did not know right from wrong, he should be acquitted on that ground; but if you think that, at the time of committing the offence, he did know right from wrong, he is responsible for his acts, although he is of weak intellect."(*u*)

Upon an indictment for murder it appeared that the prisoner, in the soldier's room in the barracks, took up his musket as if to clean it, levelled it at the deceased, fired and killed her on the spot; her husband and child being in the room, and two other soldiers being present. The prisoner was a man of singular habits, and seldom spoke to the other soldiers, was very "secluded, sulky, and sullen," and was described as "a close-minded man," and "a man of a very nasty temper." He had frequently complained of illness, and had made efforts to get into the hospital, but he was rejected, as having no visible disorder. (The report contains a statement of sundry other facts as to the prisoner's state of mind.) The defence was that the prisoner was insane, or that he was under such an insane impulse as to render him irresponsible. Rolfe, B., in summing up said—"If a prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The *onus* rests on him; and the jury must be *satisfied* that he actually was insane. If the matter be left in *doubt*, it will be their duty to convict him; for every man must be presumed to be responsible for his acts till the contrary is clearly shown. A case occurred some time ago at the Central Criminal Court, before Alderson, B., and the jury hesitated as to their verdict, on the ground that they were not satisfied whether the prisoner was or was not of sound mind when he committed the crime; and that learned judge *23] told them, that, unless they were satisfied of his insanity, it would be their duty to find a *verdict of guilty. Every man is held responsible for his acts by the law of this country, if he can discern right from wrong. This subject was a few years ago carefully considered by all the judges, and the law is clear upon the subject. It is true, that learned speculators, in their writings, have laid it down that men, with a consciousness that they were doing wrong, were irresistibly compelled to commit some unlawful act. But who enabled them to dive into the human heart, and see the real motive that prompted the commission of such deeds?

of facts as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed given, and has never, that I am aware of, been successfully objected to; and I think the course and practice of receiving such evidence, confirmed by the very high authority of Tindal, C. J., Williams, J., and Coleridge, J., in *Reg. v. M'Naghten*, who not only received it, but left it, as I understand, to the jury without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open."

(*t*) *Reg. v. Vaughan*, 1 Cox C. C. 80, Summer, 1844.

(*u*) *Reg. v. Higginson*, 1 C. & K. 129 (47 E. C. L. R.). The prisoner was convicted and executed, August 1843. *Reg. v. Davies*, 1 F. & F. 69. *Reg. v. Richards*, *Ibid.* 87, s. p.

It has been urged that no motive has been shown for the commission of this crime. It is true that there is no motive apparently, but a very inadequate one; but it is dangerous ground to take, to say that a man must be insane because men fail to discern the motive for his act. It has also been said that the conduct of the prisoner was that of a madman in committing the offence at such a time, in the presence of the woman's husband, who had arms within his reach; but it would be a most dangerous doctrine to lay down, that because a man committed a desperate offence, with the chance of instant death, and the certainty of future punishment before him, he was therefore insane, as if the perpetration of crimes was to be excused by their very atrocity." (v)

On the trial of a prisoner for the murder of his wife, it appeared that he had always treated her and their children with kindness; that they were talking with a neighbor at their door late at night, and at four o'clock next morning it was discovered that he had cut the throats of his wife and child, and had attempted to commit suicide. When questioned, he exhibited no sorrow or remorse for his conduct, but stated that "trouble and dread of poverty and destitution had made him do it, fearing that his wife and child would starve when he was dead." He said he had contemplated suicide for a week past; he had not had any quarrel with his wife, and that, having got out of bed to destroy himself, the thought had first come into his head to kill his wife and child; he had first attacked her while she was asleep in bed; she got away from him, and rushed to the window; he then killed the child, and seizing his wife, pulled her backwards to him, and cut her throat; he next tried to cut his own throat, but his powers failed him, and he did not succeed, though he wounded himself severely. This narrative, coupled with a knowledge of the prisoner's private circumstances, induced the surgeon to form the opinion that the prisoner, at the time he committed the act, had not, in consequence of an uncontrollable impulse, to which all human beings are subject, any control over his conduct. The desire to inflict pain and injury on those previously dear to the prisoner, was in itself a strong symptom of insanity, and the impossibility of resisting a sudden impulse to slay a fellow-being, was another indication that the mind was insane. There was not necessarily a connection between homicidal and suicidal monomania, though it would be more likely that a monomaniac who had contemplated suicide should kill another person, than for one who had not entertained any such feelings of hostility to his own existence. Monomania was an affection, which, for the instant, *completely deprived the patient of all self-control in respect of some one particular subject which is the object of the disease. The prisoner had no delusion, and his reasoning faculties did not seem to be affected; but he had a decided monomania evincing itself in the notion that he was coming to destitution. For that, there was some foundation in fact; but it was the surgeon's decided opinion that the prisoner was in an unsound state of mind at the moment he cut his wife's throat. On the day before the prisoner had had his razor sharpened, saying he wanted it to give to some friend; and the prisoner had suffered a severe pecuniary loss not long before, and it had produced a decided effect upon his mind, giving rise to the most gloomy anticipations on account of his wife and family. Parke, B., told the jury that the only question was whether, at the time the prisoner inflicted the wound on his wife, "he was in a state of mind to be made responsible to the law for her murder. That would depend upon the question, whether he, at the time, knew the nature and character of the deed he was committing, and, if so, whether he knew he was doing wrong in so acting. This mode of dealing with the defence of insanity had not, he was aware, the concurrence of medical men; but he must, nevertheless, express his decided concurrence with B. Rolfe's views of such cases, that learned judge having expressed his opinion that the excuse of an irresistible impulse co-existing with the full possession of reasoning powers might be urged in justification of every crime known to the law—for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. Something more than this was necessary to justify an acquittal on the

ground of insanity, and it would therefore be for the jury to say whether, taking into consideration all that the surgeon had said, which was entitled to great weight, the impulse, under which the prisoner had committed this deed, was one which altogether deprived him of the knowledge that he was doing wrong. Could he distinguish between right and wrong? Reliance was placed on the desire to commit suicide, but that did not always evidence insanity. And here the prisoner was led to attempt his own life by the pressure of a real substantial fact clearly apparent to his perceptive organs, and not by any unsubstantial delusion. The fact, however, must be taken into the account, for it might have had a serious effect on the mind of the prisoner, as also the absence of any attempt to escape from justice, and the want of all sense of sorrow and regret immediately after the death of his wife, contrasted with his more natural state of mind afterwards, when he felt and expressed regret and sorrow for his act. These circumstances ought all to be taken into consideration; but it was difficult to see how they could establish the plea of insanity in a case where there was a total absence of all delusion."^(w)

The prisoner, a youth of eighteen, at first pleaded guilty to an indictment for murder; the judge warned him that this would not affect his fate; his counsel said he was insane, and desired to be hung; the prisoner, however, with apparently perfect intelligence, retracted his plea, and pleaded not guilty. The deceased, a boy, had been found with his throat cut, and the prisoner gave himself up, and admitted the act, recounting all the circumstances with perfect intelligence; and it did not appear that there was any ill-will to the boy, and the prisoner had said, "I had no particular ill-feeling against the boy, only I had made up my mind to murder some one." He added that he had wiped his hands and the knife. Afterwards he said it was well for a Mr. Clark that he had left Chatham, for he had prosecuted him, and he had made up his mind to murder him when he came out of gaol. Evidence was given on behalf of the prisoner of strange conduct, and a surgeon proved that on two occasions he had sent the prisoner's mother to a lunatic asylum; she was low and desponding, and attempted suicide. The prisoner's brother was of weak intellect. On two occasions he had attended the prisoner, and said he believed he was laboring under what, in the profession, would be considered as moral insanity; that is, he knows perfectly well what he is doing, but has no control over himself. By the moral feelings he meant the propensities which may be diseased, while the intellectual faculties are sound; and that, having heard the evidence, in his opinion, it was reasonable to believe that there must in the prisoner's case be some derangement of the brain—some deviation from the normal condition of the brain. On cross-examination, he stated that he believed the prisoner knew what he was doing, but that an impulse came upon him, which he could not control; and he adopted an opinion of Dr. Winslow's, that no man could commit suicide in a state of sanity. He believed the prisoner had no proper control over his actions. He had a knowledge of right and wrong, but could not control his actions. Evidence on the part of the crown was given to show that the prisoner was sane. Wightman, J., told the jury that "In M'Naghten's case the judges had laid down the rule to be that there must, to raise the defence, be a defect of reason from disease of the mind, so as that the person did not know the nature and quality of the act he committed, or did not know whether it was right or wrong. Now to apply this rule to the present case would be the duty of the jury. It was not mere eccentricity of conduct which made a man irresponsible for his acts. The medical man called for the defence defined homicidal mania to be a propensity to kill, and described moral insanity as a state of mind under which a man, perfectly aware that it was wrong to do so, killed another under an uncontrollable impulse. This would appear to be a most dangerous doctrine, and fatal to the interests of society and security of life. The question is, whether such a theory is in accordance with law. The rule, as laid down by the judges, is quite inconsistent with such a view; for it was, that a man was responsible for his actions if he knew the difference between right and wrong. It was urged that the prisoner

(w) *Reg. v. Barton*, 3 Cox C. C. 275. Verdict, guilty. Summer, 1848.

did the act in order to be hanged, and so was under an insane delusion ; but what delusion was he under ? So far from it, it showed that he was quite conscious of the nature of the act and its consequences. He was supposed to desire to be hanged, and in order to attain the object committed murder. That might show a morbid state of mind, but not delusion. Homicidal mania, again, as described by the witnesses for the defence, showed no delusion ; it merely showed a morbid desire for blood. Delusion meant the belief in what did not exist. The question for the jury was, whether the prisoner at the time he committed the act was laboring under such a species of insanity as to be unaware of the nature, the character, or the consequences of the act he committed. In other words, whether he was incapable of knowing that what he did was wrong."(*ww*)

On an indictment for murder, it appeared that the prisoner had been engaged to the deceased, but her friends disapproved, and the engagement was broken off, but renewed afterwards. However, the deceased formed an attachment for another, and wrote to the prisoner to break off the engagement ; and he wrote three very sensible letters in reply to hers, that he would not stand in her way if she was resolved to part with him, but that he should prefer to have an interview with her, and to hear her determination from her own lips. Accordingly he went to the place where she lived, and they were seen together, and she was afterwards found with her throat cut in three places. The prisoner came up and assisted to carry her to the house, repeatedly stating that he had done it, and should be hanged for it. He said also, "Poor Bessie ! you should not have proved false to me." He told her grandfather, who asked what was amiss, "It is your granddaughter Betsy, murdered. She has deceived me, and the woman that deceives me must die." The prisoner behaved throughout with apparent indifference, and, on the arrival of the police, said that he wished to give himself up for murdering the young lady ; and added, "I am far happier now I have done it than I was before, and I trust she is." Evidence was given that there had been insanity in the family, and Dr. Winslow stated that he had seen the prisoner. "I talked to him largely on the subject of the crime, and I am of opinion that at the present moment he is a man of deranged intellect. He told me he did not recognize he had committed any crime at all, neither did he feel any degree of pain, regret, contrition, or remorse for what he had done. I endeavored to impress on his mind the serious nature of the crime he had committed. He repudiated the idea of its being a crime either against God or man, and attempted to justify the act, alleging that he considered Miss Goodwin as his own property ; that she had been illegally wrested from him by an act of violence ; that he viewed her in the light of his wife, who had committed an act of adultery ; and that he had as perfect a right to deal with her life as he had with any other description of property—as the money in his pocket, &c. I endeavored to prove to him the gross absurdity of his statement and the enormity of his offence : he replied, 'Nothing short of a miracle can alter my opinions.' The expression that Miss Goodwin was his property, was frequently repeated. He killed her, he said, to recover property which had been stolen from him. I could not disturb this, as I thought, very insane idea. I said, 'Suppose anyone robbed you of a picture, what course would you take to recover it ?' He said he would demand its restitution, and, if it were not granted, he would take the person's life without compunction. I remarked that he had no right to take the law into his own hands ; he should have recourse to legal measures to obtain restitution. He replied that he recognized the right of no man to sit in judgment upon him ; he was a free agent ; and as he did not bring himself into the world by any action of his own, he had perfect liberty to think and act as he pleased, irrespective of anyone else. I regard these expressions as evidence of a diseased intellect. He said he had been for some weeks under the influence of a conspiracy ; there were six conspirators plotting against him, with a view to destroy him, with a chief conspirator at their head. This conspiracy was still going on while he was in prison, and he had no doubt that, if he were at liberty, they would continue their operations against him, and in order to escape their evil purposes he would have to leave

the country. He became much excited, and assumed a wild demoniacal aspect. I am satisfied that aspect was not simulated." On cross-examination he said, "I have no doubt he knows that these opinions of his are contrary to those generally entertained, and that, if acted upon, they would subject him to punishment. I should think that he would know that killing a person was contrary to law, and wrong in that sense. I should think, from his saying he should be hanged, that he knew he had done wrong. His moral sense was more vitiated than I ever found that of any other human being. His opinions were pretty much those of atheists, but he was beyond atheism. He seemed incapable of reasoning correctly on any moral subject. He denied the existence of a God and of a future world. He said it was a matter of perfect indifference whether he was dead or alive." Martin, B., told the jury, "What the law meant by an insane man was, a man who acted under delusions, and supposed a state of things to exist which did not exist, and acted thereupon. A man who did so was under a delusion, and a person so laboring was insane. In one species of insanity the patient lost his mind altogether, and had nothing but instinct left. Such a person would destroy his fellow-creatures, as a tiger did his prey, by instinct only. A man in that state had no mind at all, and therefore was not criminally responsible. The law, however, went farther than that. If a man laboring under a delusion did something of which he did not know the real character—something of the effect and consequences of which he was ignorant—he was not responsible. An ordinary instance of such delusion was where a man fancied himself a king, and treated all around him as his subjects. If such a man were to kill another under the supposition that he was exercising his prerogative as a king, and that he was called upon to execute the other as a criminal, he would not be responsible. The result was, that if the jury believed that at the time the act was committed the prisoner was laboring under a delusion, and believed that he was doing an act that was not wrong, or of which he did not know the consequences, he would be excused. If, on the other hand, he well knew that his act would take away life—that that act was contrary to the law of God, and punishable by the law of the land—he was guilty of murder. In his opinion the law was best laid down by Le Blanc, J., in *Bowler's case* [*supra*], who told the jury that it was for them to determine whether the prisoner, when he committed the offence, was incapable of distinguishing right from wrong, or under the influence of any illusion which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the act he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to justice." After noticing other cases, Martin, B., told the jury that "they must judge of the act by the prisoner's statements and by what he did at the time. Unless they were satisfied—and it was for the prisoner to make it out—that he did not know the consequences of his act, or that it was against the law of God and man, and would subject him to punishment, he was guilty of murder. The prisoner's letters appeared to be as sensible letters as ever he had read. Again, the reason the prisoner gave for his act was, 'She should not have proved false to me.' Now, if his real motive was that he conceived himself to have been ill-used, and either from jealousy of the man who was preferred to him, or from a desire of revenge upon her, committed the act, that would be murder. Those were the very passions which the law required men to control; and if the deed was done under the influence of those passions, there was no doubt it was murder. The prisoner's expression, that he should be hanged for it, indicated that he knew the consequences of his act. Another reason he gave for what he had done was, 'The woman who deceives me must die.' If a young lady promised to marry a man, and then changed her mind, it might be truly said that she deceived him; but what would be the consequences to society if men were to say every woman who treated them in that way should die, and were to carry out those views by cutting their throats? The prisoner claimed to exercise the same power over a wife as he could lawfully exercise over a chattel; but that was not a delusion, nor like a delusion. It was the conclusion

of a man, who had arrived at results different from those generally arrived at, and contrary to the laws of God and man; but it was not a delusion." . . . "It had been said by one of the witnesses that the prisoner did not know the difference between good and evil. If that was a test of insanity, many men were tried who did not know that difference. In truth, it was no test at all. The idea of a conspiracy was a delusion, but the mere setting himself up against the law of God and man was not a delusion at all. The question for the jury was, was the prisoner insane, and did he do the act under a delusion, believing it to be other than it was? If he knew what he was doing, and that it was likely to cause death, and was contrary to the law of God and man, and that the law directed that persons who did such acts should be punished, he was guilty of murder." (xx)

On an indictment for murder, the prisoner appeared to have been on the most intimate terms with the "unfortunate woman" he had killed. No motive was assigned for the murder. The prisoner having seduced a young woman under a promise of marriage, *which he had been unable to fulfil, his reason had been much affected by it. Bramwell, B., read the opinion of the judges in the [*25 House of Lords to the jury, and then said, "It has been urged that you should acquit the prisoner on the ground that, it being impossible to assign any motive for the perpetration of the offence, he must have been acting under what is called powerful and irresistible influence, or homicidal tendency. But the circumstance of an act being *apparently* motiveless, is not a ground from which you can safely infer the existence of such an influence. Motives exist unknown and innumerable, which might prompt the act. A morbid and restless, but irresistible, thirst for blood, would itself be a motive urging to such a deed for its own relief. But if an influence be so powerful as to be termed irresistible, so much the more reason is there why we should not withdraw any of the safeguards tending to counteract it. There are three powerful restraints existing, all tending to the assistance of the person who is suffering under such an influence—the restraint of religion, the restraint of conscience, and the restraint of law. But if the influence itself be held a legal excuse, rendering the crime dispunishable, you at once withdraw a most powerful restraint—that forbidding and punishing its perpetration. We must return, therefore, to the simple question you have to determine—did the prisoner know the nature of the act he was doing, and did he know that he was doing what was wrong?" (x)

On a trial for murder, it appeared that the prisoner and his wife were walking along a road, and he had been for some time chiding her, and then he fired a pistol at her and she fell; and he pulled her up, and they proceeded a few yards, when he pushed her down, and inflicted a second wound on her throat with a knife. He then got over a hedge into a field, and ran some distance, until he was overtaken by a person who had seen the woman fall. The prisoner wiped the blood off his hands, saying he had met with a misfortune and cut his finger. He would not tell what he had done with the pistol and knife, but said, "I did it. I intended to do it, and that will put an end to it. I have been unhappy since Christmas." At the time he shot and cut his wife, he must have known that persons were within a short distance, having just before met them. The prisoner had threatened to murder his wife before, and on the day before he was heard sharpening a knife, and the wife was afterwards seen running out of the house, followed by the prisoner with a knife similar to one found near the place where the murder was committed. The prisoner had been in gaol for debt for two months in the early part of the year, and had been unfortunate in building speculations. Several witnesses were called for the prisoner, who stated that they believed that the prisoner was not in his right mind, and proved sundry statements made by him as to his property and other matters, which were alleged to be delusions, and that his conduct had been strange, and his manner greatly excited. For the prosecution, witnesses were called to prove that he was sane, and had acted in matters of business in a rational manner. Rolfe, B., told the jury that "insanity was the

(xx) *Reg. v. Townley*, 3 F. & F. 839.

(x) *Reg. v. Haynes*, 1 F. & F. 666; *Reg. v. Brough*, 2 F. & F. 838, note, s. r.

*26] most difficult *question which could engage the attention of any tribunal. It was difficult to define it in words, or even in idea. The opinion of the judges was taken by the House of Lords a few years back, as to what was to constitute a definition of insanity, and it created very great difficulty, but after great and anxious deliberation, they came to the conclusion that the old description was the best, viz. that insanity should constitute a defence only when a party was in such a state of mind arising from disease as to be incapable of deciding between right and wrong; but that this definition was imperfect, as all definitions must be, and would require to be modified with reference to each particular case. Applying that law to the present case, what the jury had to consider was, whether the evidence was such as to satisfy them that at the time the act was committed by the prisoner, he was incapable of understanding right from wrong, as that he could not appreciate the nature of the act he was committing. Perhaps it would be going too far to say that a party was responsible in every case where he had a glimmering knowledge of what was right and wrong. In cases of this description, there was one cardinal rule which should never be departed from, viz. the burden of proving innocence rested on the accused. Every man committing an outrage on the person or property of another, must be, in the first instance, taken to be a responsible being. Such a presumption was necessary for the security of mankind. A man going about the world, marrying, dealing, and acting as if he were sane, must be presumed to be sane till he proves the contrary. The question, therefore, would be, not whether the prisoner was of sound mind, but whether he had made out to their satisfaction that he was not of sound mind. They might arrive at the conclusion, from the nature of his conduct and acts up to the time of the act in question, or shortly preceding it, that he was insane; though he was not capable of proving it by positive testimony, as such was the nature of the mind, that it might be one minute sane and the next insane, and therefore it might be impossible for a party to give positive evidence of its condition at the particular moment in question. . . . The conclusion seemed irresistible, that the prisoner was to some extent laboring under a delusion, but he was not exempt from responsibility because he was laboring under a delusion as to his property, unless that had the effect of making him incapable of understanding the wickedness of murdering his wife. But when that was the question they had to consider, he could not say that it was altogether immaterial that he was insane on one point only.^(y) Indeed his insanity on that point might guide them to a conclusion as to his sanity on the point involved in this case, and, in this view of the matter, there were two circumstances in the evidence of great importance: these were, the want of motive for the commission of the crime, and its being committed under circumstances which rendered detection inevitable. They could come to no other conclusion than that the prisoner had taken away the life of his wife, and that this was murder, unless he had satisfied them that he was not capable at the time of appreciating his acts."^(z)

*27] *On a trial for murder the prisoner was acquitted, but a question was reserved as to whether the evidence of a medical man was properly admitted. He volunteered his evidence, and wished to give his opinion upon the evidence as to the state of the prisoner's mind at the time the act was done; and he was allowed so to do. The judges did not come to any formal resolution; but they all thought that in such a case a witness of medical skill might be asked, whether in his judgment such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of the disorder in a person subject to it? and that by such questions the effect of his testimony might be got in an unexceptionable manner. Several of the judges doubted whether the witness could be asked on the very point which the jury were to decide, viz., whether, from the testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity?^(a) In a case of maliciously wounding, where it was proposed to call a physician who had

^(y) *Quære*, omit "only," which seems inconsistent with the context.

^(z) *Reg. v. Layton*, 4 Cox C. C. 149, Summer, 1849; *Reg. v. Law*, 2. F. & F. 836, s. p.

^(a) *Rex v. Wright*, R. & R. 456.

heard the whole evidence, to give his opinion as to the insanity of the prisoner, Park. J. J. A., after referring to the preceding case, allowed the physician to be asked whether the facts and appearances proved showed symptoms of insanity (b)

Where the defence to an indictment for murder was that the prisoner was insane at the time he committed the act, and witnesses were called to prove that insanity had existed in many members of the prisoner's family, and that he had been insane for three years, a physician, who had been in court during the whole trial, was asked by the counsel for the prosecution "whether, from all the evidence he had heard, both for the prosecution and defence, he was of opinion that the prisoner, at the time he did the act, was of unsound mind?" and the opinion of the judges in answer to the fifth question (c) was cited in support of the question; Alderson, B., and Cresswell, J., held that the question ought not to be put. The proper mode is to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity. To take the course suggested is really to substitute the witness for the jury, and allow him to decide upon the whole case. The jury have the facts before them, and they alone must interpret them by the general opinions of scientific men. (d)

So on the trial of an ejectment where the question turned on the sanity of the testator, and a physician was asked whether in his opinion, from the facts proved in evidence, the testator was sane or insane; Lord Campbell, C. J., said the witness might give general scientific evidence on the causes and symptoms of insanity, but he must not express an opinion as to the result of the evidence he had heard with reference to the sanity or insanity of the testator; his lordship saying peremptorily that he would not allow a physician to be substituted for a jury. (e)¹

Where the defence of insanity has been set up it has been the *common [*28 practice to prove that other members of the prisoner's family have been afflicted with insanity; but it is a matter of fact that insanity is often hereditary in a family, and therefore that fact should be proved, in the first instance, by the testimony of medical men, and then the inquiry whether another member of the prisoner's family has been insane will be legitimate. (f)²

Where, in support of a defence of insanity the prisoner's counsel attempted to quote from "Cooper's Surgery," the author's opinions on the subject, in his address to the jury, on the ground that they were the sentiments of one who had studied the subject, and submitted that it was admissible in the same way as opinions of scientific men on matters appertaining to foreign law; Alderson, B., said: "I should not allow you to read a work on foreign law. Any person who was properly conversant with it might be examined; but then he adds his own

(b) *Rex v. Searle*, 1 M. & Rod. 75, 1831.

(c) *Supra*, p. 21.

(d) *Reg. v. Frances*, 4 Cox C. C. 57; s. p. *Reg. v. Burton*, 3 F. & F. 772.

(e) *Doe d. Bainbrigge v. Bainbrigge*, 4 Cox C. C. 454. The verdict was for the plaintiff, which prevented this ruling from being questioned in the Court above.

(f) *Reg. v. Tucket*, 1 Cox C. C. 103, Maule, J.

¹ The admissibility of opinions upon questions of insanity has been the subject of frequent consideration and discussion. As to witnesses who are not medical experts, the general current is in favor of permitting them to express their opinion, but it must be accompanied with the facts upon which it is founded. In some cases, however, it has been rigidly excluded: *Florey v. Florey*, 24 Ala. 241; *Choice v. State*, 31 Geo. 424; *Real v. People*, 42 N. Y. 270; *Real v. People*, 55 Barb. 551, 579; 8 Abb. Pr. N. S. 314; *Comm. v. Wilson*, 1 Gray 337; *Powell v. State*, 25 Ala. 21; *O'Brien v. People*, 48 Barb. 275; *Wyman v. Gould*, 47 Maine 159; *Cram v. Cram*, 33 Verm. 15; *Comm. v. Fairbanks*, 2 Allen 511; *Gehrke v. State*, 13 Texas 568; *Stewart v. Spedder*, 5 Md. 433. As to medical experts, they may state their opinion upon the whole evidence if they have heard it all, or upon a hypothetical statement which is in conformity with the whole evidence: *Reed v. People*, 1 Parker C. R. 481; *Lake v. People*, Ibid. 495; *People v. Lake*, 2 Kernan 358; *People v. Thurston*, 2 Parker C. R. 49; *Negro Jerry v. Townsend*, 9 Md. 145; *Sanches v. People*, 22 N. Y. 147; *Champ v. Comm.*, 2 Met. (Ky.) 17; *State v. Reddick*, 7 Kansas 143; *People v. M'Cann*, 3 Parker C. R. 272.

² *State v. Windsor*, 5 Harring. 512; *Baxter v. Abbott*, 7 Gray 71; *People v. Garbutt*, 17 Mich. 9; *State v. Felter*, 25 Iowa 87; *Cole's Trial*, 7 Abb. Pr. N. S. 321; *Bradley v. State*, 31 Ind. 492; *State v. Christmas*, 6 Jones (Law) 471; *Newcomb v. State*, 7 Miss. 383; *People v. Smith*, 31 Cal. 468.

personal knowledge and experience to the information he may have obtained from books. We must have the evidence of individuals, not their written opinions. You surely cannot contend that you may give the book in evidence, and if not, what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course?" And on its being said that it was certainly done in M'Naghten's case, Alderson, B., added, "And that shows still more strongly the necessity for a stringent adherence to the rules laid down for our observance. But for the non-interposition of the judge in that case, you would not probably have thought it necessary to make this struggle now." (g)¹

The application of the rules and principles laid down in these cases to each particular case as it may arise, will necessarily in many instances be attended with difficulty; more especially with regard to the true interpretation of the expressions, which state that the prisoner, in order to be a proper subject of exemption from punishment on the ground of insanity, should appear to have been unable "*to distinguish right from wrong*," or to discern "*that he was doing a wrong act*," or should appear to have been "*totally deprived of his understanding and memory*;" as even in Hadfield's case his expressions when apprehended, that "he was tired of life," that "he wanted to get rid of it," and that "he did not intend anything against the life of the King, but knew that the attempt only would answer his purpose;" seem to show that he must have been aware that he was doing a *wrong act*, though the degree of its criminality might have been but imperfectly presented to him, through the morbid delusion by which his senses and understanding were affected. But it is clear that idle and frantic humors, actions occasionally unaccountable and extraordinary, mere dejection of spirits, or even such insanity as will sustain a commission of lunacy, will not be sufficient to exempt a person from punishment who has committed a criminal act. And it seems that though if there be a total permanent want of reason, or if there be a total temporary want of it when the offence was committed, the prisoner will be entitled to an acquittal; yet, *29] if there be a partial degree of reason, a competent use of it, sufficient *to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil; then, upon the fact of the offence proved the judgment of the law must take place. (h)

In Allison's Principles of the Criminal Law of Scotland, (i) and there is no difference between the law of England and the law of Scotland with reference to insanity, it is said, that "to amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is able to distinguish right from wrong, *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts." (k)

If a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner become mad, he shall not be tried, as he cannot make his defence. If, after he is tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane

(g) Reg. v. Crouch, 1 Cox C. C. 94.

(h) Per Yorke, Sol.-Gen., in Lord Ferrers' case, 19 Howell's St. Tri. 947, 948, *et per* Lawrence, J.; Rex v. Allen, Stafford Lent Assizes, 1807, MS. And see Lord Thurlow's judgment in the Attorney-General v. Parnter, 3 Br. Cha. Ca. 441.

(i) P. 654.

(k) Cited by Sir J. Campbell, Attorney-General, in Reg. v. Oxford, 9 C. & P. 532 (38 E. C. L. R.).

¹ State v. O'Brien, 7 R. I. 336. When the defence is insanity, neither books of established reputation nor statistics of the increase of insanity can be read to the jury: Commonwealth v. Wilson, 1 Gray 337; Melvin v. Earley, 1 Jones (Law) 386.

memory, execution shall be stayed; for, peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.(l)

And, by the common law, if it be doubtful whether a criminal, who at his trial is in appearance a lunatic, be such in truth or not, the fact shall be investigated.(m) And it appears that it may be tried by the jury, who are charged to try the indictment(n) by an inquest of office to be returned by the sheriff of the county wherein the Court sits(o) or, being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a venire awarded returnable *instantly*, in the nature of an inquest of office.(p) And if it be found that the party only feigns himself mad, and he refuses to answer or plead, he would formerly have been dealt with as one who stood mute,(q) but now a plea of not guilty may be entered under the 7 & 8 Geo. 4, c. 28, s. 2.

Where, on a prisoner being brought up to plead, his counsel stated that he was insane, and a jury was sworn to try whether *he was so or not, Williams, J., [*30 held that the counsel for the prosecution should call his witnesses to show that the prisoner was sane, and capable of pleading; as this was not so much an issue joined as a preliminary inquiry for the information of the Court.(r) But in a similar case Cresswell, J., held, notwithstanding the preceding case, that, as the presumption is that a man is sane, if the prisoner's counsel suggested that he was insane, he must give evidence of the fact.(s)

But in case a person in a phrenzy happen, by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the Court upon his trial that he is mad, the judge in his discretion may discharge the jury of him and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching his guilt, and this *in favorem vite*; and if there be no color of evidence to prove him guilty, or if there be pregnant evidence to prove his insanity at the time of the fact committed, then upon the same favor of life and liberty it is fit that the trial proceed in order to his acquittal.(t)

By the 39 & 40 Geo. 3, c. 94, "in all cases when it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be *required*(u) to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing such offence, the Court before whom such trial shall be had shall order such person to be kept in strict custody, in such place and in such manner as to the Court shall seem fit, until his Majesty's pleasure shall be known; and it shall thereupon be lawful for his Majesty to give such order for the safe custody of such person during his pleasure, in such place and in such manner as to his Majesty shall seem fit."(v)

By sec. 2, "if any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment; or if upon the trial of any person so indicted, such person shall appear to the jury charged with such indictment to be insane, it shall be lawful for the Court, before whom any such person shall be brought to be arraigned or tried as aforesaid, to direct such finding to be

(l) 4 Blac. Com. 25; 1 Hale 35.

(m) 1 Hawk. P. C. c. 1, s. 4. If there be a *doubt* as to the prisoner's sanity, a jury ought to be sworn to try the question: *Ley's case*, 1 Lewin 239, Hullock, B.

(n) Bac. Abr. Idiot (B.); 1 Hale 33, 35, 36; 1 Hawk. P. C. c. 1, s. 4, note (5).

(o) 1 Hawk. P. C. c. 1, s. 4; *Somerville's case*, 1 And. 107; 1 Sav. 50, 56; 1 Hale 35.

(p) *Post* 46; *Kel.* 13; 1 *Lev.* 61; 1 *Sid.* 72. And the proceeding by inquest *ex officio* is recommended in cases of importance, doubt, or difficulty: 1 Hale 35; *Sav.* 56; 1 And. 104. See 1 Hawk. P. C. c. 1, s. 4, note (5).

(q) 1 Hawk. P. C. c. 1, s. 4.

(r) *Reg. v. Davies*, 3 C. & K. 328.

(s) *Reg. v. Turton*, 6 Cox C. C. 385.

(t) Bac. Abr. Idiot (B.); 1 Hale 35, 36, per Foster, J.; 18 St. Tri. 411.

(u) It is the duty of the judge to ask the jury whether they acquit on the ground of insanity: *Burrow's case*, 1 Lewin 238, Holroyd, J.

(v) And see as to Ireland, the 1 & 2 Geo. 4, c. 33, s. 16.

recorded, and thereupon to order such person to be kept in strict custody till his Majesty's pleasure shall be known." And it is further enacted, "that if any person charged with any offence shall be brought before any Court to be discharged for want of prosecution, and such person shall appear to be insane, it shall be lawful *31] for such Court to order a jury to be impanelled to try the sanity of *such person; and if the jury so impanelled shall find such person to be insane, it shall be lawful for such Court to order such person to be kept in strict custody, in such place and in such manner as to such Court shall seem fit, until his Majesty's pleasure shall be known."

This section extends to all offences, and is not confined like the first to cases of treason, murder and felony. The prisoner was indicted for assaulting one E. Earl, and beating her with intent to murder her. The jury found specially that he was insane at the time of committing the offence, *and also at the time of the trial*, and that they acquitted him on account of such insanity, and the judge ordered him to be kept in custody accordingly. The judges were unanimously of opinion that the second section applies to all cases, though only misdemeanors,—and that though mere insanity at the time of the offence would not have warranted an order, yet insanity found at the time of the trial did warrant it.(w)

And now the 3 & 4 Vict. c. 54, s. 3, enacts, that "in all cases where it shall be given in evidence upon the trial of any person charged with any misdemeanor that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity; and if they shall find that such person was insane at the time of the committing of such offence, the Court before whom such trial shall be had shall order such person to be kept in strict custody, in such place and in such manner as to the Court shall seem fit, until Her Majesty's pleasure shall be known; and it shall thereupon be lawful for Her Majesty to give such order for the safe custody of such person, during her pleasure, in such place and in such manner as to Her Majesty shall seem fit; and in all cases where any person before the passing of this Act has been acquitted of any such offence on the ground of insanity at the time of the commission thereof, and has been detained in custody as a dangerous person, by order of the Court before whom such person has been tried, and still remains in custody, it shall be lawful for Her Majesty to give the like order for the safe custody of such person during her pleasure, as Her Majesty is hereby enabled to give in the case of any person who shall hereafter be acquitted on the ground of insanity."

Where a prisoner, indicted for a misdemeanor in uttering seditious words, upon his arraignment showed symptoms of insanity, and an inquest was forthwith taken under the statute, it was held that the jury might form their judgment of the state of the mind of the prisoner from his demeanor while the inquest was being taken, and might thereupon find him to be insane without any evidence being given as to his present state. And that it was unnecessary to ask him whether he would cross-examine the witnesses or offer any remarks or evidence, as that would *32] be a useless prolongation of a painful proceeding.(x) So the jury may take *into consideration both the conduct of the prisoner in their presence and the evidence given.(y)

Where a prisoner's counsel set up the defence of insanity for him, and the prisoner objected to that defence, asserting that he was not insane, he was allowed to suggest questions to be put to the witnesses for the prosecution, to negative the supposition that he was insane; and the judge, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose.(z)

If the jury are of opinion that the prisoner did not in fact do all that the law

(w) *Rex v. Little*, *cor.* Wood, B. Surrey Summer Assizes, 1820, Hil. T. 1821, MS., Bayley, J., and Rus. & Ry. 430.

(x) *Reg. v. Goode*, 7 Ad. & E. 536 (34 E. C. L. R.). The jury were sworn in *hæc verba*, "You shall diligently inquire and true presentment make for and on behalf of our Sovereign Lady the Queen, whether J. G., the defendant, be insane or not, and a true verdict give according to the best of your understanding; so help you God."

(y) *Reg. v. Davies*, 6 Cox C. C. 326.

(z) *Reg. v. Pearce*, 9 C. & P. 667 (38 E. C. L. R.), Bosanquet, J.

requires to constitute the offence charged, supposing the prisoner had been sane, they must find him not guilty generally, and the Court have no power to order his detention under this Act, although the jury should find that he was in fact insane. Where, therefore, on an indictment for treason, which stated, as an overt act, that the prisoner discharged a pistol loaded with powder and a bullet, the jury found that the prisoner was insane at the time when he discharged the pistol, but whether the pistol was loaded with ball or not there was not satisfactory evidence, the Court expressed a strong opinion that the case was not within the statute.(a)

If the acts proved to have been done by the prisoner be such as would have amounted to the crime charged, if they had been done by a person of sane mind, the grand jury are *bound* to find a bill, in order that the prisoner may be confined under this Act.(b)

If a prisoner have not at the time of the trial, from the defect of his faculties, sufficient intelligence to understand the nature of the proceedings against him, the jury ought to find that he is not sane, and upon such finding he may be ordered to be kept in custody under this Act.(c)

III. Persons are properly excused from those acts which are not done of their own free will, but in *subjection to the power of others*.(d) Thus, though a legislator establish iniquity by a law, and command the subject to do an act contrary to religion and sound morality; yet obedience to such laws, while in being, is a sufficient extenuation of civil guilt before the municipal tribunal; though a different decree will be pronounced in *foro conscientie*.(e) And actual force upon the person and present fear of death may, in some cases, excuse a criminal act. Thus, although the fear of having houses burnt or goods spoiled is no excuse in law for joining and marching with rebels, yet an actual force upon the person and present fear of death may form such excuse, provided they continue all the time during which the party remains with the rebels.(f)¹ And in general the person committing a crime will not be answerable if he was not a free agent, and was subject to actual force at the time the act was done. Thus, if A. by force take the arm of B., in which is a weapon, and therewith kill C., A. is guilty of murder, but not B.: but if it be only a moral force put upon B., as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse.(g) An idiot or lunatic, or a child so young as not to be punishable for his criminal act, when made use of for the purpose of committing crimes, are merely the instruments of the procurer, who will be answerable as a principal.(h) As to persons in *private relations*, the principal case where constraint of a superior is allowed as an excuse for criminal misconduct proceeds upon the matrimonial subjection of the *wife* to her husband; for neither a *child* nor a *servant* are excused the commission of any crime, whether capital or not capital, by the command or coercion of the parent or master.(i)

But a *feme covert* is so much favored in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, or even a burglary, by the coercion of her husband, or in his company, which the law construes a coercion.(k)² But this is only the pre-

(a) Reg. v. Oxford, 9 C. & P. 525 (38 E. C. L. R. 38). Lord Denman, C. J., Alderson, B. and Patteson, J. (b) Reg. v. Hodges, 8 C. & P. 195 (34 E. C. L. R.), Alderson, B.

(c) Rex v. Dyson, 7 C. & P. 305 n. (32 E. C. L. R.), s. c., 1 Lewin, 64. Parke, B.

(d) 1 Hale 43; 4 Blac. Com. 27. (e) 4 Blac. Com. 27.

(f) Per Lee, C. J., 18 Sta. Tri. 393, 394; Reg. v. Tyler, 8 C. & P. 616 (34 E. C. L. R.)

(g) 1 Hale 433; 1 East P. C. c. 5, s. 12, p. 225.

(h) 1 Hawk. P. C. c. 31, s. 7; 1 East P. C. c. 5, s. 14, p. 228.

(i) 1 Hale 44, 516; 1 Hawk. P. C. c. 1, s. 14; Moor. 813; 3 Kel. 34.

(k) 1 Hale 45; 1 Hawk. P. C. c. 1, s. 9; 4 Blac. Com. 28; Kel. 31. According to some, if a wife commit a larceny by the command of her husband, she is not guilty; which seems to be the law if the husband be *present*, but not if he be absent at the time and place of the felony committed: 1 Hale 45.

¹ United States v. Vigol, 2 Val. 346; United States v. Hashell, 4 Wash. C. C. 402.

² If a wife join with her husband in the commission of a crime less than murder, she is presumed to act under the coercion of her husband and in law is not guilty: Davis v. State, 15 Ohio 72. Wife may be convicted of aiding and abetting her husband of manslaughter: Freel v. State, 21 Ark. 212.

sumption of law; so that if upon the evidence it clearly appear that the wife was not drawn to the offence by her husband, but that she was the principal inciter of it, she is guilty as well as the husband. And if she be any way guilty of procuring her husband to commit the offence, it seems to make her an accessory before the fact in the same manner as if she had been sole. (l) And if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of murder, treason, or robbery, (m) in company with, or by coercion of her husband, *34] she is punishable as much as if she were sole. (n) And she will *be guilty in the same manner of all those crimes which, like murder, are *mala in se*,

(l) 1 Hale 516; 2 Hawk. P. C. c. 29, s. 24.

(m) Reg. v. Buncombe, 1 Cox C. C. 183.

(n) 1 Hawk. P. C. c. 1, s. 11; 1 Hale 45, 47, 48, 516; Kel. 31; 2 Bla. Com. 29. The reason given is the heinousness of those crimes. I find no decision which warrants the position in the text, as to treason, murder, or robbery. Somerville's case, 1 And. 104, which is the only case where husband and wife have been convicted of treason, only shows that a wife may be convicted of treason with her husband. There Arden and his wife were charged with procuring Somerville to destroy the Queen, and both found guilty, but as none of the evidence is stated, it may have been that the wife was the instigator, and both properly convicted. In Somerset's case, which is the only case of a wife convicted, as well as her husband, as an accessory to a murder, according to 3 Inst. 50, the Earl and Countess were indicted as accessories before the fact, to the murder of Sir T. Overbury, the wife was arraigned alone first, and pleaded guilty, and being asked what she had to say why judgment of death should not be given against her, she said, "I can much aggravate, but nothing extenuate my fault" (2 St. Tr. 957). Assuming, therefore, that the indictment was joint against both, the case only proves that the wife *may*, properly, be convicted upon her own confession, which indicates that she was the more guilty party, as it is clear she was in this case. See Hume's Hist. Eng., vol. 6, p. 68, &c. But as the Earl and Countess were separately arraigned, and on different days, and as the indictment against the Earl, as recited in his pardon (2 St. Tr. 1014), is against him alone, I infer that the Countess was indicted alone; if so, the case is merely that of a wife pleading guilty to an indictment charging her alone as accessory, and unless in such a case she either pleaded that she committed the offence in company with her husband (as it seems she may, 1 Hale 47; M. 37; Ed. 3; Rot. 34), or such appeared to be the case upon her trial, no question as to coercion could arise. In Reg. v. Alison, 8 C. & P. 418 (34 E. C. L. R.), Mr. J. Patteson mentions an old case, where a husband and wife, intending to destroy themselves, took poison together, the husband died, but the wife recovered, and was tried for the murder, and "acquitted solely on the ground that, being the wife of the deceased, she was under his control, and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent;" but I know from the very learned judge himself that he guarded against subscribing to the reason given for this decision. Probably the case referred to is an anonymous one (Moor. 754), where it is said, the question was, whether it was murder in the woman, and the recorder caused the special matter to be found, but no decision is stated, nor have I been able to find the case elsewhere. Before Somerville's case, 26 Eliz., and Somerset's case, A. D. 1615, I find no exception to the general rule that the coercion of the husband excuses the act of the wife. (See 27 Ass. 40, Stamf. P. C. 26, 27, 142; Poulton de Pace Regis 130; Br. Ab. Coron. 108; Fitz. Ab. Coron. 130, 160, 199). But after those cases I find the following exceptions in the Books: Bac. Max. 57, excepts treason only. Dalton, c. 147, treason and murder, citing for the latter Mar. Lect. 12 (which we conceive refers to the Reading of Marrow, a Master in Chancery, in the time of Henry VII. See Willes v. Bridger, 2 B. & A. 282); 1 Hale P. C. pp. 45, 47, treason, murder and homicide; and p. 434, treason, murder and manslaughter; Kelyng 31 an *obiter dictum*, murder only; Hawk. b. 1, c. 1, s. 11, treason, murder, and robbery; Blac. Com. vol. 1, p. 444, treason, and murder; vol. 4, p. 29, treason, and *mala in se*, as murder and the like. Hale, therefore, alone excepts manslaughter, and Hawkins introduces robbery, without any authority for so doing; and, on the contrary, in Reg. v. Cruse, 8 C. & P. 545 (34 E. C. L. R.), a case is cited, where Burrough, J., held that the rule extended to robbery. It seems long to have been considered that the mere presence of the husband was a coercion (see 4 Blac. Com. 28), and it was so contended in Reg. v. Cruse; and Bac. Max. 56, expressly states that a wife *can* neither be principal nor accessory by joining with her husband in a felony, because the law intends her to have no will; and in the next page he says, "If husband and wife join in committing treason, the necessity of obedience doth not excuse the wife's offence, as it does in felony." Now if this means that it does not absolutely excuse, as he has stated in the previous page, it is warranted by Somerville's case, which shows that a wife *may* be guilty of treason in company with her husband, and which would be an exception to the general rule, as stated by Bacon. So also would the conviction of a wife with her husband for murder in *any* case be an exception to the same rule. Dalton cites the exception from Bacon without the rule, and Hale follows Dalton, and the other writers fol-

and prohibited by the law of nature.(o) And in one case it appears to have been held by all the judges, upon an indictment against a married woman, for falsely swearing herself to be next of kin and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath.(p) But upon an indictment for disposing of forged notes, it was ruled that a woman was protected by being the wife of a man with whom she was indicted, who disposed of them in *her presence.(q) So, where on an indictment against husband and wife for feloniously wounding with intent to disfigure, the jury [*35 found that the wife acted under the coercion of her husband, and did not herself personally inflict any violence upon the prosecutor, it was held, that she ought to have been acquitted.(r)

Where, on an indictment against husband and wife for jointly receiving stolen goods, it appeared that a burglary was committed by their two daughters, who were traced to Cranbrooke, where their father and mother then lived, with a quantity of the property stolen, with which they went towards their father's house; and on the same night, between nine and ten o'clock, the mother and her two daughters went to the house of a draper, and brought(s) two trunks, a red and blue one, and a person who lived next door to the prisoners saw them and their two daughters, on the next day, in the kitchen, where the two daughters were packing a blue box, and the two boxes were afterwards found in London, in consequence of a statement made by the wife, who, when the house was searched, denied that any of the stolen goods were in it, and made various other false statements; and a quantity of the stolen property was found concealed in different parts of the house; the jury found both the husband and wife guilty; it was held, that as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of the husband, the conviction of the wife could not be supported, though she had been more active than her husband.(t)

On an indictment against husband and wife for receiving stolen sugar, it appeared that the husband received it in the first instance in the absence of his wife. Some remains of the sugar were found on searching in a sink in the kitchen, and the wife stated that she and her daughter had washed all the sugar away, and that they had burnt the bags in which it was contained, and that she thought it a hard

low Hale; and it seems by no means improbable that the exceptions of treason and murder, which seem to have sprung from Somerville's and Somerset's case, and which were probably exceptions to the rule as stated by Bacon, have been continued by writers without adverting to their origin, or observing that the presence of the husband is no longer considered an absolute excuse, but only affords a *prima facie* presumption that the wife acted by his coercion. See the learned argument of Mr. Carrington in *Reg. v. Cruse*, 8 C. & P. 541 (34 E. C. L. R.). In 1849, G. Manning and his wife were jointly convicted of murder, but the question discussed in this note was not raised, probably because upon the evidence it was plain she was the more active party in the offence. The case as reported 2 C. & K. 887 (61 E. C. L. R.), and 1 D. C. C. R. 467, does not advert to this question, but the charge of the recorder to the grand jury, 2 C. & K. 903 (61 E. C. L. R.) contains some observations upon it. See *Reg. v. Smith*, 1 D. & B. 553, which is quite in accordance with this note, *post*, p. 35. C. S. G.

(o) 4 Blac. Com. 29. This position of Mr. J. Blackstone is obviously much too large, as it includes larceny and burglary. C. S. G.

(p) *Rex v. Dicks*, in 1781, 2 MS. Sum. tit., Of Offenders, and MS., Bayley, J.

(q) *Rex v. Atkinson*, *post* 47.

(r) *Reg. v. Smith*, 1 D. & B. 553. The facts of this case (except as above stated) were not submitted to the judges. As the wife met the prosecutor at a railway station, and induced him to go to a lonely spot where her husband wounded him (see the note to the case), it is clear she was an accessory before the fact, and responsible as such for her acts in the absence of her husband, and under the 11 & 12 Vict. c. 46, s. 1, she ought to have been convicted as such accessory. C. S. G.

(s) So in the report; *quære*, bought.

(t) *Rex v. Archer*, R. & M. C. C. R. 143. The marginal note is "upon a joint charge against husband and wife, of receiving stolen goods, the wife cannot, properly, be convicted, if the husband is," which seems not to be warranted by the case, which, at most, only decides that where there is no evidence whatever, that the wife was present when the goods were received, or of her conduct when they were received, she ought not to be jointly convicted with her husband. C. S. G.

case that she and her husband should be at a loss of four or five pounds. Coltman, J., told the jury that "if the husband received the property, knowing it to be stolen, and if the wife received it from him with the like knowledge, and with the purpose of aiding and assisting him in the object which he had in view in receiving it, by turning it to pecuniary profit or in other like manner, although *primâ facie* she might be supposed to be acting under the coercion of her husband, that was rebutted by the active part which she took in the matter with the intention above mentioned. But if the part she took was merely for the purpose of concealing her husband's guilt, and of screening him from the consequences, then she ought to *36] be acquitted. A wife cannot be *convicted of harboring her husband, when he has committed a felony, and the mere circumstance of her attempting to conceal what may lead to his detection appears to come within the same principle." (u)

On an indictment against a wife for receiving stolen goods, it appeared that her husband stole the goods from a shop, and delivered them into her hands. Whether the articles were stolen at one or at several times, or delivered to the prisoner at one or at different times, did not appear. The husband absconded, his house was searched, and a box taken from the prisoner, after a struggle on her part to retain it. It contained pawn-tickets which related to the stolen goods. Several of these tickets had been given for articles pledged by the prisoner, who falsely stated as to some that they were birthday presents, and as to others that they were articles in which she dealt. In two instances the prisoner had sent persons to pledge some of the articles, and had received the pawn-tickets and money lent by the pawn-brokers. The jury were told that, as her husband had delivered the stolen articles to the prisoner, the law presumed that she acted under his control in receiving them; but that this presumption might be rebutted: if therefore they were satisfied that at the time when the prisoner received the articles she knew that they were stolen, and in receiving them acted not by reason of any coercion of her husband, but voluntarily, and with a fraudulent intention, she might be found guilty; and on her being found guilty the questions were reserved, whether the direction was right, and whether on the evidence there was any case for the jury; and it was held that the case failed on both points; if there had been plenty of evidence there would have been no case to go to the jury; but it appeared that there was no evidence at all. (v)

Where on an indictment for larceny it appeared that the goods were found in the house of the prisoner's husband, who was a blind man, and when they were found the prisoner said she had bought them a long time before; Erle, J., said that if the prisoner had said nothing, and the goods had simply been found in the house of the husband, there would have been no evidence to go to the jury. But as she said she bought the goods, it must be left to the jury to decide whether the goods were in the possession of the prisoner or her husband; and the jury were told that if they were of opinion that the goods were in the possession of the wife without the consent and control of her husband, they must find her guilty. (w)

The prisoner was indicted together with her husband and one Prishous for burglary and receiving. The jury found Prishous guilty of housebreaking, and the prisoner and her husband of receiving. Part of the stolen property was found *37] in the house *where the prisoner and her husband lived together, and the evidence warranted the jury in convicting the husband of receiving; but the

(u) Reg. v. McClarens, 3 Cox C. C. 425. The wife was acquitted.

(v) Reg. v. Brooks, 1 Dears C. C. 184. This decision is clearly right on the ground that there was no evidence whatever as to the guilty knowledge or conduct of the prisoner *at the time the goods were received*. Parke, B., said that, as the prisoner received the goods from her husband, "it is difficult to see how she could be guilty of this offence." With all deference, it is perfectly easy to suggest cases where a wife may be convicted of receiving stolen goods from her husband. Suppose she incites him to steal a diamond necklace for her, and he does so in her absence, delivers it to her, and she wears it; or, suppose a thief brings stolen goods to a house, and the husband declines to receive them, but is induced by the wife so to do, and afterwards the husband delivers them to the wife; it cannot be doubted that in these and the like cases she may be convicted, for the plain reason that she is acting in no way under his coercion. C. S. G.

(w) Reg. v. Banks, 1 Cox C. C. 238.

only evidence which affected the prisoner was that, some time after the robbery, in the absence of her husband, she produced a quantity of the stolen property, and said it was to be destroyed, and said she had been changing some foreign money, and thought she was going to be taken up for it, and asked a young woman to come down, if she were taken, and say a foreign captain had given her part of the stolen property. It was contended that there was no evidence that she received the property either in the absence of, her husband or from any other person than him; and that if there was evidence for the jury, the question would be whether she received it from him, and if not, whether she received it in his absence; but Martin, B., ruled that there was evidence for the jury, and did not leave either of these questions to them. It was held, however, that the questions ought to have been left to the jury, and it was perfectly consistent with the facts that the goods might have been received by the husband at his own house, and so have come into the possession of the wife through her husband in a manner that did not render her liable to be convicted.(x)

Where on an indictment against husband and wife for jointly receiving stolen fowls, it appeared that the fowls were found in the husband's house, and the wife said she had bought part from people who came to the house in his absence, and that her husband bought some at Shrewsbury market on Wednesday; and the husband afterwards said that he was not out of the place where he resided on the Wednesday, and had bought "the fowls" from the person who stole them; so that the evidence showed either a joint receiving by both or a separate receiving by each in the absence of the other, and the jury found both guilty; it was held that, assuming the receiving to have been joint, the wife was entitled to be acquitted, as the offence was committed in her husband's presence; and assuming the receiving to have been separate, the offence against both was not proved as laid, and that the husband was rightly convicted, but the wife not.(y)

Upon an indictment against husband and wife for jointly receiving stolen goods, the jury found that the wife received them without the control or knowledge of and apart from her husband, and that the husband afterwards adopted his wife's receipt; and it was held that, upon this finding, the conviction of the husband could not be supported. The word "adopted" might mean that the husband passively consented to what his wife had done without taking any active part in the matter, and in that case he would not be guilty of receiving. Or, it might mean, that he did take such active part; but this rigid construction ought not to be put upon the word "adopted."(z) But where the thief delivered the stolen property to the prisoner's wife in his absence, and she then paid sixpence on account, [*38 but the amount to be paid was not then fixed; and afterwards the prisoner and the thief met, agreed on the price, and the prisoner paid the balance; it was held that the receipt was not complete till the price was fixed, and the money paid, and consequently that the prisoner was rightly convicted of receiving the stolen property.(yy)

Where a jury found a wife guilty of stealing from the person, and her husband guilty of receiving the property stolen knowing it to have been stolen, and also found that the wife acted voluntarily and without any restraint on the part of the husband, and that he received the property from his wife knowing it to have been

(x) *Reg. v. Wardroper*, Bell C. C. 249. Martin, B., at the trial rightly treated the indictment as joint and several. See 14 & 15 Vict. c. 100, s. 14; but there was no evidence of a receipt by the wife in the absence of her husband, so as to bring the case within that clause.

(y) *Reg. v. Matthews*, 1 Den. C. C. 596. There was nothing to show any activity on the part of the wife at the time of the receipt. See now the 24 & 25 Vict. c. 96, s. 94, by which persons charged with a joint receipt of stolen property may become convicted of separate receipts.

(z) *Reg. v. Dring*, D. & B. 329. It was doubted in this case, whether sec. 14 of the 14 & 15 Vict. c. 100, applied to successive receipts of the whole property stolen; but sec. 17 of the Statute of Frauds, 29 C. 2, c. 3 is, "except the buyer shall accept part of the goods so sold, and actually receive the same," and no one ever doubted that a receipt of the whole was within this clause.

(yy) *Reg. v. Woodward*, 1. L. & C. 122.

stolen by her; it was held that the husband was rightly convicted of feloniously receiving the property from his wife.(zz)

Where the wife is to be considered merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. *C. Squire* and his wife were indicted for the murder of a boy, who was bound as a parish apprentice to the husband, and it appeared in evidence that both prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of her husband. But the surgeon who opened the body deposed that, in his judgment, the boy died from debility and want of proper food and nourishment, and not from the wounds, &c., which he had received. *Lawrence, J.*, directed the jury, that as the wife was the servant of the husband, it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any breach of duty in neglecting to do so; though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withheld it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though in *foro conscientiae* the wife was equally guilty with the husband, yet in point of law she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment.(a)

In inferior misdemeanors a wife may be indicted, together with her husband;(b) *39] and she may be punished with him for keeping *a bawdy house; for this is an offence as to the government of the house in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of the sex.(c) So a wife might be jointly convicted with her husband of an assault, upon an indictment against both, for feloniously inflicting a bodily injury dangerous to life, under 1 Vict. c. 88, s. 5.(d) But where the husband and wife were indicted for a misdemeanor, in uttering counterfeit coin, it was held that the same rule which applied to felonies should apply to that case.(e) But a prosecution for a conspiracy is not maintainable against a husband and wife only; because they are esteemed but as one person in law, and are presumed to have but one will.(f)

In all cases where the wife offends alone without the company or coercion of her husband, she is responsible for her offence as much as any feme sole.(g) Thus she

(zz) *Reg. v. M'Athey*, 1 Leigh & C. 250.

(a) *Rex v. Squire* and his wife, Stafford Lent Assizes, 1799, MS.

(b) See *Reg. v. Martin*, 8 A. & E. 481 (35 E. C. L. R.) where husband and wife were convicted of obtaining goods by false pretences, and the judgment reversed on another ground. There is no doubt that in all misdemeanors a wife may be jointly convicted with her husband, as she may be proved to have acted voluntarily; but I find no authority that the same rule as to coercion, which applies to felonies, does not extend to misdemeanors. On the contrary, *Rex v. Price*, 8 C. & P. 19 (34 E. C. L. R.) and *Anon.*, *Matth. Dig. Cr. Law* 262, show that the rule applies to the misdemeanor of uttering base coin; and the reason given in *Rex v. Dixon*, 10 Mod. 335, and *Reg. v. Williams*, *Salk.* 384, as to the keeping of gaming and bawdy houses, that the wife may probably have as great, nay, a greater share in the criminal management of the house, than the husband, tends to show, that, in order to convict the wife she must be acting voluntarily, and not under coercion. In *Reg. v. Cruse*, 8 C. & P. 541 (34 E. C. L. R.) the wife had taken a very active part. *Reg. v. Williams*, and *Reg. v. Ingram*, *Salk.* 384, were in arrest of judgment, and therefore the Court would presume, if necessary, that the wife had acted voluntarily; and *Rex v. Dixon* was on demurrer, and the Court would, and it seems did, hold the indictment good, because it might be proved that the wife was not under coercion. There is no authority, therefore, that the rule does not extend to misdemeanors, and the tendency of the authorities certainly is that it does. C. S. G.

(c) 1 Hawk. P. C. c. 1, s. 12; *Williams's case*, 10 Mod. 63; *Salk.* 384, s. c., in arrest of judgment. So also for keeping a gaming house: *Rex v. Dixon* and wife, 10 Mod. 335, on demurrer, where by the indictment the husband and wife *et uterque eorum* were charged with the offence. See 1 Bur. R. 600.

(d) *Reg. v. Cruse*, 2 Moo. C. C. R. 53; s. c., 8 C. & P. 541 (34 E. C. L. R.).

(e) *Reg. v. Price*, 8 C. & P. 19 (34 E. C. L. R.), *Mirehouse*, C. S., after consulting *Bosanquet* and *Coltman*, J. J. and *vide Matth. Dig. Cr. Law* 262. *Anon.*, s. p. per *Bayley*, J.

(f) 1 Hawk. P. C. c. 72, s. 8; 38 E. 3, 3.

(g) 4 Blac. Com. 29. But if a wife incur a forfeiture by a penal statute, the husband may be made a party to an action or information for the same, and shall be liable to answer what shall be recovered thereon: 1 Hawk. P. C. c. 1, s. 13.

may be indicted alone for a riot;(*h*) may be convicted of selling gin against the injunctions of the 9 Geo. 2, c. 23, (*i*) or for recusancy. (*k*) And she may be indicted for being a common scold; (*l*) for assault and battery; (*m*) for forestalling; (*n*) for forcible entry; (*o*) or for keeping a bawdy house, if her husband do not live with her; (*p*) and for trespass or slander. (*q*) And she may also be indicted for receiving stolen goods of her own separate act without the privity of her husband; or if he, knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessory; (*r*) and though in a serious offence, such as that of sending threatening letters, the husband be an agent in the transaction, yet if he be so ignorantly, by the artifice of the wife, she alone is punishable. (*s*) And generally a feme covert shall answer as much as if she were sole for any offence not capital against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of her husband, she may be punished for it without the husband, by way of indictment; which being a proceeding grounded merely on the breach of the law, the *husband shall [*40 not be included in it for any offence to which he is in no way privy. (*t*)

It is no excuse for the wife that she committed the offence by her husband's order and procurement, if she committed it in his absence; at least it is not to be presumed in such case that she acted by coercion. *S. Morris* was tried for uttering a forged order, knowing it to be forged, and her husband for procuring her to commit the offence; and it appeared that her husband ordered her to do it, but that she uttered the instrument in his absence. Upon a case reserved, the judges held that the presumption of coercion at the time of the uttering did not arise, as the husband was absent at that time; and that the wife was properly convicted of the uttering, and the husband of the procuring. (*u*) In a previous case, where the prisoner was indicted for forgery and uttering Bank of England notes, the principal witness stated, that, in consequence of a conversation which he had had some time before with the prisoner's husband, he went to the husband's shop; that the husband was not present, but that he saw the prisoner, who beckoned him to go into an inner room; that she followed him into the room, and that he there told her what her husband had said to him; upon which they agreed about the business, and he bought of her three two pound notes, at one pound four shillings each; that he paid her for the notes, and was to receive eight shillings in change; and that when he was putting the notes into his pocket-book, and before he had received the change, the husband looked into the room, but did not come in or interfere with the business further than by saying, "Get on with you." After this the witness and the prisoner returned into the shop where the husband was; the prisoner gave him the change, and both the prisoner and her husband cautioned him to be careful. The counsel for the prisoner objected that she acted under the coercion of her husband; that the evidence would have been sufficient to have convicted the husband, if both the husband and wife had been upon their trial; and that therefore the prisoner ought to be acquitted. (*v*) But Thomson, B., said, "I am very clear as to the law on this point. The law, out of tenderness to the wife, if a felony be committed in the presence of the husband, raises a presumption

(A) Dalt. 447.

(i) Croft's Case, Str. 1120. And she may be committed for disobeying an order of bastardy: *Rex v. Ellen Taylor*, 3 Burr. 1679.

(k) Hob. 96; Foster's case, 11 Co. 62; 1 Sid. 410; Sav. 25.

(l) Foxley's case, 6 Mod. 213, 239.

(m) Salk. 384.

(n) Sid. 410; 2 Keb. 634. *Qu.* and see Bac. Ab. *Baron and Feme* (G) notes.

(o) 1 Hale 21; Co. Lit. 357; 1 Hawk. c. 64, s. 35. That is in respect of such actual violence as shall be done by her in person, but not in respect of what shall be done by others at her command, because such command is void.

(p) 1 Hawk. P. C. c. 1, s. 13, n. 11, where 1 Bac. Abr. 594, is cited; *sed qu.*

(q) 1 Bac. Abr. *Baron and Feme* (G) notes.

(r) 22 Ass. 40; Dalt. c. 157.

(s) Hammond's case, 1 Leach 447.

(t) 1 Hawk. P. C. c. 1, s. 13; 1 Bac. Abr. *Baron and Feme* (G), where it is said in the notes, that she cannot be indicted for barratry, and Roll. Rep. 39 is cited. But *qu.* and see 1 Hawk. P. C. c. 81, s. 6, and *post* 266.

(u) *Rex v. Morris*, East. T. 1814, MS., Bayley, J., and Russ. & Ry. 270.

(v) He referred to 2 East P. C. c. 16, s. 8, p. 559; 1 Hale 46; Kel. 37.

primâ facie, and *primâ facie* only, as is clearly laid down by Lord Hale, that it was done under his coercion: (w) but it is absolutely necessary that the husband should in such case be actually present, and taking a part in the transaction. Here it is entirely the act of the wife; it is indeed in consequence of a communication previously with the husband, that the witness applies to the wife; but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came: and it was sufficient if before that time she did that which was necessary to complete the crime. The *41] coercion must be at the time of the act done, and then the *law out of tenderness refers it *primâ facie* to the coercion of the husband. But when the crime has been completed in his absence, no subsequent act of his (although it might possibly make him an accessory to the felony of the wife) can be referred to what was done in his absence." (x) And it seems that the correct rule is, that if a felony be shown to have been committed by the wife in the presence of the husband, the *primâ facie* presumption is that it was done by his coercion; but such presumption may be rebutted by proof that the wife was the more active party, or by showing an incapacity in the husband to coerce. Thus, if the husband were a cripple, and confined to his bed, his presence then would not be sufficient to exonerate the wife. (y) Where, therefore, in a case of arson a husband and wife were tried together, and it appeared that the husband, though present, was a cripple, and bed-ridden in the room; it was held that the circumstances under which the husband was, repelled the presumption of coercion. (z)

A feme covert is not guilty of felony in stealing her husband's goods; because a husband and wife are considered but as one person in law, and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them: for which cause even a stranger cannot commit larceny in taking the goods of the husband by the delivery of the wife, as he may by taking away the wife by force and against her will, together with the goods of the husband. (a)

The wife of a member of a friendly society is not guilty of larceny if she steal the money of the society deposited in a box in her husband's custody, which box is kept locked by the stewards, of whom he is not one; for the husband has a joint property in such money. (b)

(w) 1 Hale 516.

(x) *Rex v. Martha Hughes*, coram Thomson, B., Lancaster Lent Assizes, 1813, MS.; 2 Lewin 229, s. c.

(y) Per Tindal, C. J., in *Reg. v. Cruse*, 2 M. C. C. R. 53.

(z) *Reg. v. Henry and Elizabeth Pollard*, Maidstone Sp. Ass. 1838, before Vaughan, J., who so held, after consulting Tindal, C. J., cited in *Reg. v. Cruse*, 2 M. C. C. R. 53.

The following positions seem fairly deducible from the cases upon this subject:—1st. There is no objection on demurrer, to an indictment, which charges husband and wife jointly with the commission of an offence; for the indictment is joint and several, and both may be convicted, if it appear the wife was not acting under the coercion of the husband, or either of them. 2dly. There is no objection, either in arrest of judgment, or on error, to the joint conviction of husband and wife of the same offence; for she may have been the instigator, and both guilty. 3dly. Upon the trial of husband and wife, the *primâ facie* presumption is, that she acted under his coercion, provided he were actually present at the time the felony was committed. If, therefore, nothing appear but that the felony was committed while they were both together, the jury ought to be directed to acquit the wife. 4thly. This presumption is *primâ facie* only, and may be rebutted, either by showing that the wife was the instigator or more active party, or that the husband, though present, was incapable of coercing, as that he was a cripple, and bed-ridden, or that the wife was the stronger of the two. C. S. G. In *Reg. v. William and Emma Jones*, Gloucester Sum. Ass. 1841, Coltman, J., after attentively reading this note, said that it was quite correct: MSS. C. S. G.

(a) 1 Hale 514, where it is put thus: "If she take or steal the goods of her husband and deliver them to B., who, knowing it, carries them away, this seems no felony in B.; for they are taken *quasi* by the consent of her husband. Yet trespass lies against B. for such taking; for it is a trespass; but in *favorem vitæ*, it shall not be adjudged a felony, and so I take the law to be, notwithstanding the various opinions." And he cites Dalton, cap. 104, p. 268, 269, *ex lecturâ Cooke* (new edit. c. 157, p. 504). And see 1 Hawk. P. C. c. 33, s. 32; 3 Inst. 110; 2 East P. C. 558.

(b) *Rex v. Willis*, R. & M. C. C. R. 375. So of goods delivered to the husband to keep: Dalt. c. 157.

*And, where the prisoner was an apprentice to the prosecutor, and the prosecutor's wife had continual custody of the key of the closet where her husband's plate was usually locked up, and she had pawned some articles of it in order to supply the prisoner with pocket-money, but the articles she pawned were not those with which the prisoner was charged with stealing; and the prisoner confessed that he took the articles mentioned in the indictment from the closet, and a pawnbroker proved that he received them in pledge from the prisoner, but it did not appear by what means the prisoner had gained access to the closet from which they were taken; the Court held, that the prosecutor's wife, having the constant keeping of the key of the closet where the plate was usually locked up, and it appearing that the prisoner could not have taken it without her *privity or consent*, it might be presumed that he had received it from her, and therefore he ought to be acquitted. (c) But if the wife steal the goods of her husband, and deliver them to B., who, knowing it, carries them away, *B. being the adulterer of the wife*, this, according to a very good opinion, would be felony in B.; for in such case no consent of the husband can be presumed. (d)

Thus, where the prosecutor left his wife in the care of his house and property, and during his absence the prisoner, who had lodged for some time previously in the house, took a great many boxes, &c., from the house, and left them at a house to which he had gone a day or two before with the prosecutor's wife, passing her for his own, and where he had hired lodgings; and he soon afterwards brought her with him to the lodgings, where they lived together till he was apprehended, and the wife, who took a small basket with her, swore that there was none of the property but what she had herself taken, or given to the prisoner to take; and the jury found that the prisoner stole the property jointly with the wife; it was held that this was larceny in the prisoner; for though the wife consented, it must be considered that it was done *invito domino*. (e)

So, where the prisoner, who lodged at the house of the prosecutor, went away with the prosecutor's wife to Birmingham, where they lived together as man and wife for more than a year; they took with them from the prosecutor's house a box belonging to the prisoner, containing the wife's wearing apparel and a coffee-pot and two candlesticks, the property of the prosecutor. The coffee-pot and candlesticks were used by them at Birmingham, and afterwards sold by the wife, and the prisoner there pledged some articles of wearing apparel, and applied the money to his own use. The jury were directed to find the prisoner guilty, if they thought either that the prisoner, going away with the prosecutor's wife for the purpose of an adulterous intercourse, was engaged jointly with her in taking the goods, or that, not being a party to the original taking, the prisoner, after arriving at Birmingham, appropriated any part of the goods to his own use. The jury having found the prisoner guilty, on the ground that there was a *joint taking by the prisoner and the wife, the judges were unanimously of opinion that the conviction was right. (f)

So, where the prosecutor and his wife were on bad terms, and she arranged with the prisoner to elope with him and live together as man and wife, and the prisoner desired her to bring all the money she could, and to get the money and boxes of clothes ready by a particular night, when he would come for them and take her away; and she put £17 into the boxes, which already contained her clothes, two watches, some silk handkerchiefs, and about £4, and sat up after her husband had gone to bed till the prisoner came, took him into the room where her husband was asleep, and he took the boxes away, and, if her husband had remained asleep, she would have gone off with the prisoner, but, as her husband awoke, she was obliged to stay. It did not appear that any adultery had been committed. The boxes were locked by the wife, and were found in that state in the possession of the prisoner, and were unlocked with keys produced by the wife. Coleridge, J., di-

(c) Harrison's case, 1 Leach 47; 2 East P. C. 559.

(d) Dalton, cap. 104, pl. 268, 269 (new edit. c. 157, p. 504).

(e) Rex v. Tolfree, R. & M. C. C. R. 243, overruling Rex v. Clark, R. & M. C. C. R. 376, n. (a).

(f) Reg v. Thompson, 1 D. C. C. R. 549.

rected the jury that, if the prisoner took any of the husband's property, there then being an intention to commit adultery with the wife, he was guilty of larceny; and that, having told the wife to bring all the money that she could, it was for them to consider whether he did not intend to steal the property taken away, although he might not, at the time of the taking, know exactly of what that property consisted. (g)

On an indictment for larceny it appeared that the prisoner was a servant of the prosecutor, and that he was seen to bring a box out of the house of his master on the 28th of July, and that on the night of that day the prisoner and the prosecutor's wife occupied the same bedroom at Bath, and that in that room a police constable found them together, and charged the prisoner with stealing spoons and a watch of the prosecutor. He said, "I've not stolen anything; what I have taken away is with her consent" (nodding to the wife). She said, "Yes; I told him to get a fly, and take the boxes." The constable pointed out a box, and said, that is the prosecutor's. She said, "Yes, that is the only thing which I have got of his." The constable took the watch from the prisoner's person. The constable examined a box which the prisoner admitted to be his, and found on the top several articles of female apparel, and under these some silver spoons and sugar tongs of the prosecutor. The prisoner said, "I did not know the silver was there; the watch is Mrs. F.'s; I got it from her." The wife proved that she ordered the prisoner to get a fly and take away the boxes, and that the prisoner was not there when she was packing. He did not know of her putting in the spoons or sugar tongs. It was objected that the charge against the prisoner could not be maintained, as he was acting under the control of his mistress, and that she could not be legally charged with stealing from her husband; the jury were directed that, if the prisoner and the wife went away with the intention of carrying on an adulterous intercourse, and if he, when so going away, was concerned in taking away the property of the prosecutor, he was guilty; and, on a case reserved upon the point so raised, Erle, C. J., after argument for the prisoner, said, "Upon these facts the taking of the box *animo adulterii* was evidence of larceny. The prisoner took his master's property, and with it his master's wife, with the intention of committing adultery. The conviction must therefore be affirmed." (gg)

Where the prisoner lodged at the prosecutor's house, and knew that he would have to go out very early in the morning, and engaged a porter to be near the house at seven o'clock with his cart; the prisoner and the wife of the prosecutor were then jointly engaged in the house in packing up the articles alleged to be stolen in boxes, and when so packed the prisoner brought the boxes out, and they were put in the cart and driven to the station, the prisoner, the wife, and her three children accompanying them, and all went by the train to Leeds. A fortnight afterwards the prisoner and the wife were found living together at Leeds, in a house which she had taken in her own name, and all the property taken was found there. The wife was called as witness for the prisoner, and swore that they neither had committed adultery, nor gone away for that purpose. The jury were told that, if they were satisfied that the prisoner and the wife, when they took the property, went away for the purpose of having adulterous intercourse, and had afterwards effected that purpose, they ought to convict; but that if they believed the wife, that they did not go away with any such purpose, and had never committed adultery, they ought to acquit. The jury found the prisoner guilty of larceny, and the conviction was affirmed. (h)

*44] *So, where a wife took thirty-five sovereigns and some clothes from her husband's bedroom, and as she left the house said to the prisoner, "It's all

(g) Reg. v. Tollett, C. & M. 112 (41 E. C. L. R.)

(gg) Reg. v. Mutters, 10 Cox C. C. 50.

(h) Reg. v. Berry, Bell C. C. 95. Where the prosecutor's wife, taking with her articles of her wearing apparel, eloped with the prisoner, the clothes were found in a trunk belonging to the prisoner, of which the wife had the key, which the prisoner had given her, and she said she put them there; the name of the wife was changed, and a passage ticket taken out in the joint name of Walker. Lefroy, C. J., left the case to the jury, and the prisoner was convicted. Reg. v. Glassie, 7 Cox 1. This case is extremely ill-reported, and very little reliance can be placed on it. The facts above stated are culled from the different parts of the report.

right, come on ;" and he left in a few minutes after, and they were traced to a public-house, where they slept together, and when taken into custody the prisoner had twenty-two sovereigns upon him : the jury found him guilty of larceny, on the ground that he received the sovereigns from the wife, knowing that she took them without the authority of her husband ; and the conviction was held right ; for when a wife becomes an adulteress, she thereby determines her quality of wife, and her property in her husband's goods ceases ; and in this case the prisoner was the accomplice of the wife, assisted her, and took the sovereigns, knowing that she had taken them without the husband's consent.(i)

The prisoner, having lodged in the prosecutor's house about a year, left, but there was no evidence as to the time or manner of his leaving. The next day the prosecutor's wife left, with only a small bundle under her arm. The prisoner was apprehended on board a vessel bound to Quebec, in company with the wife, who was passing under the name of Mrs. Deer, and the prisoner had tickets for Quebec in the names of Mr. and Mrs. Deer. A great quantity of the prosecutor's property, very much more than could have been comprised in the wife's bundle, and not confined to the wife's clothes, was found in the prisoner's cabin and on his person, on the 10th of April, and it had been missed on the evening of the 9th of that month. There was no other evidence who had taken the articles from the house. The jury found the prisoner guilty of receiving, knowing the goods to have been stolen ; and it was held that there was "some evidence to support the conviction."(k)

But where the prisoner does not take away the goods in company with the wife, but she brings them to his lodgings, and there commits adultery with him, and no distinct possession of the goods on the part of the prisoner is shown, he cannot be convicted. The prisoner induced the prosecutor's wife to go to his lodgings, and she took with her a quantity of goods, not consisting of female apparel, or of articles exclusively for female use, and they were put into the prisoner's lodgings, and the prisoner and the prosecutor's wife slept together there as man and wife ; but the goods could not be traced to the individual possession of the prisoner by any particular act of his, but it could only be shown that they were found at his lodgings, some of them in the room in which he and the prosecutor's wife slept together ; and it was held that there was not enough to convict the prisoner.(l)

Upon an indictment for stealing a bonnet, books, and goloshes, it appeared that the prisoner, being a lodger in the prosecutor's house, agreed with his wife that they should go away and live together in adultery. He went away [*45 leaving the husband and wife together ; then the husband went out to work, and then the wife went after the prisoner. They were overtaken on the road in company together, and he was carrying a bandbox containing goloshes and boots, the wearing apparel of the wife of the prosecutor, and so, in law, his property ; and it was held that the prisoner ought not to have been convicted, as he was only assisting in carrying away the necessary wearing apparel of the wife.(m)

Upon an indictment for larceny, it appeared that one prisoner was uncle and the other cousin of the prosecutor's wife, and that on the nights of the 7th and 10th

(i) Reg. v. Featherstone, Dears. C. C. R. 369.

(k) Reg. v. Deer, 1 L. & C. 240. The case was not argued, and no grounds are given for the decision. As the only possible inferences from the facts are either that the prisoner took the goods, or joined with the wife in taking them, or that the wife took them or part of them, and afterwards delivered them to the prisoner, it is clear that he was guilty of stealing and not of receiving, and therefore this decision is wrong. C. S. G.

(l) Reg. v. Rosenberg, 1 C. & K. 233 (47 E. C. L. R.), Lord Denman, C. J., and Parke, B. If any separate act of possession had been shown, the point would have been reserved.

(m) Reg. v. Fitch, D. & B. 187. In Reg. v. Tollett, C. & M. 112 (41 E. C. L. R.), Carrington contended that if a wife eloped with an adulterer it would be no larceny in the adulterer to assist in carrying away her clothes ; but Coleridge, J., told the jury that "if he elopes with an adulteress, who takes her clothes with them, it is larceny to steal her clothes, just as much as it would be larceny to steal her husband's wearing apparel, or anything else that was his property." This case was not cited in Reg. v. Fitch, but Coleridge, J., concurred in that decision, which seems properly to overrule his direction in Reg. v. Tollett ; for where the necessary wearing apparel alone is taken, the necessity for which it is taken furnishes the motive, and negatives the *animus furandi*. C. S. G.

of February they went to the prosecutor's house, without his knowledge, after he had gone to bed. The wife admitted them on each occasion. The first night they packed and took away, in the wife's presence and with her consent, a box containing property of the prosecutor, and on the second night they took, in her presence and with her consent, a carpet and cooking-pots. On the 11th, after the prosecutor had gone to his work, the cousin went to the house, and with the wife's consent carried away a bed, and placed it in a granary at a short distance, requesting the person who gave him permission to do so not to inform the prosecutor. The cousin then returned to the house, and went away with the wife, taking with him a basket containing property of the prosecutor. The wife left without her husband's knowledge or assent, and without the intention of returning; they went together to the house of the uncle. The prosecutor and a constable went thither that evening, and the uncle denied he had any property of the prosecutor's; the house was searched, and a milk jug and several other articles of the prosecutor's were found in a bedroom; and boxes and other articles of the prosecutor's were found in an adjoining house. The boxes had upon them the address, "Henry Avery, to be left at the Rose Inn, Folkstone." There was no evidence that the wife remained at the uncle's house, or that she had committed adultery with either prisoner, or intended to do so. The jury found that the prisoners took the goods without the knowledge or consent of the husband, and with the intention to deprive him absolutely of his property in them, and found the prisoners guilty. But it was held that the conviction was wrong. No adultery was shown to have taken place, or to have been intended; the goods were taken with the consent of the wife, and she could not be guilty of larceny in simply taking the goods of her husband; and if a stranger do no more than simply assist a wife in taking the goods of her husband, as the wife, as principal, cannot be guilty of larceny, the stranger, as aider, cannot *46] be guilty. In this case it was not left to the jury to say whether the prisoners were acting as principals when the act was done, or whether the wife was the principal, and the prisoners merely aiding and assisting her, and that state of the case which is most favorable to the prisoners must be assumed, and therefore the conviction must be quashed.(n)

A feme covert shall not be deemed accessory to a felony for receiving her husband who has been guilty of it, as her husband shall be for receiving her; nor shall be a principal in receiving her husband when his offence is treason; for she is *sul potestate viri*, and bound to receive him.(o) Neither is she affected by receiving jointly with her husband, any other offender.(p)

It is no ground for dismissing an indictment for burglary or larceny as to the wife, that she is charged with her husband and described as his wife; for the indictment is joint and several according as the facts may appear; and on such an indictment the wife may be convicted and the husband acquitted.(q)

In burglary or larceny, if a man or woman are indicted, and the woman pretends to be the man's wife, but is not so described in the indictment, the onus of proving that she is his wife is upon her. Thus where *Thomas Wharton* and *Jane Jones* were indicted for burglary, and the woman pleaded that she was married to Wharton, and would not plead to the name of Jones, the grand jury who found the bill was sent for, and in their presence, and with their consent, the court inserted the name *Jane Wharton*, otherwise *Jones*, not calling her the wife of *Thomas Wharton*, but giving her the addition of spinster, upon which she pleaded; and the Court told her that if she could prove that she was married to Wharton before the burglary she should have the advantage of it: but on the trial she could not, and was found guilty, and judgment given upon her.(r) If a woman be indicted as a single woman and pleads to the felony, that is *primâ facie* evidence that she is not a feme covert but is not conclusive of the fact.(s) And in such a case, such evidence must be

(n) Reg. v. Avery, Bell C. C. 150.

(o) 1 Hale 47; 1 Hawk. P. C. c. 1, s. 10.

(p) 1 Hale 48, 621. But if the wife alone, the husband being ignorant, do knowingly receive B., a felon, the wife is accessory and not the husband: 1 Hale 621.

(q) 1 Hale 46.

(r) Rex v. Jones, Kel. 37.

(s) Quinn's case, 1 Lewin 1; Reg. v. Woodward, 8 C. & P. 561 (34 E. C. L. R.), Paterson, J.

given as to satisfy the jury that the prisoners are in fact husband and wife, in the same way as to convince them of any other fact.^(t) But cohabitation and reputation will be sufficient evidence upon such point. *William and Mary Atkinson* were indicted for disposing of forged country bank notes: and it appeared that the man disposed of them in the presence of the woman at a public-house, to which they went together to meet the person to whom they were disposed of; that the man went thither by appointment, and the woman had a bundle of the same notes in her pocket. There was evidence on the part of the prosecution, that they had lived and passed for man and wife for some months; upon which it was *put to Gibbs, C. B., whether the woman was not entitled to an acquittal, and he [*47 thought she was; and the counsel for the prosecution at once acquiesced.^(u) Where, upon an indictment against a woman for harboring a murderer, knowing him to have committed the murder, it was probable that a marriage had taken place between the parties, in Ireland, at a place where the registers were very imperfectly kept, and the parties had for many years considered each other as man and wife, no evidence was offered for the prosecution, with the sanction of the Court.^(v) Where, however, the indictment states the woman to be the wife of the person with whom she is jointly indicted, no evidence is necessary to show that she is the wife.^(w)

IV. Upon the plea or excuse of ignorance, it may be shortly observed, that it will apply only to ignorance or mistake of fact, and not to any error in point of law.¹ For ignorance of the municipal law of the kingdom is not allowed to excuse any one that is of the age of discretion and *compos mentis*, from its penalties when broken; on the ground that every such person is bound to know the law, and presumed to have that knowledge.^(x) And it is no defence for a foreigner charged with a crime committed in England, that he did not know he was doing wrong, the act not being an offence in his own country.^(y) Where, therefore, two Frenchmen were committed on a charge of murder in a duel, and alleged that they were ignorant of the law of England, and believed that acting as seconds in a fair duel was not punishable here, as it was not punishable in France, and that this was a fair duel, it was held that they were precisely in the same position as if they were native subjects of England, and the Court refused to bail them.^(z) And as

(t) *Rex v. Hassell*, 2 C. & P. 434 (12 E. E. L. R.), Garrow, B. *Quære*, whether the proper course for a woman so indicted is not to plead the wrong addition on arraignment, as by pleading to the felony she answers to the name by which she is indicted. C. S. G.

(u) *Rex v. Atkinson*, O. B. Jan. Sess. 1814, MS. Bayley, J.

(v) *Reg. v. Good*, 1 C. & K. 185 (47 E. C. L. R.), Alderson, B., observed, "If the prisoner went through the ceremony of marriage, and it should have turned out that there was some irregularity in the marriage, nevertheless if it appeared that she had acted under the supposition that she was the wife of the murderer, and according to the duty which she considered to be cast upon her, the Court would have felt it right to have inflicted a very slight punishment upon her." As in every case, except bigamy and criminal conversation, living together as man and wife is sufficient evidence of a marriage: *Morris v. Miller*, 1 Bl. R. 632; *Woodgate v. Potts*, 2 C. & K. 457 (61 E. C. L. R.), there seems to have been abundant evidence in this case of a marriage between the parties; but, assuming that not to be so, it is deserving of consideration whether if a woman received and comforted a felon, honestly believing him to be her husband, that would not entitle her to an acquittal, upon the ground that no guilty intention could exist under such circumstances, but, on the contrary, she was doing that which she honestly believed to be her duty to do. C. S. G.

(w) *Rex v. Knight*, 1 C. & P. 116 (12 E. C. L. R.), Park, J. J. A.

(x) 1 Hale 42; 4 Blac. Com. 27, *ignorantia juris, quod quisque tenetur scire, neminem excusat*, is a maxim as well of our own law as it was of the Roman: Plowd. 343, Ff. 22, 6, 9.

(y) *Rex v. Esop*, 7 C. & P. 456 (32 E. C. L. R.), Bosanquet and Vaughan, JJ.

(z) *Barronet's case*, 1 E. & B. 1 (72 E. C. L. R.); 1 Dears. C. C. R. 51. This is in accordance with the Mosaic law: "Ye shall have one manner of law as well for the stranger as for one of your own country." (Levit. xxiv. 49; Exod. xii. 49.)

¹ *Tardiff v. State*, 23 Texas, 169; *Winehart v. State*, 6 Ind. 30; *Whitton v. State*, 37 Miss. 379. It is a sound principle of criminal jurisprudence, that the intention to commit the crime is of the essence of the offence; and to hold that a man shall be held criminally responsible for an offence, of the commission of which he is ignorant at the time would be intolerable tyranny: *Duncan v. State*, 6 Humph. 148.

a ship, public or private, on the high seas, is, for the purpose of jurisdiction over crimes committed therein, a part of the territory to which the ship belongs, a person voluntarily coming on board an English ship, is as much amenable to the criminal law of England as if he came voluntarily into an English county, and *48] ignorance of the law is no more an excuse *in the one case than in the other. (a) But in some instances an ignorance or mistake of the fact will excuse; which appears to have been ruled in cases of misfortune and casualty; as if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this will not be a criminal action. (b)

See the Year Book, 13 Ed. 4, p. 9, pl. 5, as to statutes binding aliens.

*49]

*CHAPTER THE THIRD.

OF PRINCIPALS AND ACCESSORIES.

WHERE two or more are to be brought to justice for one and the same felony, they are considered in the light either—I. Of principals in the first degree. II. Principals in the second degree. III. Accessories before the fact; or, IV. Accessories after the fact. And in either of these characters they will be *felons* in consideration of law; for he who takes any part in a felony, whether it be a felony at common law or by statute, is in construction of law a felon, according to the share which he takes in the crime. (a)

I. Principals in the first degree are those who have *actually and with their own hands committed the fact*; and it does not appear necessary to say anything in this place by way of explanation of the nature of their guilt, which will be detailed in treating of the different offences in the course of the work.

II. Principals in the second degree are those who were *present, aiding and abetting* at the commission of the fact. They are generally termed *aiders and abettors*, and sometimes accomplices: but the latter appellation will not serve as a term of definition, as it includes all the *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. (b) The distinction between principals in the first, and principals in the second degree; or, to speak more properly, the course and order of proceeding against offenders founded upon that distinction, appears to have been unknown to the most ancient writers on our law, who considered the persons present aiding and abetting in no other light than as *accessories at the fact*. (c) But as such accessories they were not liable to be brought to trial till the principal offenders should be convicted or outlawed; a rule productive of much mischief, as the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed. And with a view to obviate this mischief the judges by degrees adopted a different rule; and at length it became settled law that all those who are present, aiding and abetting, when a felony is committed are principals in the second degree. (d)¹

(a) Reg. v. Sattler, Reg. v. Lopez, D. & B. C. C. 525.

(b) Levett's case, Cro. Car. 538; 4 Blac. Com. 27; 1 Hale 42, 43.

(c) Fost. 417.

(b) Fost. 341.

(c) Fost. 347.

(d) Coal-heaver's case, 1 Leach 66. And see Fost. 428, and Rex v. Towle, Russ. & Ry. 314. This law was by no means settled till after the time of Ed. 3; and so late as the first Queen Mary a chief justice of England strongly doubted of it, though indeed it had been sufficiently settled before that time.

¹ When presence aiding and abetting constitutes a party a principal, see Comm. v. Chapman, 11 Cush. 422; Connaught v. State, 1 Wis. 159; State v. McGregor, 41 N. H. 407; State v. Wilson, 30 Conn. 500; State v. Ellis, 12 La. Ann. 390; State v. Simmons, 6 Jones (Law) 21; Thompson v. Comm. 1 Met. (Ky.) 13; Hill v. State, 28 Geo. 604; Burnett v. State, 18 Texas 713; State v. Nash, 7 Clarke 347; State v. McClintock, 8 Ibid. 203; United States v. Douglass, 2 Blatchf. C. C. 207; Doan v. State, 26 Ind. 496; State v. Squires, 2

In order to render a person a principal in the second degree, or an aider and abettor, he must be *present aiding and abetting* at the fact, or ready to afford assistance if necessary; but the *presence* *need not be a strict actual immediate presence, such a presence as would make him an eye or ear witness of [50] what passes, but may be a constructive presence.^(e) So that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement and protection to the whole gang, and to insure the success of their common enterprise.^(c) But there must be some participation; therefore if a special verdict against a man as a principal does not show that he did the act, or was present when it was done, or did some act at the time in aid which shows that he was present, aiding and assisting, or that he was of the same party, in the same pursuit, and under the same expectation of mutual defence and support with those who did the fact, the prisoner cannot be convicted.^(f) So, if several are out for the purpose of committing a felony, and upon alarm and pursuit run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered as principals in that maiming.^(g) And it is not sufficient to make a man a principal in uttering a forged note, that he came with the utterer to the town where it was uttered, went out with him from the inn where they put up a little before he uttered it, joined him again in the street a short time after the uttering, and at a little distance from the place of uttering, and ran away when the utterer was apprehended.^(h) This case has, however, been considered as having been decided upon the principle, that the circumstances which will amount to a constructive presence at common law will not be sufficient for the same purpose upon an indictment under a statute.⁽ⁱ⁾ The general rule, however, applies to offences by statute as well as at common law, viz., that all present at the time of committing an offence are principals, although one only acts, if they are confederates, and engaged in a

(e) Fost. 350; 2 Hawk. P. C. c. 29, s. 7, 8; see Reg. v. Howell, 9 C. & P. 437 (38 E. C. L. R.), Littledale, J.

(f) Rex v. Borthwick, Dougl. 207.

(g) Rex v. White & Richardson, R. & R. 99. Post, Book III. p. 1008.

(h) Rex v. Davis & Hall, East. T. 1806. MS. Bayley, J.; and R. & R. 113.

(i) By Graham, B., in the case of Brady and others, O. B. June 1813, 1 Stark. Crim. Plead. 80, in the note.

Nev. 226; State v. Fley, 2 Brevard 338. As a general rule where a statute creates a felony, all present aiding and abetting are guilty as principals: M'Gowan v. State, 9 Yerg. 184.

¹ The abettor must be in a situation where he may actually give aid, not merely where the perpetrator erroneously supposes he may. Proof that a person conspired to commit a murder, is not in itself a *legal presumption* of his having aided; but it is to be weighed as evidence of it. But if it be proved that there was a conspiracy, and that one of the conspirators was in a situation in which he might have given aid at the time of the murder, it is a legal presumption that he was there to carry into effect the preconcerted crime, and it is for him to rebut the presumption by showing that he was there for a purpose unconnected with the conspiracy: The Commonwealth v. Knapp, 6 Pick. 496. One who is present and sees that a felony is about to be committed, and does in no manner interfere, does not thereby participate in the felony committed. It is necessary, in order to make him an aider or abettor, that he should do or say something, showing his consent to the felonious purpose and contributing to its execution: State v. Hildreth, 9 N. C. 440; Grier v. State, 13 Mo. 382. Personal presence at the place where a crime is committed is not always necessary to constitute the offender a principal, *e. g.*, where it is perpetrated by means of an instrument, as by the discharge of a gun taking effect in another county or by an innocent living agent: People v. Adams, 3 Denio 190. When an offence is committed in one state by means of an innocent agent, the employer is guilty as a principal, though he did not act in that state, and was at the time the offence was committed in another: Adams v. People, 1 Coms. 173.

common design, of which the offence is part.^(k) And it has been considered, in a case where three persons were charged with uttering a forged note, that other acts done by all of them jointly, or by any of them separately, shortly before the offence, may be given in evidence to show the confederacy and common purpose, although such acts constitute distinct felonies.^(l) And also that what was found upon each may be proved against each to make out such confederacy, although it were not found until some interval after the commission of the offence.^(m)

Kelly and *McCarthy* were indicted for stealing oats, and it appeared that Kelly *51] was hired by the prosecutor to draw oats in *sacks from a vessel to the prosecutor's warehouse, and McCarthy was employed by the prosecutor to load the sacks out of the vessel into the trams on which they were carried. The trams belonged to Kelly. Whilst one load was being conveyed to the warehouse, Kelly said to McCarthy, "It's all right," and shortly afterwards McCarthy emptied some oats out of two sacks which were on a tram close to the vessel, into a nosebag, which he then placed under the tram. Kelly, at this time, was absent with a load; but returned in a few minutes to the vessels with an empty tram, took the nosebag from under the tram, where McCarthy had placed it, and put it on the tram, and drove off with it, McCarthy being, at the time Kelly took the nosebag from under the tram, on the vessel, which lay close to the tram, and within three or four yards of Kelly. It was submitted that Kelly was entitled to be acquitted, as he was not present at the time when the oats were stolen. Maule, J.: "I think the evidence shows that this was all one transaction, in which both concurred; and I think both having concurred, and both being present at some parts of the transaction, both may be convicted."⁽ⁿ⁾

Upon an indictment for larceny against *Hornby* and *W. G.*, it appeared that *W. G.* was the foreman of the prosecutor, a canvas manufacturer, but had no authority to sell any yarn. On one occasion *Hornby* sent his servants to the warehouse of the prosecutor to bring away yarn, and *W. G.* delivered with the yarn an invoice made out in the name of the prosecutor. Subsequently, *Hornby* sent two of his men to the warehouse of the prosecutor, and, on arriving, they found *Hornby* and *W. G.* there. Some yarn was pointed out as the yarn which they were to take to *Hornby's* premises; and they thereupon, in the presence of *Hornby* and *W. G.*, carried away the yarn in question. When *Hornby* was charged he produced the invoice which *W. G.* gave him on the first occasion, and stated that, except on that occasion, he had had no dealings with him. It was submitted that *Hornby* was only guilty of receiving the yarn, knowing it to have been stolen; but *Coltman, J.*, held that if *Hornby* knew that in the transaction in question *W. G.* was, in fact, committing a felony, he, as well as *W. G.*, was guilty of the same felony; and, therefore, the question for the jury was whether, at the time of the pretended sale by *W. G.*, *Hornby* knew that *W. G.* was exceeding his authority and defrauding his master.^(o)

Going towards the place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, will not make the party a principal if he was at such a distance, at the time of the felonious taking as not to be able to assist in it. The prisoner and *J. S.* went to steal two horses; *J. S.* left the prisoner half a mile from the place in which the horses were, and brought the horses to him, and both rode away with them. Upon a case reserved, the judges thought the prisoner an accessory only, not a principal, because he was not present *52] at the original taking.^(p) So, where a servant let a person into his master's *house, in order that he might steal his master's money, and he continued in the house till the robbery, but the servant left the house before the robbery was

(k) *Rex v. Tattersal*, Sedgwick & Hodgson, East. T. 1801, MS. Bailey, J.

(l) *Id. ibid.*

(m) *Id. ibid.*

(n) *Reg. v. Kelly*, 2 C. & K. 379 (61 E. C. L. R.), Maule, J. refused to reserve the point and the prisoners were convicted.

(o) *Reg. v. Hornby*, 1 C. & K. 305 (47 E. C. L. R.).

(p) *Reg. v. Kelly*, MS. Bayley, J., and R. & R. 421. And see *post*, Book IV., Of receiving stolen goods.

committed, it was held that the servant was an accessory before the fact.^(q) So, where on an indictment for stealing in a dwelling-house, it was proved that a servant had unlocked the door of the house, in order that another person might get in and steal the property, which he did about twenty minutes after the servant had left the house, it was contended that, as it was clear that if the servant had been indicted for house-breaking and stealing, he might have been convicted;^(r) that showed that he was guilty of stealing the money, for that could not depend upon the form of the indictment. But it was held that the servant was only an accessory before the fact to the offence charged in this indictment.^(s) So, where three prisoners were jointly indicted for maliciously wounding with intent to maim, &c., and one of them did not come up and take any part until the wound had been inflicted by the others, it was held that the latter only could be convicted, though the former kicked the prosecutor several times after he came up.^(t) So, if two prisoners go to a house, intending to commit a theft in it, and one enters first and is apprehended, and then the other enters and commits the theft, the former is only an accessory before the fact.^(u)

But where a man committed a larceny, in a room of a house, in which room he lodged, and threw a bundle containing the stolen property out of the window to an accomplice who was waiting to receive it, the judges came to a different conclusion. The accomplice was indicted and convicted as a receiver; and the learned judge before whom he was tried was of opinion, that as the thief stole the property in his own room, and required no assistance to commit the felony, the conviction of the accomplice as a receiver might have been supported, if the jury had found that the thief had brought the goods out of the house, and delivered them to the accomplice; but as the jury had found that the thief threw the things out of the window, and that the accomplice was in waiting to receive them, he thought the point fit for consideration. And the judges were of opinion that the accomplice in this case was a principal, and that the conviction of him as a receiver was wrong.^(v)

So, where on an indictment against *George P.* for stealing, and *Henry P.* for receiving pork, it appeared that the prisoners were seen conversing together near the prosecutor's premises, and went together to his warehouse, and George went into the warehouse and took the pork out of a tub, and brought it out of the warehouse and gave it to Henry, who had remained on the outside, and who was not in a position to see what George did in the warehouse, but was sufficiently near to have rendered him aid in case he had been taken into custody; that is to say, the evidence was sufficient to have convicted him as a principal in the second degree; and the jury having found Henry guilty, upon a case reserved upon the *question [53 whether a person who was a principal in the second degree could, under the above circumstances, be convicted as a receiver of the goods stolen, the judges were unanimously of opinion that he could not; and, therefore, the conviction of Henry was wrong.^(w)

But in order to make a person who is present when a felony is committed a principal in the second degree, there must be a community of purpose with the party actually committing the felony, at the time when the felony is committed. One count charged *Hilton* and *M'Evin* with stealing from the person; another charged them with feloniously receiving the stolen property. *Hilton* was walking by the side of the prosecutrix, and *M'Evin* was seen just previously following behind her. The prosecutrix felt a tug at her pocket, found her purse was gone,

(q) Reg. v. Tuckwell, C. & M. 215 (41 E. C. L. R.), Coleridge, J. It is not stated how long before the theft the servant left.

(r) Reg. v. Jordan, 7 C. & P. 432 (32 E. C. L. R.).

(s) Reg. v. Jeffries & Bryant, Gloucester Spr. Ass. 1848, Cresswell and Patteson, JJ., MSS. C. S. G. 3 Cox C. C. 85.

(t) Reg. v. M'Shane, C. & M. 212 (41 E. C. L. R.), Tindal, C. J.

(u) Reg. v. Johnson, C. & M. 218 (41 E. C. L. R.), Maule, J., and Rolfe, B.

(v) Rex v. Owen, R. & Mood. C. C. R. 96.

(w) Reg. v. Perkins, 2 D. C. C. 459. This case must not be taken to decide that a principal cannot, under any circumstances, be a receiver, as the marginal note would seem to indicate. If a principal were to deliver the goods to another, and afterwards at a distance from the place where the felony was committed were to receive them again there can be no doubt that he might be convicted as a receiver. C. S. G.

and, on looking round, saw Hilton behind her, walking with M'Evin in the opposite direction, and saw her hand something to M'Evin. The jury were directed that, if they did not think, from the evidence, M'Evin was participating in the actual theft, it was open to them on these facts to find him guilty of receiving. The jury found Hilton guilty of stealing and M'Evin guilty of receiving; and it was held that the direction was right, as to make M'Evin a principal in the second degree that there must have been a community of purpose with Hilton in the actual stealing.(x)

When an offence is committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal. Thus if a child under years of discretion, a madman, or any other person of defective mind, is incited to commit a murder or other crime, the inciter is the principal *ex necessitate*, though he were absent when the thing was done.(y) Where therefore, on an indictment for larceny it appeared that the prisoner had induced a child of the age of nine years to take money from his father's till and give it him, Wightman, J., left it to the jury to say whether the child was an innocent agent, that is, whether he knew that he was doing wrong, or was acting altogether unconsciously of guilt and at the dictation of the prisoner.(z) And if a man give another a forged note that the other may utter it, if the latter be ignorant of the note being forged, the uttering by the latter is the uttering of the former, though the former were absent at the time of the actual uttering.(a) But if the person who received the note knew that it was forged, the person who gave it would not be punishable as a person.(b) For where a person having incited another to lay poison, is absent at the time of laying it, he is an accessory only, though he prepared the poison, if the person laying it is amenable as a principal; but is punishable as a principal if the person laying the poison is not so amenable.(c)

Where a prisoner went to a die-sinker and ordered four dies of the size of a *54] shilling to be made, stating them to be for two whist clubs. One die was to be exactly like the obverse side of a shilling, another with an inscription, a third exactly like the reverse side of a shilling, and the fourth with an inscription; and before making them, the die-sinker communicated with the officers of the Mint, who directed him to execute the prisoner's order, which he did by making the first and third dies, and from these counterfeit shillings could be coined; it was held that the prisoner was the principal felon, as the die-sinker was an innocent agent.(d) So, where the prisoners had applied to an artist to engrave a copy of the coupons of the Netherlands Bank, and the artist, suspecting that there was an intention to defraud, communicated with the Dutch consul, and, under his direction, employed persons to engrave the plate in pursuance of the orders given him; it was held that the authority given was better than the one held sufficient in the preceding case, and that the artist was an innocent agent.(e)

Where poison is laid for a man, and all who were present and concurred in laying it are absent at the time it is taken by the party killed by taking it, all are principals; otherwise all would escape punishment.(f)

Bull in London, and Schmidt on the Continent, were engaged in planning the forgery of a plate, as appeared by letters which had passed between them. The order for the plate was, however, given by Bull to an innocent agent before Schmidt came to England. On his arrival he and Bull went to the manufacturer, and the plate was given to them. It was contended that Bull was the principal, and that Schmidt was only an accessory before the fact. That it was precisely the same as if Bull had engraved the plate, and, if so, Schmidt was only an accessory. Tindal, C. J.: "That reasoning would be good if the actual maker had been a guilty party, because

(x) Reg. v. Hilton, 1 Bell C. C. 20.

(y) Fost. 349; Kel. 52; *post*, Book III. p. 669.

(z) Reg. v. Manley, 1 Cox C. C. 104.

(a) Rex v. Palmer & Hudson, 1 New Rep. 96; *post*, Book IV.

(b) Rex v. Soares, R. & R. 25.

(c) Fost. 349.

(d) Reg. v. Bannen, 2 M. C. C. 309, 1 C. & K. 295 (47 E. C. L. R.).

(e) Reg. v. Valler, 1 Cox C. C. 84, Gurney, B., and Wightman, J.

(f) Fost. 349; Kel. 52; 4 Co. 44, b.

FROM THE PREFACE

TO

THE FOURTH LONDON EDITION.

IN preparing this Edition for the press, the system adopted by the Author has been followed as nearly as could be; and the Statutes and Cases have been introduced in a manner similar to that which the Author himself pursued in preparing the Second Edition; but although the Editor has used his best endeavors to keep the work within as narrow limits as were consistent with giving a full and correct statement of the Statutes and Cases since the last Edition, yet the number of these is so great as to render a third volume unavoidable. This the Editor extremely regrets, but he felt himself bound to adhere to the plan of the Author, and the more especially as that plan affords to the reader the fullest and most useful view of the enactments and decisions.

Great difficulty has been experienced in many instances in giving a faithful representation of the decisions. The marginal notes have been so rarely found to be warranted by the cases themselves, that they have been omitted: and the Editor has endeavored, so far as the reports enabled him, to give such a statement of the facts, the decision, and the grounds of it, wherever they appeared, as to enable the reader to understand what the decision, *as reported*, really is; but many cases are so loosely and inaccurately reported that this has been no easy task, and very probably the Editor has not always succeeded in his attempt.

As the work is confined to indictable offences, and does not treat of criminal procedure, the Statutes relating to the summary conviction of offenders have not been introduced.

The cases, which were decided too late to be inserted in their proper places in the body of work, will be found in the Appendix in the Third Volume. Their names are inserted in the Table of Cases in that Volume, and they are also referred to in the General Index.*

At the beginning of the First Volume a chapter has been introduced which contains certain general provisions applicable to many of the offences treated of in the work. This has been done in order to facilitate the reference to these provisions wherever it may be necessary.

The cases marked "MSS. C. S. G." are from the Editor's collection.

The Editor would be doing great injustice to himself if he were not to express the very deep sense he entertains of the great honor which was done to him by the very flattering manner in which his labors in the last Edition were appreciated, not

* In this American Edition these cases have been incorporated in the body of the work.

only in Her Majesty's dominions, but also in the United States. He has endeavored in this edition to show the sense he feels of the honor done to him by rendering it as complete and perfect as he was able.

It has been also a matter of great gratification that during the time this work has been passing through the press, the Editor has been able to lend his humble assistance towards the completion of the new Code of Criminal Law for the State of New York; for which he has received as flattering an acknowledgment as possible from the Commissioners, who have shown so much ability in the preparation of that great work. The Editor cannot but express the hope that such mutual interchange of goodwill in the endeavor to ameliorate the law, may exert a strong tendency to promote those feelings of amity which ought ever to subsist between the kindred nations of Great Britain and the United States; nor can he help thinking that they who, amid the din of arms, where generally the laws stand in abeyance, have sedulously devoted themselves to the amendment of their laws, must be deeply impressed with the truth contained in the beautiful lines—

Pax optima rerum
Quas homini novisse datum est; pax una triumphis
Innumeris potior.

PREFACE

TO

THE SECOND EDITION.

A SECOND EDITION of this Treatise has long been delayed by the pressure of professional engagements, and by the changes effected in the criminal laws during several successive sessions of Parliament. It has of course been an object that it should embrace, as far as possible, the statutes of consolidation and improvement, for which the country is so much indebted to the able and judicious exertions of Mr. Peel.

"The crime of high treason was not originally included in the plan of this work, on account of the great additional space which the proper discussion of that important subject would have occupied; and because prosecutions for that crime—happily not frequent—are always so conducted as to give sufficient time to consult the highest authorities." These reasons, which were given in the Preface to the First Edition, have still been allowed to operate; and the crime of high treason is not, therefore, one of the subjects discussed in the following pages. The law upon all other indictable offences will, it is hoped, be there found in an appropriate arrangement: and a chapter or book upon the Law of Evidence in criminal prosecutions, which formed a part of the original plan of the work, has now been supplied by the kind assistance of my friend, Mr. E. Vaughan Williams, whose professional attainments abundantly assure the value of the addition.

WM. OLDNALL RUSSELL.

LINCOLN'S INN: *May* 1826.

ADVERTISEMENT

TO THE

NINTH AMERICAN EDITION.

The American profession is now presented with a new edition of **RUSSELL ON CRIMES AND MISDEMEANORS**, reprinted from the last London edition. The work, as will be seen, has been very much enlarged. In conformity with the principle heretofore adopted and acted upon by the American publishers, it is presented entire and unmutilated, for though there is much statute law inapplicable to this country, yet the cases decided on the construction of these statutes are very interesting, and of use as illustrating the canons of interpretation. **RUSSELL ON CRIMES** has long been a standard work, and has commended itself to practitioners in every part of the United States for its fullness and accuracy. The leading American cases have been brought up to the present time.

G. S.

NOVEMBER, 1876.

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4 & 5. c. 36. Central Criminal Court		158	Administering Oaths Dealing in Slaves	
c. 67. Rescuing transported Persons		612	Rioters continuing togeth	
5 & 6. c. 43. Special Constables		1040	1 & 2. c. 82. Breaking Parkhur Prison	
c. 50, s. 5. Highway Act In- terpretation Clause		530	2 & 3. c. 47, s. 46. Unlicensed The- tres	
s. 21. Roads at the End of Bridges		559	c. 74. Unlawful Assemblies	
s. 23. New Highways		496	c. 93. Rural Police	
s. 58. On Boundaries of Parishes		498	3 & 4. c. 9. Parliamentary Papers	
s. 59. Liability to repair allotted parts.		498	c. 29, s. 8. Smallpox	
s. 60. Costs of Appor- tioning		498	c. 54, s. 3. Lunatics comm- ting Misdemeanors	
s. 61. Boundaries of Par- ishes		498	c. 72. Marriages	
s. 80. Width of Highways		474	c. 88. Rural Police	
s. 82. Widening Highways		474	c. 97. Railway Offences	
s. 83. Ground taken to be Highway		474	5 & 6. c. 29. Pentonville	
s. 84. Diverting and stop- ping Highways		474	Assaulting Officers of	
s. 85. View of Justices, &c.		475	c. 109. Parish Constables	
s. 86. Stopping connect- ed Ways		477	c. 113, s. 1. Marriages	
s. 87. Order as to all or part		477	6 & 7. c. 12. Coroners' Inquests	
s. 88. Appeal		477	c. 26, s. 12. Millbank	
s. 89. Jury to decide		478	s. 24. Officers of Mi bank	
s. 90. Costs of Appeal		478	s. 19. Assaulting Office of	
s. 91. Order of Sessions		478	c. 37, s. 10. Marriages	
s. 92. Party to repair New Road		479	c. 39. Marriages	
s. 93. Highways repaira- ble <i>ratione tenuræ</i>		479	c. 68. Theatres	
s. 94. Proceedings for Non- repair before Justices		508	c. 96. Lord Campbell's Lit Act	37
s. 95. Indictments directed		509	c. 98. Slave Trade	
s. 96. Application of Fines		524	7. c. 2, ss. 1, 2. Trial of (	
s. 98. Costs		527	fences at Sea	
s. 99. Presentment		508	7 & 8. c. 24. Forestalling	
s. 100. Witnesses		521	c. 101, s. 31. Burial of Pa pers	
s. 111. Expenses of de- fending Indictments		529	c. 39. Night-poaching	
s. 113. Roads not within the Act		530	c. 56, s. 3. Marriages	
c. 54. Marriages within pro- hibited Degrees		274	c. 81. Irish Marriages	
			8 & 9. c. 70, s. 10. Marriages	
			c. 109, s. 2. Gaming-houses	
			s. 17. Cheating at Play	
			s. 17. Wagers	
			9 & 10. c. 24, s. 1. Fixed Terms Punishment	
			c. 26. Escape	

he would stand in a different position to those who had counselled him to the commission of the crime. But it altogether fails where the immediate agent is an innocent one. Then those who have plotted and arranged that he should do the particular act are themselves principals. Suppose the prisoners had been both abroad, and that, having planned the forgery, one of them had given the order for the plate by letter, can it be doubted that they would be indictable as principals; and can it make any difference that one of them is in this country? It seems to me, then, that the circumstance of the immediate agent in this forgery being an innocent person renders the rule of law as to principal and accessory inapplicable." Alderson, B.: "If a person does an act of this kind, with a guilty intent, he is not the agent of any one. If he does it innocently, he is the agent of some person or persons; and if two have agreed to employ him, he is the agent of both. In this case, therefore, it is a question for the jury whether the prisoners were jointly acting in procuring this plate to be made. If they were, then the engraver acts on behalf of both. It makes no difference whether they were in England or elsewhere; when they have once agreed to do the thing, the act of one is the act of all, although the rest be absent at the time." (g)

*It has been held, that to aid and assist a person to the jurors unknown, [*55 to obtain money by the practice of *ring-dropping* is felony, if the jury find that the prisoner was confederating with the person unknown to obtain the money by means of this practice. (gg) And if several act in concert to steal a man's goods, and he is induced by fraud to trust one of them in the presence of the others with the possession of the goods, and then another of the party entice the owner away, in order that the party who has obtained such possession may carry the goods off, all will be guilty of felony, the receipt by one, under such circumstances, being a felonious taking by all. (h) So, where a prisoner asked a servant who had no authority to sell, the price of a mare, and desired him to trot her out, and then went to two men, and having talked to them, went away, and the two men then came up and induced the servant to exchange the mare for a horse of little value, it was held that if the prisoner was in league with the two men to obtain the mare by fraud and steal her he was a principal. (i)

If a fact amounting to murder should be committed in *prosecution of some unlawful purpose*, though it were but a bare trespass, all persons who had gone in order to give assistance, if need were, for carrying such unlawful purpose into execution, would be guilty of murder. But this will apply only to a case where the murder was committed in *prosecution of some unlawful purpose*, some common design in which the combining parties were united, and for the effecting whereof they had assembled; for unless this shall appear, though the person giving the mortal blow may himself be guilty of murder, or manslaughter, yet the others who came together for a different purpose will not be involved in his guilt. (k)¹ Thus where three soldiers went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand; and the owner's son coming by collared the man at the gate, and asked him what business he had there, whereupon the soldier stabbed him; it was ruled to be murder in the man

(g) Reg. v. Bull, 1 Cox C. C. 281. It follows from this case that the trial of the guilty parties may be where the innocent agent made the plate, although they may be in another county, or even out of the kingdom when the plate is made. In point of law the act of the innocent agent is as much the act of the procurer as if he were present and did the act himself. See Rex v. Brisac, 4 East R. 163.

(gg) Moore's case, 1 Leach 314.

(h) Rex v. Standley, MS., Bayley, J., and R. & R. 305; Rex v. County, MS., Bayley J. Post. Book IV.

(i) Reg. v. Sheppard, 9 C. & P. 121 (38 E. C. L. R.), Coleridge, J.

(k) Post. 351, 352; 2 Hawk. P. C. c. 29, s. 9; see Reg. v. Howell, 9 C. & P. 437 (38 E. C. L. R.), per Littledale, J.

¹ One may aid and abet another, in the commission of the offence of manslaughter, and be punishable accordingly. So, under an indictment, charging one with being present, aiding, helping, abetting, comforting, assisting and maintaining S. K. in the commission of murder,—the prisoner may be well convicted of manslaughter: *State v. Coleman*, 5 Porter 32.

who stabbed, but that those on the tree were innocent. It was considered that they came to commit a small inconsiderable trespass, and that the man was killed upon a sudden affray without their knowledge. But the decision would have been otherwise if they had all come thither with a general resolution against all opposers; for then the murder would have been committed in prosecution of their original purpose.^(l)

*Where on a trial for murder the case on the part of the Crown was, that
*56] the prisoner and Jackson had followed the deceased for the purpose of robbing him, and that, in pursuance of that object, one or both of them struck the deceased on the head and killed him, and the preceding passage was cited for the prisoner; Bramwell, B., told the jury, "The rule of law is this: if two persons are engaged in the pursuit of an unlawful object, the two having the same object in view, and in the pursuit of that common object, one of them does an act which is the cause of death under such circumstances that it amounts to murder in him, it amounts to murder in the other also. The cases which have been referred to may be explained in this way. The object for which the parties went out was a comparatively trifling one, and it is almost impossible to suppose that if one had committed a murder whilst engaged in the pursuit of such an object, the act could have been done in furtherance of the common object they had in view, which was comparatively so unimportant." "Suppose two men go out together, and one of them holds a third man for the purpose of enabling his companion to cut that man's throat, and his companion does so, no one could doubt that they were both equally guilty of murder. Therefore, if you find the common unlawful object in two prisoners, and death ensuing from the act of Jackson in pursuance of that common unlawful object, under such circumstances that it was murder in him, it is your duty to find the prisoner guilty."^(m)

For where there is a *general resolution against all opposers*, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms, or behavior, at or before the scene of action, and homicide is committed by any of the party, every person present in the sense of the law when the homicide is committed will be involved in the guilt of him that gave the mortal blow.⁽ⁿ⁾ Thus where several persons are together for the purpose of committing a breach of the peace, assaulting persons who pass, and, while acting together in that common object, a fatal blow is given, it is immaterial which struck the blow, for the blow given under such circumstances is in point of law the blow of all, and it is unnecessary to prove which struck the blow.^(o)

But it must be observed that this doctrine respecting the whole party being involved in the guilt of one or more, will apply only to such assemblies as are formed for carrying some common purpose, *unlawful in itself*, into execution. For if the original intention was lawful, and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or manslaughter, as circumstances may vary the case: but the persons engaged with him will not be involved in

*his guilt, *unless they actually aided and abetted him in the fact*; for they
*57] assembled for another purpose which was lawful, and consequently the guilt

(l) *Fost.* 353; *Case at Sarum Lent Assizes 1697*, MS.; *Denton v. Chapple*, 2 *Hawk. P. C.* c. 29, s. 8. And see *Rex v. Hodgson and others*, 1 *Leach* 6; and an *Anon.* case at the Old Bailey in December Sessions 1664, 1 *Leach* 7, note (a), where several soldiers, who were employed by the messengers of the Secretary of State to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be; and having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony in all; and Holt, C. J., citing the case, says, "That they were all engaged in an unlawful act is plain, for they could not justify breaking a man's house without making a demand first; yet all those who were not guilty of the stealing were acquitted, notwithstanding their being engaged in one unlawful act of breaking the door; for this reason, because they knew not of any such intent, but it was a chance opportunity of stealing, whereupon some of them did lay hands."

(m) *Reg. v. Jackson*, 7 *Cox C. C.* 357.

(n) *Fost.* 353, 354; 2 *Hawk. P. C.* c. 29, s. 8. See *post*, 742.

(o) *Reg. v. Harrington*, 5 *Cox C. C.* 231, *Martin, B.*

of the person actually killing cannot by any fiction of law be carried against them beyond their original intention.(p)

When several are present and abet a fact, an indictment may lay it generally as done by all, or specially, as done by one and abetted by the rest.(q) And even in offences in which there could have been only one principal in the first degree, as in rape, a charge against all as principals in the first degree is valid, if there be no difference in the punishment between the principals in the first and those in the second degree; though it should seem that the more correct form in a case of this kind would be to charge the parties according to the facts as they will be proved.(r)

An indictment against the principal in the second degree in murder should show distinctly that he was present when the mortal stroke was given; and it should seem that it would not be sufficient to state that both of their malice aforethought made the assault; that the principal in the first degree then and there gave the mortal stroke, and so that both murdered; at least it would not be sufficient if, before the allegation that both murdered, it is stated that the one (the principal in the second degree) counselled and incited the other to do the act.(s)

III. *An accessory before the fact* is he who, being absent at the time of the offence committed, doth yet procure, counsel, command or abet another to commit a felony.(t)¹ And it seems that those who by hire, command, counsel, or conspiracy, and those who by showing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could not be encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact.(u) But words that amount to bare permission will not make an accessory, as if A. says he will kill J. S., and B. says "you may do your pleasure for me," this will not make B. an accessory.(v) And it seems to be generally agreed that he who barely conceals a felony which he knows to be intended is guilty only of misprision of felony, and shall not be adjudged an accessory.(w) The same person may be a principal and an accessory in the same felony, as where A. commands B. to kill C., and afterwards actually joins with him in the fact.(x)

The offence of an accessory before the fact differs so much from that of a principal in the second degree, that where a person was indicted as an accessory before the fact, it was held that she could not be convicted of that charge upon evidence proving her to have been present aiding and abetting; it being clearly

(p) *Post*. 354, 355; 2 Hawk. P. C. c. 29, s. 9. And see further upon this point, *post*, Book III. Chap. III. on Homicide.

(q) 2 Hawk. P. C. c. 23, s. 76, and c. 25, s. 64; *Rex v. Young*, 3 T. R. 98. See *post*, 706.

(r) *Rex v. Vide*, Fitz. Corone, pl. 86; *Rex v. Burgess*, Tr. T. 1813. *Post*, 920.

(s) *Rex v. Winifred and Thomas Gordon*, 1 Leach 515; 1 East P. C. 352.

(t) 1 Hale 615.

(u) 2 Hawk. P. C. c. 29, s. 16.

(v) 1 Hale 616.

(w) 1 Hale 616; 2 Hawk. P. C. c. 29, s. 23.

(x) 2 Hawk. P. C. c. 29, s. 1, where it is said also that he may be charged as principal and accessory in the same indictment; but this was not allowed: *Rex v. Madden*, R. & M., C. C. R. 277; *Rex v. Galloway*, *Ibid.* 234, until the 11 & 12 Vict. c. 46. In *Atkin's* case, who was tried for the murder of Sir E. Godfrey, two indictments were found against him, one as principal, the other as accessory; and he was arraigned upon both at the same time. But the first was abandoned, and evidence given only in support of the second; the verdicts appear, however, to have been pronounced successively: 7 *Howell's St. Tri.* 231.

¹ Accessories before the fact: see *Hately v. State*, 15 Geo. 346; *McCarty v. State*, 26 Miss. 299; *Brennan v. People*, 15 Ill. 511; *Brown v. State*, 18 Ohio St. 496. It is not material that an accessory should have originated the design of committing the offence. If the principal had previously formed the design, and the alleged accessory encouraged him to carry it out by stating falsehoods or otherwise, he is guilty as accessory of the offence: *Keithler v. State*, 10 S. & M. 192. A person may be legally convicted as accessory before the fact of murder in the second degree: *Jones v. State*, 13 Texas 168. The distinction between principals and accessories before the fact is abolished in Michigan and California: *Shannon v. People*, 5 Mich. 71; *People v. Bigler*, 5 Cal. 23; *People v. Davidson*, *Ibid.* 133.

*58] admitted to be *necessary to charge a principal in the second degree with being *present*, aiding and abetting.(y)¹

Where *Danelly* was indicted for a burglary with intent to steal, and with stealing certain goods in the house, and *Vaughan* as an accessory to "the said burglary," and *Danelly* had been acquitted of the burglary, but found guilty of the larceny, and *Vaughan* found guilty as accessory, it was objected that as the jury had acquitted the principal of the burglary, the accessory must be acquitted altogether. But as a great majority of the judges were of opinion that, as *Danelly* acted in order to detect the other prisoner, he was free from any felonious intent, and therefore the charge against *Vaughan*, as accessory, of course could not be supported.(z)

It is to be observed, that the Legislature, in statutes made from time to time concerning accessories before the fact, has not confined itself to any certain mode of expression; but has rather chosen to make use of a variety of words all terminating in the same general idea. Thus some statutes make use of the word *accessories*, singly, without any words descriptive of the offence;(a) others have the words *abatement*, *procurement*, *helping*, *maintaining*, and *counselling*;(b) or *aiders*, *abettors*, *procurers*, and *counsellors*.(c) One describes the offence by the words *command*, *counsel*, or *hire*;(d) another calls the offenders *procurers* or *accessories*.(e) One having made use of the words *comfort*, *aid*, *abet*, *assist*, *counsel*, *hire* or *command*, immediately afterwards, in describing the same offence in another case, uses the words *counsel*, *hire*, or *command* only.(f) One statute calls them *counsellors* and *contrivers* of felonies;(g) and many others make use of the terms *counsellors*, *aiders*, and *abettors*, or barely *aiders* and *abettors*. Upon these different modes of expression, all plainly descriptive of the same offence, Mr. J Foster thinks it may safely be concluded that in the construction of statutes we are not to be governed by the bare sound, but by the true legal import of the words; and that every person who comes within the description of these statutes, various as they are in point of expression, is in the judgment of the Legislature an accessory before the fact; unless he is present at the fact, and in that case he is undoubtedly a principal.(h)

*59] *Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact; for there is nothing in the notion of commanding, hiring, counselling, aiding, or abetting, which may not be effected by the intervention of a third person without any direct immediate connection between the first mover and the actor. It is a principle in law which can never be controverted, that he who procures a felony to be done is a felon. So that if A. bid his servant hire somebody, no matter whom, to murder B. and furnish him with money for that purpose, and the servant procure C., a person whom A. never saw nor heard of to do it, A., who is manifestly the first mover or contriver of

(y) *Rex v. Winifred and Thomas Gordon*, 1 Leach 515; s. c., 1 East P. C. 352. And see *Haydon's case*, 4 Co. 42 b.; *post*, p. 75.

(z) *Rex v. Danelly & Vaughan*, 2 Marsh 571, and R. & R. 310; *post*, *Larceny*, vol. 2, p. 188. It was urged that *Vaughan* could not be guilty as accessory to the "said felony and burglary," as charged in the indictment, the jury having negatived the burglary; that an accessory must be convicted of a felony of the same species as the principal, and that his offence, though distinct, is yet derivative from that of the principal.

(a) 31 Eliz. c. 12, s. 5; 21 Jac. 1, c. 6.

(b) 23 Hen. 8, c. 1, s. 3.

(c) 1 Ed. 6, c. 12, s. 13.

(d) 4 & 5 Ph. & M. c. 4.

(e) 39 Eliz. c. 9, s. 2.

(f) 3 & 4 Will. & M. c. 9.

(g) 1 Ann. st. 2, c. 9.

(h) That is, a principal in the first degree if the actual perpetrator, or a principal in the second degree if only an aider and abettor: *Fost.* 131. And see *Fost.* 130, where speaking of a case in 1 And. 195, in which an indictment was held to be sufficient, though the words of the statute of Ph. & M. were not pursued, the words *excitavit, movit, et procuravit*, being deemed tantamount to the words of the statute and descriptive of the same offence, he says that he takes that case to be good law, though he confesses it is the only precedent he has met with where the words of the statute have been totally dropped.

¹ To commit murder and to be accessory to it are different offences. The Act of Congress punishing murder does not embrace an accessory before the fact: *United States v. Ramsey*, 1 Hemp. 481.

the murder, is an accessory before the fact.(i) And a nobleman was found guilty of murder, by his peers, upon evidence which satisfied them that he had contributed to the murder, by the intervention of his lady and of two other persons who were themselves no more than accessories, without any sort of proof that he had ever conversed with the person who was the only principal in the murder, or had corresponded with him directly by letter or message.(k) For with respect to an accessory before the fact, it is not necessary that there should be any direct communication between the accessory and the principal. It is enough if the accessory direct an intermediate agent to procure another to commit a felony: and it will be sufficient, even though the accessory does not name the person to be procured, but merely directs the agent to employ some person.(l)

In *high treason* there are no accessories, but all are principals, on account of the heinousness of the crime.(m) But in murder, and felonies in general, there may be accessories, except only in those offences which by judgment of law are sudden and unpremeditated; such are some cases of manslaughter and the like, where there cannot be any accessories before the fact.(n) But there are other cases of manslaughter where there may be accessories before the fact. Upon an indictment for manslaughter it appeared that the death of the prisoner's wife was caused by *swallowing sulphate of potash for the purpose of procuring abortion, she [*60 believing herself to be pregnant, although in reality she was not. The prisoner purchased the sulphate of potash, and gave it to his wife in order that she might swallow it for the above-mentioned purpose, but he was absent at the time when she swallowed it. For the prosecution, it was contended that the wife committed a felony in swallowing the sulphate of potash, and as death ensued therefrom, she also committed murder;(o) that the prisoner was an accessory before the fact to this felony, and to the consequent murder, and might be tried under the 11 Vict. c. 46, s. 1, and that, although the evidence showed his offence was murder, yet that would support an indictment for manslaughter. For the prisoner it was contended that there could not be an accessory before the fact in manslaughter; but it was held, upon the facts of this case, that the prisoner might be convicted of manslaughter.(p)

In *forgery* it is laid down generally in the books that all are principals, and that whatever would make a man accessory before in felony would make him a principal in forgery;(q) but it is conceived that this must be understood of forgery at common law, and where it is considered only as a misdemeanor.(r)

If several combine to forge an instrument, and each executes by himself a distinct part of the forgery, they are all principals, though they are not together

(i) See the case of *M. Daniel, Egan and Berry*, Fost. 125; 2 Hawk. P. C. c. 29, s. 1, 10; 19 Howell's St. Tri. 746, 789. The opinion was, that the parties clearly would have been answerable as accessories in the manner charged if the offence had been a robbery; but as it appeared that the person robbed was a party to the conspiracy, and gave his money freely, so that there was no robbery, judgment was given for the prisoners.

(k) The case of the Earl of Somerset, indicted as an accessory before the fact in the murder of Sir Thomas Overbury, 19 St. Tri. 804.

(l) *Rex v. Cooper*, 5 C. & P. 535 (24 E. C. L. R.), per Parke, J. J.

(m) 2 Hawk. P. C. c. 29, s. 2, 5; 1 Hale 613; Fost. 341; 4 Blac. Com. 35.

(n) *Bibbith's case*, 4 Rep. 43; Moor 461; Cro. Eliz. 540; 4 Blac. Com. 36; 1 Hale 615; 2 Hawk. P. C. c. 29, s. 24. There may be accessories after in manslaughter, and if the principal be found guilty of manslaughter, upon an indictment for murder, a party charged as accessory after the fact to the murder, may be found guilty as accessory to the manslaughter: *Rex v. Greenacre*, 8 C. & P. 35 (34 E. C. L. R.), Tindal, C. J., Coleridge and Colman, JJ.

(o) *Rex v. Russell*, R. & M. C. C. 356.

(p) *Reg. v. Taylor*, 1 D. & B. 288. During the argument, Bramwell, B., said, "Suppose a man for mischief gives another a strong dose of medicine, not intending any further injury than to cause him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, another had counselled him to do it, would not he who counselled be an accessory before the fact?" See *Reg. v. Smith*, 2 Cox C. C. 233, per Parke, B., s. r. See the observations on this subject: Greaves' Cr. Acts 43, 2d ed.; and see *Reg. v. Wilson*, 1 D. & B. 127; and *Reg. v. Farrow*, *Ibid.* 164.

(q) *Bothe's case*, Moor 666; 1 Sid. 312; 2 Hawk. c. 29, s. 2, and authorities cited in 2 East P. C. 973.

(r) 2 East P. C. 973; and see *post*, vol. 2, p. 790; and see *Morris's case*, 2 Leach 1096, note (s).

when the instrument is completed. On an indictment for forgery against *Bingley, Dutton* and *Batkin*, it appeared that Bingley and Dutton bought the paper, and cut it into pieces of the proper size at their house; it was then taken to Batkin, who struck off in blank all the printed part of the note except the date line and the number, and impressed on the paper the wavy horizontal lines. The blanks were then brought back to the house of Bingley and Dutton, where the water-mark was introduced into the paper; after which Bingley, in the presence of Dutton, impressed the date line and number, and Dutton added the signature. It did not appear that Batkin was present at this time. The jury found that all three concurred and co-operated in the design and execution of the forgery, each taking his own part, and that Bingley and Dutton acted together in completing the notes. The judges were of opinion that, as each of the prisoners acted in completing some part of the forgery, and in pursuance of the common plan, each was a principal in the forgery; and that although Batkin was not present when the note was completed by the signature, he was equally guilty with the others. (*)

*61] So if several make distinct parts of a forged instrument, each is *a principal, though he does not know by whom the other parts are executed, and though it is finished by one alone in the absence of the others. (t) On an indictment against *Dade, Kirkwood*, and *Stansfield*, for forging a note, and against *Collins* and *Campbell* as accessories before the fact, it appeared that Stansfield made the paper, Kirkwood engraved the plate, and struck off the impression; and Dade, in the absence of Stansfield and Kirkwood, filled up and finished the note. Stansfield, when he made the paper, did not know that Kirkwood or Dade were to have anything to do with the forgery; nor did Kirkwood know, when he engraved the plate and made the impression, that Dade or Stansfield were, or were to be, concerned. Collins and Campbell were the movers, and through them all the parties were set to work. Dade was not upon his trial, and Collins and Campbell could not properly be tried, unless Stansfield and Kirkwood were to be deemed principals. The judges were unanimous that Kirkwood and Stansfield were principals, and that the ignorance of Stansfield and Kirkwood of those who were to effect the other parts of the forgery was immaterial: it was sufficient if they knew it was to be effected by somebody. (u) There was another indictment against Dade and Kirkwood for forgery, and against Collyer and Calvert as accessories before the fact. Kirkwood engraved the plate, and worked off the impression from it, and Dade, in his absence, filled up the notes; Dade was not on his trial. It was held, that Kirkwood was a principal. (v)

It follows, from the two last cases, that those who procure and cause an instrument to be forged, but execute no part of the forgery, and are not present when it is executed, are accessories before the fact, and not principals.

Where three persons agreed to utter a forged bank note, and one uttered it at Gosport, and the other two, by previous concert, waited at Portsmouth; the two latter were held to be accessories. (w)

In crimes under the degree of felony there can be no accessories; but all persons concerned therein, if guilty at all, are principals. (x)¹

(*) *Rex v. Bingley, R. & R., C. C. R. 446.*

(t) *Rex v. Kirkwood, R. & M., C. C. R. 304*; *Rex v. Dade, Ibid. 307*; *Rex v. Bingley, R. & R. 446.*

(u) *Rex v. Kirkwood, 3 Burn., J. D. & W. Ed. 286, MSS., Bayley, B.; s. c., Rex v. Dade, R. & M., C. C. R. 307.*

(v) *Rex v. Kirkwood, 3 Burn. J. D. & W. Ed. 286, MSS., Bayley, B.; s. c., R. & M., C. C. R. 304.*

(w) *Rex v. Soares, Atkinson and Brighton, MS.; s. c. 974, R. & R. 25*; and see *Rex v. Badcock, R. & R. 249.*

(x) 4 Blac. Com. 36; 1 Hale 613, *Post*, p. 128, note (b).

¹ No accessories in misdemeanors: see *Lowenstein v. People*, 54 Barb. 299; *Comm. v. Burns*, 4 J. J. Marsh. 182; *State v. Westfield*, 1 Bailey 132; *Curlin v. State*, 4 Yerg. 143. See also *Comm. v. Gillespie*, 7 S. & R. 469; *U. S. v. Morrow*, 4 Wash. C. C. 733; *Ward v. People*, 3 Hill 385; *Comm. v. M'Attee*, 8 Dana 28. One who invites others to commit an assault and battery is guilty and may be punished as a principal, if the offence be actually committed, although he did not otherwise participate in it: *State*

It should be observed, as to felonies created by Acts of Parliament, that regularly if an Act of Parliament enact an offence to be felony, though it mention nothing of accessories before or after, yet virtually and consequentially those that counsel or command the offence are accessories before the fact, and those who knowingly receive the offender are accessories after.(y)

It is a maxim that *accessorius sequitur naturam sui principalis*;(z) and therefore an accessory cannot be guilty of a higher crime than his principal. Certain accessories after the fact, namely receivers *of stolen goods, are in some instances [*62 punished with more severity than the principal offenders.(a)

It has been occasionally much considered how far an accessory is involved in the guilt of the principal when the principal does not act in conformity with the plans and instructions of the accessory. With regard to this, it appears that *if the principal totally and substantially varies* from the terms of the instigation, if being solicited to commit a felony of one kind, he wilfully and knowingly commit a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt.(b) Thus if A. command B. to burn C's house, and he in so doing commits a robbery; now A., though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unsequential nature.(c) And if A. counsels B. to steal goods of C. on the road, and B. breaks into C's house and steals them there, A. is not accessory to the breaking the house, because that is a felony of another kind.(d) He is however accessory to the stealing.(e) But if *the principal complies in substance* with the instigation of the accessory, varying only in circumstances of time or place, or in the manner of execution, the accessory will be involved in his guilt: as if A. command B. to murder C. by poison, and B. does it by a sword or other weapon, or by any other means, A. is accessory to this murder; for the murder of C. was the object principally in contemplation, and that is effected.(f) And it seems that if A. counsels B. to steal goods in C's house, but not to break into it, and B. does break into it, A. is accessory to the breaking.(g) And where *the principal goes beyond* the terms of the solicitation, yet if, in the event, the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. As if A. advise B. to rob C., and in robbing him B. kills him, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery: or if A. solicit B. to burn the house of C., and B. does it accordingly, and the flames taking hold of the house of D., that likewise is burnt: in these cases A. is accessory to B. both in the murder of C. and

(y) 1 Hale 613, 614, 704; 3 Inst. 59.

(z) 3 Inst. 139; 4 Blac. Com. 36.

(a) Fourteen year's penal servitude, by 24 & 25 Vict. c. 96, s. 91.

(b) Fost. 369.

(c) 1 Hale 617; 4 Blac. Com. 37.

(d) Plowd. 475.

(e) 1 Hale 617.

(f) Fost. 369, 370; 2 Hawk. P. C. c. 29, s. 20.

(g) Bac. Max. Reg. 16.

e. Lymburn, 1 Brevard 397. Where the agent who does the act constituting the offence is himself guilty, he is the principal if it be a felony, and the employer is an accessory before the fact; but if it be a misdemeanor both are principals: *People v. Adams*, 3 Denio 190. All those who aid or abet the commission of a misdemeanor, are principal offenders. Therefore one who demises a house with the intent that it shall be kept, and which is accordingly kept, for the purposes of public prostitution, and who derives a profit from that mode of using the property, is punishable by indictment for a misdemeanor. The indictment should charge the defendant as the keeper of a common bawdy-house in the ordinary form; and the lessee who lives in and conducts the house may be joined with the lessor in the indictment: *People v. Erwin*, 4 Denio 129. In all offences less than felonies those who in felonies would be accessories before the fact, become principals, and must be proceeded against accordingly: *Williams v. State*, 11 S. & M. 58. There can be no accessories in inferior offences; but whatever will make one an accessory before the fact, will make him a principal in trespass and other misdemeanors, as in battery, forgery at common law and others. Procurers and aiders, therefore, are principals in such cases, and may be so charged in the indictment: *State v. Cheek*, 13 Ired. 114. One who incites or procures another to commit an assault, though not present at its commission, nor otherwise participating therein, may be indicted and punished as a principal: *Baker v. State*, 12 Ohio (N. S.) 214.

in the burning of the house of D. The advice, solicitation, or orders, were pursued in substance, and were extremely flagitious on the part of A.; and the events, though possibly falling out beyond his original intention, were, in the ordinary course of things, the probable consequences of what B. did under the influence and at the instigation of A. (*h*)

Where A. counselled a pregnant woman to murder her child when it should be born, and she murdered it accordingly, A. was held to be accessory to the murder: the procurement before the birth being considered as a felony continued after the birth, and until the murder was perpetrated by reason of that procurement. (*i*)

*63] But more difficult questions arise where the principal *by mistake commits a different crime* from that to which he was solicited by the accessory. It has been said, that if A. orders B. to kill C., and he by mistake kills D., or aiming a blow at C. misses him and kills D., A. will not be accessory to this murder, because it differs in the person. (*k*) And in support of this position *Saunders' case* (*l*) is cited; who, with the intention of destroying his wife, by the advice of one *Archer*, mixed poison in a roasted apple, and gave it her to eat; and the wife having eaten a small part of it, and having given the remainder to their child, *Saunders* (making only a faint attempt to save the child whom he loved, and would not have destroyed) stood by and saw it eat the poison, of which it soon afterwards died. And it was held, that though *Saunders* was clearly guilty of the murder of the child, yet *Archer* was not accessory to that murder. But Mr. J. Foster thinks that this case of *Saunders* does not support the position (which he calls a merciful opinion) to its full extent; and he proposes the following case as worthy of consideration:—"B. is an utter stranger to the person of C.; A. therefore takes upon him to describe him by his stature, dress, age, complexion, &c., and acquaints B. when and where he may probably be met with. B. is punctual at the time and place; and D., a person possibly in the opinion of B. answering the description, unhappily comes by and is murdered, upon a strong belief on the part of B. that this is the man marked out for destruction. Here is a lamentable mistake;—but who is answerable for it? B. undoubtedly is; the malice on his part *egreditur personam*. And may not the same be said on the part of A.? The pit which he, with a murderous intention, dug for C., D. *through his guilt* fell into and perished. For B., not knowing the person of C., had no other guide to lead him to his prey than the description A. gave of him. B. in following this guide fell into a mistake, which it is great odds any man in his circumstances might have fallen into. I therefore, as at present advised, conceive that A. was answerable for the consequence of the flagitious orders he gave, since that consequence appears, in the ordinary course of things, to have been highly probable." (*m*)

Mr. J. Foster then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to turn:—"Did the principal commit the felony he stands charged with under the influence of the flagitious advice; and was the event, in the ordinary course of things, a probable consequence of that felony? or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind, or upon a different subject." (*n*)

A. commands B. to kill C., but before the execution thereof repents and countermands B., yet B. proceeds in the execution thereof; A. is not accessory, for his consent continues not, and he gave timely countermand to B.: but though A. had repented, yet if B. had not been actually countermanded before the fact committed, A. had been accessory. (*o*)

*64] IV. *An accessory after the fact* is a person who, knowing a *felony to have been committed by another, receives, relieves, comforts, or assists the felon (*p*)¹ And it seems to have been agreed, that any assistance given to one

(*h*) Fost. 370.

(*k*) 1 Hale 617; 3 Inst. 51.

(*m*) Fost. 370, 371.

(*o*) 1 Hale 617.

(*i*) Rex v. Parker, Dy. 186, a. pl. 2.

(*l*) Plowd. 475; 1 Hale 431.

(*n*) Fost. 372.

(*p*) 1 Hale 618; 4 Blac. Com. 37.

¹ *Harril v. State*, 29 Miss. 702.

known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory of this description: as where one assists a felon with a horse to ride away, or with money or victuals to support him in his escape, or where one harbors and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more where one harbors in his house and openly protects such a felon, by reason whereof the pursuers dare not take him.(g) If A. has his goods stolen by B., and C. knowing they were stolen receives them, this simply of itself makes not an accessory; but if B. come to C. and deliver him the goods to keep for him, C. knowing that they were stolen, and that B. stole them, or if C. receive the goods to facilitate the escape of B., or if C. knowingly receives them upon agreement to furnish B. with supplies out of them, and accordingly supplies him, this makes C. an accessory. But the bare receiving of stolen goods, knowing them to be stolen, makes not an accessory; for he may receive them to keep for the true owner, or till they are recovered or restored by law.(r)

Where, after setting out the conviction of a principal for a robbery of a £100 note, an indictment alleged that the prisoner did receive, harbor, maintain, relieve, aid, comfort and assist the principal, knowing him to have committed the robbery, and it appeared that shortly after the robbery the prisoner applied to his landlady to change the note, but did not succeed; and that the principal went to a shop to purchase some articles, for the payment of which he tendered the note, and received a large part of it in change, and that during the time he was in the shop the prisoner was waiting outside; Maule, J., held that there was evidence of comforting and assisting. If a man stole a horse, and another assisted him in coloring and disguising him, so that he could not be known again, that would make him an accessory. Here the prisoner assists the party who has stolen the note to get rid of it, and thus evade the justice of the country.(s)

Where a lad robbed a banking house, in which he was clerk, and the same evening went to the room of the prisoner, a man, where he stayed twenty minutes, and both of them proceeded together that evening, by coach, to Bristol, and thence to Liverpool, where they were apprehended before they set sail for America, whither the prisoner had said they were going: it was held that this was evidence to go to the jury, upon an indictment charging the prisoner with harboring, receiving, and maintaining the boy, although the places in the coaches were paid for by the boy.(t) So a man who employs another person to harbor the principal may be convicted as an accessory after the fact, although he himself did no act of relieving or assisting the principal.(u)

*Also, whoever rescues a felon from an arrest for the felony, or voluntarily and intentionally suffers him to escape, is an accessory to the felony:(v) and [*65 it has been said, that those are in like manner guilty who oppose the apprehending of a felon (w) It is agreed by all the books, that a man may be an accessory after the fact by receiving one who was an accessory before, as well as by receiving a principal.(x) And it has been holden, that a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harboring or concealing the thief, or assisting in his escape.(y)

In order to support a charge of receiving, harboring, comforting, assisting and maintaining a felon, there must be some act proved to have been done to assist the felon personally; it is not enough to prove possession of various sums of money derived from the disposal of the property stolen.(z)

Where an indictment alleged that *Mill* sent letters demanding money with

(g) 2 Hawk. P. C. c. 29, s. 26; 1 Hale 618, 619; 4 Blac. Com. 38.

(r) 1 Hale 619.

(s) Reg. v. Butterfield, 1 Cox C. C. 39.

(t) Rex v. Lee, 6 C. & P. 536 (25 E. C. L. R.), Williams, J.

(u) Rex v. Jarvis, 2 M. & Rob. 40, Gurney, B.

(v) 2 Hawk. P. C. c. 29, s. 27; 1 Hale 619; but not the merely suffering him to escape, where it is a bare omission: 1 Hale 619; 2 Hawk. P. C. c. 29, s. 29.

(w) 2 Hawk. P. C. c. 29, s. 27.

(x) 2 Hawk. P. C. c. 29, s. 1.

(y) Fost. 123; Crompt. Just. 41 b, pl. 4 and 5.

(z) Reg. v. Chapple, 9 C. & P. 355 (38 E. C. L. R.), Law, R., after consulting Littledale, J., and Alderson, B.

menaces, and that the prisoner did "feloniously receive, harbor, maintain, and assist" the said Mills, knowing her to have committed the said felony, and the letters contained threats of exposing the immorality of the prosecutor, and one of them threatened to insert a paragraph in the "Satirist;" and immediately afterwards articles reflecting on the prosecutor appeared in that paper, of which the prisoner was the proprietor, and on being cautioned as to the course he was pursuing, the prisoner said he could not stop the publication of such articles in future, and referred to Mills, and gave her address, and on being told that the prosecutor would submit to a little extortion rather than have his character assailed, the prisoner consented to wait a week that the prosecutor might be spoken to on the subject. Notices, however, that further articles of the same nature would be published continued to appear in the "Satirist." It was contended that there was no evidence to prove that the prisoner was an accessory; it was answered that any assistance given to the principal to enable her to carry out the object with which the felony was committed was sufficient. Erle, J.: "I do not agree to that proposition; the assistance must tend to prevent the principal felon from being brought to justice. The question is, did he, after the felony was complete, assist the felon to elude justice? It is no part of this felony that the money should be paid: the crime is complete as soon as the demand is made. Can it be said, then, that by assisting in a fresh attempt to obtain money, he aided her in concealing or even carrying out the one completed." Erle, J., however left the case to the jury, intending to reserve the point; but the jury acquitted the prisoner.(a)

Where an Act of Parliament enacts an offence to be felony, though it mentions nothing of accessories, yet virtually and consequentially those that knowingly receive the offender are accessories **after*.(b) It has, however, been said, that [66] if the Act of Parliament that makes the felony in express terms, comprehend accessories *before*, and make no mention of accessories *after*, it seems there can be no accessories *after*; the expression of procurers, counsellors, abettors, all which import accessories *before*, making it evident that the Legislature did not intend to include accessories *after*, whose offence is of a lower degree than that of accessories *before*.(c) But by others it is considered to be settled law, that in all cases where a statute makes any offence treason, or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there be an express provision to the contrary.(d) And although it be generally true, that an Act of Parliament creating a felony renders consequentially accessories *before* and *after* within the same penalty, yet the special penning of the Act sometimes varies the case: thus the 3 Hen. 7, c. 2 (now repealed), for taking away women, made the taking away, the procuring and abetting, and also the wittingly receiving, all equally felonies and excluded from clergy. So that Acts of Parliament may diversify the offences of accessory or principal according to their various penning, and have done so in many cases.(e)

There is no doubt but that it is necessary for a receiver to have had notice, either express or implied, of the felony having been committed, in order to make him an accessory by receiving the felon;(f) and it is also agreed, that the felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. So that if one wound another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent; this does not make him accessory to the homicide, for till death ensues there is no felony committed.(g)

The law has such a regard to the duty, love, and tenderness, which a wife owes to her husband, that it does not make her an accessory to the felony by any receipt whatever which she may give to him; considering that she ought not to discover her husband.(h)

(a) Reg. v. Hansill, 3 Cox C. C. 597.

(c) 1 Hale 614.

(e) 1 Hale 614.

(g) 2 Hawk. c. 29, s. 35; 4 Blac. Com. 38; but I apprehend it would make him accessory to the felony of maliciously wounding. C. S. G.

(h) 2 Hawk. c. 29, s. 34; 1 Hale 621, *ante*, p. 46. But this applies to no other relation besides that of a wife to her husband; and the husband may be an accessory for the receipt of his wife: 1 Hale 621.

(b) 1 Hale 613, *ante*, p. 61.

(d) 2 Hawk. P. C. c. 29, s. 14.

(f) 2 Hawk. P. C. c. 29, s. 32.

It is not thought necessary to discuss further the general principles of law relating to accessories after the fact, since prosecutions against such persons grounded on the common law are seldom instituted at the present time; nor do they appear to have been frequent for many years past, nor to have had any great effect.⁽ⁱ⁾ It should seem, however, that the 7 & 8 Geo. 4, c. 28, ss. 8, 9, will apply to accessories after the fact, where no punishment is specially provided for their felony.^(k) The Consolidation Acts of the 24 & 25 Vict. make accessories after the fact to felonies punishable under those Acts respectively liable to imprisonment for any term not exceeding two years.^(l)

*The principal and accessory may be indicted in the same indictment, and tried together, which is the best and most usual course. Formerly the accessory could not, without his own consent, have been brought to trial till the guilt of the principal was legally ascertained by conviction or outlawry, unless they were tried together.^(ll)¹ And an accessory could not in such case have been tried, un-

(i) Fost. 372.

(k) See *ante*, p. 3.

(l) See *ante*, p. 5.

(ll) 1 Hale 623; 2 Hawk. c. 29, s. 45; Fost. 360.

¹ Where the accessory is tried alone, the record of the principal's conviction must be produced; but if there are counts charging the accessory with "being present, aiding and abetting," the guilt of the principal may be proved by parol testimony, although he may have been actually convicted: *State v. Taylor*, 2 Bailey 49.

Indictment. The first count, after stating that A. B. had committed larceny at, &c., on, &c. charged the defendant with then and there aiding and abetting A. B., &c. The second count charged the defendant as an accessory to the larceny before the fact. Plea, not guilty. Verdict and judgment against the defendant. *Held*, 1. That the want of an averment in the indictment, that the principal had been convicted, was no ground for arresting the judgment. 2. That an accessory must be tried after the conviction of the principal, or be tried with him: *Harty v. State*, 3 Blackf. 386. Where the principal and accessory are joined in one indictment, but are tried separately, the record of the conviction of the principal is *prima facie* evidence of his guilt, upon the trial of the accessory, and the burden of proof rests on the accessory, not merely that it is questionable whether the principal ought to have been convicted, but that he clearly ought not to have been convicted: *Comm. v. Knapp*, 10 Pick. 477. See also *State v. Cruak*, 2 Bailey 66. It is not necessary to set out the conviction of the principal in the indictment: *Ibid*. The court may in its discretion permit an accessory to be tried separately from the principal: *State v. Yanev*, 1 Const. Rep. 237. An accessory cannot be put on trial before the conviction of the principal unless he consent thereto, or be put on trial with his principal: *State v. Pybus*, 4 Hamp. 442; *Whitehead v. State*, *Ibid*. 278; *Comm. v. Woodward*, Thacher's Crim. Cas. 63; *Sampson v. Comm.*, 5 W. & S. 385. Accessory discharged by acquittal of principal: *United States v. Crane*, 4 McLean 317. On the trial of a prisoner indicted as an accessory to murder, the record of the conviction of the principal is evidence to prove that conviction, and all its legal consequences, though not evidence of the fact of the guilt of the prisoner: *Keithler v. State*, 10 Sm. & Marsh. 192. Where a principal and accessory are tried separately, though on the same indictment, evidence of the conviction of the principal is not admissible on the trial of the accessory, unless judgment has been first rendered against the principal: *State v. Duncan*, 6 Ired. 98. An accessory cannot take advantage of error in the record against the principal, and the attainder of the principal while unreversed is *prima facie* evidence against the accessory of the principal's guilt: *State v. Duncan*, 6 Ired. 236. The confession of a principal is not evidence against an accessory: *State v. Newport*, 4 Harring. 567. Upon the trial of a principal in the second degree, it is competent for the state to offer in evidence an admission of his own guilt made by the principal in the first degree, to establish the fact of such guilt, in addition to the record of his conviction. The original indictment, verdict, and judgment against a principal in the first degree are admissible against one indicted in the second degree, and is *prima facie* evidence of the guilt of the principal in the first degree: *Studstill v. State*, 7 Geo. 2. The principal must be tried and convicted before an accessory can be tried: *Bacon v. People*, 1 Parker C. R. 246. It is only necessary that one of several principals should be convicted: *Starin v. People*, 45 N. Y. 333. To establish the guilt of one charged as accessory before the fact to a felony, the guilt of the principal must first be proved: *Ogden v. State*, 12 Wis. 532. An accessory may be indicted without the conviction of the principal being averred, but his guilt must be averred, and the evidence must show that his guilt was legally established before the trial of the accessory: *Holmes v. Comm.*, 1 Casey 221. Where the accessory is tried alone before the conviction of the principal, acts and conduct of the principal, immediately following the commission of the offence and tending to show that he committed it, are competent evidence to prove the guilt of the principal: *State v. Rand*, 33 N. H. 216. A discharge of the principal in the first degree in an indictment for murder does not discharge the other defendants who are arraigned as accessories: *State v. Phillips*, 24 Mo. 475. On an indict-

less the principal had been attainted, so that if the principal stood mute of malice, or challenged peremptorily above the legal number of jurors, or refused to answer directly to the charge, the accessory could not have been put upon his trial.^(m) But the 24 & 25 Vict. c. 94, which came into operation on Nov. 1, 1861, has made the following salutary provisions for the effectual prosecution of accessories.

"As to accessories before the fact :

Sec. 1. "Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon."

This clause is taken from the 11 & 12 Vict. c. 46, s. 1, upon which it was held, that it was no objection to an accessory before the fact being convicted that his principal had been acquitted. *Hall and Hughes* were jointly indicted for stealing certain cotton. Hall was acquitted and called as a witness against Hughes; and it clearly appeared that Hall had stolen the cotton at the instigation of Hughes, and in his absence. It was contended, that as Hall had been acquitted, Hughes must be so also; for the statute had only altered the form of pleading, and not the law, as to accessories before the fact; but it was held, that the statute had made the offence of the accessory before the fact a substantive felony, and that the old law, which made the conviction of the principal a condition precedent to the conviction of the accessory, was done away by that enactment.⁽ⁿ⁾

In every case where there may be a doubt whether a person be a principal or accessory before the fact, it may be advisable to prefer the indictment under this section, as such an indictment will be sufficient, whether it turn out on the evidence that such person was a principal or accessory before the fact, as well as where it is clear that he was either the one or the other, but it is uncertain which he was.

It may be well to observe, however, that there are cases in which it is not clear that an indictment under this section would suffice. Suppose, for instance, that the offence of the principal be local; *e. g.*, a burglary committed in the county of Worcester, and that the accessory is indicted in the county of Stafford on the ground that the evidence shows that the acts, by which he became accessory, were done in the latter county, it may be questionable whether the accessory could be *68] indicted and tried under this section in that county; for it only authorizes the accessory to be indicted and tried "as if he were a principal felon," and the principal could only be indicted and tried in Worcestershire. Possibly if such an objection were taken on the trial, it might be held that sec. 7 of this Act authorized the indictment and trial in Staffordshire, on the ground that the evidence showed the party to have become an accessory before the fact in that county. But supposing that to be so, the same question might be raised in arrest of judgment or on error, and on the face of the record all that would appear would be that the prisoner was indicted and tried as a principal in Staffordshire for a burglary committed in Worcestershire; but even here it might be held that the effect of the 24 & 25 Vict. c. 94, s. 1, is to make every indictment which charges a person as principal contain a charge of being accessory before the fact also, and consequently that there was nothing on the face of the record inconsistent with

(m) Post. 362, where the doctrine is reprobated; and see 1 Hale 625, where it is said that it is for this reason that Weston, the principal actor in the murder of Sir Thomas Overbury, could not for a long while be prevailed upon to plead, that so the Earl and Countess of Somerset, who were the movers and procurers, might escape: 1 St. Tr. 314.

(n) Reg. v. Hughes, Bell C. C. 242.

ment for an assault with intent to kill, the defendant cannot be convicted of being an accessory before the fact: *State v. Scannell*, 39 Me. 68. Where the offence of a principal is committed in one county and that of the accessory in another, the accessory may be tried in the county where he performed the act which made him an accessory: *Bacon v. People*, 1 Parker C. R. 246. An accessory before the fact to a felony procured in another state, to be committed within New Hampshire, cannot be tried for the offence of procuring its commission, in the County of New Hampshire, within which the principal offence is committed: *State v. Moore*, 6 Foster 448.

the facts having proved that the prisoner was such an accessory in Staffordshire. However, in any such case, it would be prudent to insert a count framed under the next section.

In *Reg. v. Chadwick*,^(o) the prisoner was indicted as a principal for murder by arsenic, and the jury found that he procured the arsenic, and caused it to be administered by another person, but was absent when it was administered; and thereupon it was objected that the 11 & 12 Vict. c. 46, s. 1, did not apply to murder; but Williams, J., overruled the objection; and having given the matter full consideration, refused to reserve the point. And this decision was clearly right; for it has been held that a commission to the ordinary to receive all clerks indicted for felony, but not for murder, gave authority to the ordinary to receive a person indicted for murder; and all the justices said that murder is felony, and if a commission be made to two to inquire of all felonies, they can well take indictments of murder, although a pardon of all felonies is not available for one indicted of murder; for that is by statute 13 R. 2, st. 2, c. 1.^(p)

Sec. 2. "Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished."^(q)

"As to accessories after the fact:

Sec. 3. "Whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal *felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive [*69 felony whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished."^(r)

Upon an indictment against a prisoner as a principal he cannot be convicted under this section as an accessory after the fact. The prisoner was indicted for stealing from the person; there was no evidence to prove that charge, but there was ample evidence to prove that he was an accessory after the fact to the stealing from the person; it was held that he could not be convicted as such accessory upon this indictment.^(s)

Sec. 4. "Every accessory after the fact to any felony (except where it is otherwise specially enacted), whether the same be a felony at common law or by virtue of any Act passed or to be passed, shall be liable, at the discretion of the Court, to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labor, and it shall be lawful for the Court, if it shall think fit, to require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to such punishment: Provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

"As to accessories generally:

Sec. 5. "If any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwith-

^(o) *Stafford. Sum. Ass.* 1850, MSS. C. S. G.

^(p) *Anonymous*, Keilw. 91, b; and see 2 Hale 45; 3 Inst. 236, and Graves' Cr. St. 20, 2d edit.

^(q) This clause is taken from the 7 Geo. 4, c. 64, s. 9; and 9 Geo. 4, c. 54, s. 23 (1).

^(r) This clause is taken from the 11 & 12 Vict. c. 46, s. 2.

^(s) *Reg. v. Fallon*, 1 L. & C. 217.

standing such principal felon shall die, or be pardoned, or otherwise delivered before attainder; and every such accessory shall upon conviction suffer the same punishment as he would have suffered if the principal had been attained."^(t)

Sec. 6. "Any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, *and may be tried together*, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."^(u)

Sec. 7. "Where any felony shall have been wholly committed within England *70] or Ireland, the offence of any person who shall be *an accessory either before or after the fact to any such felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act, by reason whereof such person shall have become such accessory, shall have been committed: and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony or *any felonies committed in any county or place in which such person shall be apprehended or be in custody*, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within Her Majesty's dominions or without, or partly within Her Majesty's dominions and partly without; provided that no person who shall be once duly tried either as an accessory before or after the fact, or for a substantive felony under the provisions hereinbefore contained, shall be liable to be afterwards prosecuted for the same offence."

This clause is taken from the 7 Geo. 4, c. 64, ss. 9, 10; 9 Geo. 4, c. 54, ss. 23, 24 (l.); and 11 & 12 Vict. c. 46, s. 2.

Under those enactments accessories might be tried by any court which had jurisdiction to try the principal, although the principal felony had been committed on the sea or on land, whether within the Queen's dominions or without, and where the principal felony was committed in one county, and the act by which the person became an accessory was done in another county, the accessory might be tried in either.

By the earlier part of this clause, where the principal felony is wholly committed in England or Ireland, the accessory may be tried either in the county where the principal felony may be tried, or in the county where the act by which he became an accessory was done. But where the principal felony is not committed wholly in England or Ireland, the accessory may be tried by any court which has jurisdiction to try the principal, or in any county, in which the accessory may be apprehended or be in custody. The object of this latter provision is to meet cases where the principal felony may have been committed, either on land or sea, out of England and Ireland; in such cases no court had jurisdiction to try the principal until he was apprehended in England or Ireland, and consequently where the principal in such cases had not been apprehended, the accessory would not have been triable at all under the former enactments. The words in italics cure this defect.

"As to abettors in misdemeanors:

Sec. 8. "Whosoever shall aid, abet, counsel, or procure the commission of any

(t) This clause is taken from the 7 Geo. 4, c. 64, s. 11, and 9 Geo. 4, c. 54, s. 25 (l.).

(u) This clause is framed from the 14 & 15 Vict. c. 100, s. 15, and the words in italics inserted. The Committee of the Commons who sat on the 14 & 15 Vict. c. 100, struck out those words, not perceiving that they were the only important words in the clause: for there never was any doubt that separate accessories and receivers might be included in the same indictment under the circumstances referred to in the clause; the doubt was, whether they could be *compelled* to be tried together in the absence of the principal where they separately became accessories, or separately received.

The marginal note was erroneously altered after the Bill went to the House of Lords. It began "separate accessories," because the clause applies only to accessories at different times. "Several" persons may become accessories at one and the same time and place.

misdemeanor, whether the same be a misdemeanor at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender."

This clause is framed from the similar clauses in the 7 & 8 Geo. 4, c. 30, s. 26; 9 Geo. 4, c. 56, s. 33 (I.), &c., and is really only a declaration of the common law on the subject; by which all *persons, who would be accessories in [71 felony, are principals in misdemeanor, (uu) and hence it follows that a person indicted for committing a misdemeanor may be convicted, if it appear that he caused it to be committed, although he is absent when it is committed. (v)

"As to other matters:

Sec. 9. "*Where any person shall, within the jurisdiction of the Admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed 'on the high seas;' provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces.*"

The object of the earlier part of this clause is to remove a doubt whether a person who became an accessory on the sea in the cases mentioned in it, was a felon; it may be that this was an unfounded doubt, but it was thought better to prevent the question arising. The 7 Geo. 4, c. 64, s. 9, contained a similar enactment.

The latter part of the clause is framed on the 7 & 8 Vict. c. 2, and provides for the form of indictment against accessories on the sea. (w)

An accessory before the fact to the crime of self-murder was not triable at common law, because the principal could not be tried; and such an accessory was not triable under the 7 Geo. 4, c. 64, s. 9 (now repealed), which did not make accessories triable except in cases where they might have been tried before. *Russell* was tried on an indictment which charged *S. Wormsley* with murdering herself with arsenic, and *Russell* with inciting her to commit the said murder. It appeared that *Wormsley*, who was about four months advanced in pregnancy, but not quick with child, died from taking arsenic, which she had received from *Russell* for the purpose of procuring a miscarriage, and that she knowingly took it with intent to procure a miscarriage, in the absence of *Russell*. It was objected that there was no evidence to prove that she was *felo de se*; that the 9 Geo. 4, c. 31, s. 13, did not apply to a woman administering poison to herself, and that assuming her to have taken arsenic knowingly, and with intent to procure miscarriage, she was not guilty of any offence; and, consequently, if there were no principal there could be no accessory. Secondly, that the 7 Geo. 4, c. 64, s. 9, did not apply to the case of a principal who was *felo de se*. It was held that she was *felo de se*; that *Russell* was an accessory before the fact, but that he could not be tried as an accessory under the 7 Geo. 4, *c. 64, s. 9, as he could not have [72 been tried at all before that statute, which was to be considered as extending to those persons only, who, before the statute, were triable either with or after the principal, and not to make those triable who before could never have been tried. (x)

On a trial for murder, it appeared that the deceased had died from the effects of corrosive sublimate taken to procure abortion, in July, 1861. She had endeavored

(uu) See *ante*, p. 61.

(v) *Reg. v. Clayton*, 1 C. & K. 128 (47 E. C. L. R.); *Reg. v. Moland*, 2 M. C. C. R. 276; and see the note and cases *post*, p. 128.

(w) By sec. 10, nothing in this Act contained shall extend to Scotland, except as hereinafter otherwise expressly provided.

(x) *Rex v. Russell*, R. & M. C. C. R. 356; *Reg. v. Leddington*, 9 C. & P. 79 (38 E. C. L. R.), *Alderson*, B.

to purchase corrosive sublimate herself, but the druggists having refused to furnish it to her, she had urged the prisoner to procure it, which he did with the full knowledge of the purpose to which it was to be applied; but there was ground for believing that the prisoner, in procuring the poison, had acted under the influence of threats by the deceased of self-destruction if the means of procuring abortion were not supplied to her. She was a married woman, living separately from her husband, and pregnant by the prisoner. The jury expressly negatived the fact of the prisoner having administered the poison to, or caused it to be taken by, the deceased. They found that the prisoner procured the poison, and delivered it to the deceased, with a knowledge of the purpose to which she intended to apply it, and that he was, therefore, accessory before the fact of her taking poison to procure abortion. Cockburn, C. J., thereupon, on the authority of the preceding case, directed the jury to return a verdict of guilty; but it appearing doubtful to him how far the ruling in that case, that if poison be taken by a woman to produce abortion, and death ensues, she is *felo de se*, could be upheld; and still more so, how far a man, accessory to the misdemeanor of a woman taking poison to procure abortion, can be held to be accessory to her self-murder, if, contrary to the intention of the parties, death should be the consequence, his Lordship reserved these points: and it was held that the conviction was wrong. That there was a very marked distinction between the two cases. In the one the prisoner persuaded the woman to take the arsenic; in the other the prisoner was unwilling that the woman should take the poison. The facts of the case were quite consistent with the supposition that he hoped and expected that she would change her mind, and would not resort to it. Then the cases being distinguishable, it was unnecessary to decide whether the woman was *felo de se*.(y)

Where an accessory is indicted alone, before his principal has been convicted, the indictment should be for a substantive felony. An indictment charged *Ashmall* with feloniously using an instrument with intent to procure a miscarriage, and *Tay* with procuring *Ashmall* to commit the said felony. *Ashmall* did not appear to take his trial, and it was held that *Tay* was not compellable to plead to this indictment, although he might have been to an indictment for a substantive felony.(z) But where an indictment *stated that *Lowe* cast away a vessel, *73] and that the prisoner incited him to commit the said felony, it was objected that the indictment was not properly framed as for a substantive offence, under the 7 Geo. 4, c. 64, s. 9, but was in the form of an indictment at common law against principal and accessory, and as the principal had not been convicted, and was not on his trial, the accessory could not be tried. But it was held that the description of the offence was not altered by the statute. It might have been put in a different shape, but every allegation in this indictment would have been included in any other.(a) So where *Mills* was indicted for sending letters demanding money with menaces, and *Hansill* with receiving, harboring, &c. *Mills*, knowing her to have committed the said felony, *Erle, J.*, held that *Hansill* might be tried before *Mills*, on this indictment under the 11 & 12 Vict. c. 46, s. 2 (now repealed, but re-enacted by the 24 and 25 Vict. c. 94, s. 3), as that clause was only intended to alter the course of trial, and not the mode of describing the offence.(b) But an indictment alleging that a certain evil-disposed person feloniously stole, and that before the said felony was done the prisoner did feloniously incite the said evil-disposed person to commit the said felony, is bad.(c)

Where the proceedings are against the accessory alone for receiving stolen goods,

(y) *Reg. v. Fretwell*, 1 L. & C. 161. But now by the 24 & 25 Vict. c. 100, s. 58, any woman taking poison to procure abortion is guilty of felony, which materially alters the character of such cases for the future, and the difficulty as to the trial of the accessory is got rid of by sec. 1 of the 24 & 25 Vic. c. 94. See *Reg. v. Gaylor*, 1 D. & B. 288, *ante*, p. 60.

(z) *Reg. v. Ashmall*, 9 C. & P. 237 (38 E. C. L. R.), *Gurney, B.*, and *Patteson, J.*

(a) *Reg. v. Wallace*, 2 M. C. C. 200; C. & M. 200. This case seems to overrule *Reg. v. Ashmall*; *supra*, which was not cited in it.

(b) *Reg. v. Hansill*, 3 Cox C. C. 597.

(c) *Reg. v. Caspar*, 2 M. C. C. R. 101.

the name of the principal need not be stated.^(d) So where the proceedings are against both principal and accessory, the indictment may contain counts for a substantive felony in receiving stolen goods without naming the principal, and upon such an indictment the receiver may be convicted, although the principal be acquitted.^(e)

A count charging a person with being accessory before the fact may be joined with a count charging the same person with being accessory after the fact to the same felony, and the prosecutor cannot be compelled to elect upon which he will proceed, and the party may be found guilty upon both.^(f) A case has occurred, in which a party was indicted for receiving stolen goods, and also for receiving, harboring and comforting the felon, and the prisoner was convicted.^(g)

Where a count charged a prisoner with stealing certain cotton, and another count charged him with receiving the property aforesaid, and it was proved that the prisoner had solicited a servant to rob his master; which he did, and took the cotton to the prisoner, in whose possession it was afterwards found, and he stated that he had got it from the servant, and the jury found a general verdict of guilty; it was held, on a case reserved, that the jury might upon this evidence reasonably convict the prisoner as an accessory before the fact upon the count for stealing, under sec. 1 of the 11 & 12 Vict. c. 46, and that there was no inconsistency in finding that he was guilty of being an accessory before the fact, and that he received the goods knowing them to have been stolen.^(h) But where one count charged the prisoner with stealing sheep, and another with receiving the said sheep knowing them to have been stolen, and the jury found a verdict of guilty on both counts, the Court of Queen's Bench in Ireland set aside the verdict and judgment on the ground that this was an inconsistent verdict. The Court assumed that the counts were inserted under the 11 & 12 Vict. c. 46, s. 3, and held that that statute only authorized the jury to convict either of stealing or receiving, and not of both.⁽ⁱ⁾

An indictment against an accessory should state that the principal committed the offence; and it is not sufficient merely to state, that he was indicted for the

(d) *Rex v. Jervis*, 6 C. & P. 156 (25 E. C. L. R.), Tindal, C. J.; *Rex v. Wheeler*, 7 C. & P. 170 (32 E. C. L. R.), Coleridge, J.; *Reg. v. Caspar*, 2 M. C. C. R. 101; s. c., 9 C. & P. 289 (38 E. C. L. R.).

(e) *Reg. v. Pulham*, 9 C. & P. 280 (38 E. C. L. R.), Gurney, B.; *Rex v. Austin*, 7 C. & P. 796 (32 E. C. L. R.), Parke and Bolland, Bs.

(f) *Rex v. Blackson*, 8 C. & P. 43 (34 E. C. L. R.), Parke, B., and Patteson, J., after full consideration.

(g) *Ibid.* per Parke, B.

(h) *Reg. v. Hughes*, Bell C. C. 242.

(i) *Reg. v. Evans*, 7 Cox C. C. 151. The Court said that "it might be possible that a man may have stolen goods, and, after disposing of them, may afterwards get them into his hands knowing them to be stolen, and be thus guilty of stealing and receiving the same goods." Now, suppose on the trial of this indictment, the facts had been as thus stated, it seems plain that the jury ought to have found the verdict they did, and upon the finding as it stood the Court were bound to presume that the evidence proved both counts. But the Court add, "the statements in this record negative such a state of facts;" and "the unity of the offence in the ordinary language is put beyond doubt, the stealing and receiving are of the same chattel, laid as the property of the same person, on the same day." This is a plain error; the property must be the same, and the time laid is perfectly immaterial; but even if it were material, a man may on the same day steal goods at one place, part with them, and receive them again at another place. Again, the 11 & 12 Vict. c. 46, s. 3, only says, "it shall be lawful" for the jury to convict either of stealing or receiving; but it does not forbid them to convict of both. Suppose a written confession of the prisoner proved both offences, how can a jury on their oaths acquit of either? In point of law there never was any objection to the insertion of several distinct felonies in one indictment; it was no ground of demurrer, arrest of judgment or error (1 Chitt. Cr. L. 253), but it was mere matter for the discretion of the judge to put the prosecutor to elect on which charge he would proceed. The 11 & 12 Vict. c. 46, s. 3, had taken away that discretion in this case, and made a prisoner triable at the same time for stealing and receiving, and as the Act contains no prohibitory words, the necessary consequence follows that the jury may convict of both if the evidence prove both offences. If it were otherwise, they must find a false verdict either on the one or other count, and thereby save the prisoner from the punishment of one of the two offences he had committed. See p. 126, *post*. C. S. G.

offence, as the indictment is only an accusation, and it does not follow that he really committed the offence, because he was indicted for it. *(k)*

Where an indictment against an accessory after the fact stated that at a General Session of Oyer and Terminer holden, &c., "it was presented" that the principal committed a robbery, Maule, J., arrested the judgment, because the indictment did not state by whom the presentment was made. It was possible that it might not be necessary to set out the whole indictment, though that was doubtful. But it certainly ought to be stated by whom the presentment was made. *(l)*

Formerly, if a man had been indicted as accessory in the same felony to several persons, he could not have been arraigned till all the principals were convicted and attainted: but it was afterwards settled, that if a man were indicted as accessory to two or more, and the jury found him accessory to one, it was a good verdict, and judgment might pass upon him. *(m)*

*If A. be indicted as principal, and B. as accessory, and both be acquitted, *75] or if B. only be acquitted, yet B. may be indicted as principal in the same offence, and his former acquittal is no bar. *(n)* So if A. were indicted as principal and acquitted, he might formerly have been afterwards indicted as accessory before the fact. *(o)* But now an acquittal as principal is clearly a bar to an indictment for being accessory before the fact; for on an indictment as principal an accessory before the fact may be convicted under the 24 & 25 Vict. c. 94, s. 1. So if a man be indicted as principal and acquitted, he may be indicted as accessory after the fact; and so if he be indicted as accessory *before* the fact and acquitted, he may be indicted as accessory after the fact. *(p)* The late statute, as we have seen, enacts, that no person who shall be once duly tried for any offence of being an accessory shall be liable to be again indicted or tried for the *same offence*. *(q)*

The indictment charged all four prisoners with feloniously inciting a certain evil-disposed person to forge a will; the evidence did not show any joint act done by the prisoners, but only separate and independent acts at separate and distinct times and places. After all the evidence on the part of the prosecution had been given, one of the prisoners pleaded guilty; it was thereupon urged that all the other prisoners were entitled to an acquittal; that the indictment charged a joint inciting, and there being no evidence of any joint acting, and one prisoner being convicted, the others could not be convicted jointly with her; but Williams, J., overruled the objection. *(r)*

Where the principal and accessory are tried together upon the same indictment, there is no doubt but that the accessory may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; for the accessory is in this case to be considered as *particeps in lite*: and this sort of defence necessarily and directly tends to his own acquittal. And where the accessory is brought to his trial after the conviction of the principal, and it comes out in evidence upon the trial of the accessory that the offence of which the principal was convicted *did not amount to felony in him, or not to that species of felony with which he was charged*, the accessory may avail himself of this, and ought to be acquitted. *(s)* For though it is not necessary upon such trial on the part of the prosecution to enter into a detail of the evidence on which the conviction was founded, and the record of the conviction is deemed sufficient evidence against the accessory to put him upon his defence; *(t)* yet the presumption raised

(k) Lord Sanchar's case, 9 Co. 117 a. In Reg. v. Read, 1 Cox C. C. 65, this case was not cited; but Maule, J., expressed an opinion in accordance with it, and would have reserved the point, if the prisoner had been found guilty.

(l) Reg. v. Butterfield, 1 Cox C. C. 39.

(m) Fost. 361; 9 Co. 119; 1 Hale 624; 2 Hawk. P. C. c. 29, s. 46; Plowd. 98, 99; Fost. 361.

(n) 1 Hale 625; Rex v. Winifred & Thomas Gordon, 1 Leach 515; s. c., 1 East P. C. 35.

(o) Rex v. Birchenough, R. & M. C. C. R. 477, overruling 1 Hale 626; 2 Hale 244.

(p) 1 Hale 626.

(q) 24 & 25 Vict. c. 94, s. 7.

(r) Reg. v. Barber, 1 C. & K. 442 (47 E. C. L. R.); Rex v. Messingham, R. & M. C. C. R. 257, was relied on in support of the objection.

(s) Fost. 365; Rex v. M'Daniel and others, 19 Sta. Tri. 806.

(t) But see Rex v. Turner, *post*, p. 77, note *(z)*.

by the record that everything in the former proceeding was rightly and properly transacted must, it is conceived, give way to facts manifestly and clearly proved; and that as against the accessory the conviction of the principal will not be conclusive, being as to him *res inter alios acta*.(u) This was the opinion of Mr. J. Foster; and upon this opinion the Court, in a case at the Old Bailey, permitted the counsel for an accessory to controvert the propriety of the conviction of the principal by *vivâ voce* testimony, and to show that the act done by the principal did not amount to a *felony*, and was only a *breach of trust*.(v) And in a later case, in the same Court, it was also admitted that the record of the conviction of the principal was not *conclusive* evidence of the felony against the accessory, and that he has a right to controvert the propriety of such conviction.(w)

But how far an accessory can defend himself in *point of fact*, by showing that the principal was *totally innocent*, has been considered as a question of more difficulty, and one which should be handled with caution; because facts for the most part depend upon the credit of witnesses; and when the strength and hinge of a case happen to be disclosed, as they may be by one trial, daily experience convinces us that witnesses for very bad purposes may be too easily procured. Upon this point, however, Mr. J. Foster cites some authorities, which he apprehends to be strong, to show that the accessory may insist upon the *innocence of the principal*; and then says, "if it shall manifestly appear, in the course of the accessory's trial, that in point of fact the principal was innocent, common justice seems to require that the accessory should be acquitted: A. is convicted upon circumstantial evidence, strong as that sort of evidence can be, of the murder of B.; C. is afterwards indicted as accessory to this murder; and it comes out upon the trial, by incontestible evidence, that B. is still living (Lord Hale somewhere mentions a case of this kind). Is C. to be convicted or acquitted? The case is too plain to admit of a doubt. Or, suppose B. to have been in fact murdered, and that it should come out in evidence, to the satisfaction of the Court and jury, that the witnesses against A. were mistaken in his person (a case of this kind I have known), and that A. was not, nor could possibly have been, present at the murder."(x)

Upon an indictment against an accessory, a confession by the principal is not admissible to prove the guilt of the principal; it must be proved *aliunde*, especially if the principal be alive, and could be called as a witness; and it seems that even the conviction of the principal would not be admissible to prove the guilt of the principal. The prisoner was indicted for receiving sixty sovereigns, which had been stolen by S. Rich. A confession by S. Rich, made before a magistrate in the presence of the prisoner, in which she stated various facts implicating the prisoner, was tendered in evidence. Mr. J. Patteson refused to receive anything that was said by S. Rich respecting the prisoner, but admitted what she said respecting herself only. S. Rich had been **found guilty* on another indictment, but had not been sentenced, and might have been called as a witness. The judges (except Lord Lyndhurst, C. B., and Taunton, J.)(y) were unanimously of opinion that Rich's confession was no evidence against the prisoner; and many of them appeared to think that had Rich been convicted, and the indictment against the prisoner stated not her conviction, but her guilt, the conviction would not have been any evidence of her guilt, which must have been proved by other means.(z) And upon the authority of this case, where an accessory before the fact to a murder was tried after the principal had been convicted and executed, Parke, B., ordered the proceedings to be conducted in the same

(u) Fost. 365.

(v) Smith's case, 1 Leach 288.

(w) Prosser's case (mentioned in a note to Smith's case, 1 Leach 290). *Cor.* Gould, J., who is considered to have been a very accurate crown lawyer: *Rex v. Blick*, 4 C. & P. 377 (17 E. C. L. R.), s. P., Bosanquet, J. And see *Rex v. M'Daniel and others*, 19 St. Tri. 806.

(x) Fost. 367, 368; and see 3 Esp. R. 134 (in the case of *Cook v. Field*), where it was stated by Bearcroft, and assented to by Lord Kenyon, that where the principal had been convicted, it is nevertheless on the trial of the accessory competent to the defendant to prove the principal innocent. And see *Rex v. M'Daniel and others*, 19 St. Tri. 806.

(y) Who were absent.

(z) *Rex v. Turner, R. & M. C. C. R.* 347; 1 Lewin 119.

manner as if the principal was then on his trial, and the evidence against the accessory was not gone into until the case against the principal was concluded.(a) Where two persons were indicted together, one for stealing and the other for receiving, and the principal pleaded guilty, Wood, B., refused to allow the plea of guilty to establish the fact of the stealing by the principal as against the receiver.(b)

The prisoner was indicted as an accessory after the fact to one Mills, who was charged with sending letters demanding money with menaces, and Erle, J., held that these letters were admissible in evidence against the accessory, for it was necessary to prove a demand of the money, and these letters constituted the demand. They were, therefore, evidence of acts done. It would have been very different if they had been mere written statements made by Mills that she had made a demand. They could not then be admitted against the prisoner.(c) And where Read was indicted as accessory before the fact to Simpson, and conversations with Simpson in the absence of Read were offered in evidence, Maule, J., refused to admit them.(d) And where on an indictment against Hawkey and Pym for murder, Pym was tried first, and Hawkey was alleged to have fired the fatal shot in a duel, it was held that it might be proved that Hawkey on the morning before the duel had said, "I will shoot him as I would a partridge." Erle, J., saying, "this statement is an act indicating malice aforethought in Hawkey, and that is a fact which the jury have to ascertain. The intentions of a person can only be inferred from external manifestations, and words are some of the most usual and best evidence of intention. It is not a declaration after the act done narrating the past, but it shows the mind of the party."(e) In the same case Erle, J., held that what Hawkey had said after the duel relating to what passed at the spot where the duel took place was not admissible.(f)

*78]

*CHAPTER THE FOURTH.

OF INDICTABLE OFFENCES.

OFFENCES which may be made the subject of indictment, and are below the crime of treason, may be divided into two classes. *felonies* and *misdemeanors*.

The term *felony* appears to have been long used to signify the degree or class of crime committed, rather than the penal consequence of forfeiture occasioned by the crime, according to its original signification. The proper definition of it, however, as stated by an excellent writer, recurs to the subject of forfeiture, and describes the word as signifying—an offence which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment may be superadded according to the degree of guilt.(a) Capital punishment does by no means enter into the true definition of felony: but the idea of felony is so generally connected with that of capital punishment, that it is hard to separate them; and to this usage the interpretations of the law have long conformed. Therefore, formerly, if a statute made any new offence felony, the law implied that it should be punished with death as well as with forfeiture, unless the offender prayed the benefit of clergy, which all felons were entitled once to have, unless the same was expressly taken away by statute.(b)

(a) Ratcliffe's case, 1 Lewin 121.

(b) Anonymous, cited in Rex v. Turner, *supra*.

(c) Reg. v. Hansill, 3 Cox C. C. 597.

(d) Reg. v. Pym, 1 Cox C. C. 339.

(e) Reg. v. Read, 1 Cox C. C. 65.

(f) *Ibid*.

(a) 4 Blac. Com. 95, and see 1 Hawk. c. 25, s. 1. "The higher crimes, rape, robbery, murder, arson, &c., were called felony; and being interpreted want of fidelity to his lord, made the vassal lose his fief:" 2 Hume, App. ii. p. 129. As to the derivation of the word *felony*, from *feah*, or *fee*, the fief or estate, and *lon*, the price or value; and ascribing to it the meaning of *pretium feudi*, see Spelm. Gloss. *Felon*, 4 Blac. Com. 95.

(b) 4 Blac. Com. 98; Rex v. Johnson, 3 M. & S. 549. *Post*, vol. 2, p. 464; but now

With regard to felonies created *by statute*, it seems clear that not only those crimes which are made felonies in express words, but also all those which are decreed to have or undergo judgment of life and member by any statute become felonies thereby, whether the word "*felony*" be omitted or mentioned.(c) And where a statute declares that the offender shall, under the particular circumstances, be deemed to have *feloniously* committed the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony.(d) So where a statute says that an offence, previously a misdemeanor, "shall be deemed and construed to be a felony," instead of declaring it to be a felony in distinct and positive terms, the offence is thereby made a felony.(e) An enactment [*79 that an offence shall be felony, which was felony at common law, does not create a new offence (f) An offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and therefore, if it be prohibited under "pain of forfeiting all that a man has," or of "forfeiting body and goods," or of being "at the king's will for body, land and goods," it shall amount to no more than a high misdemeanor.(g) And though a statute make the doing of an act *felonious*, yet if a subsequent statute make it *penal* only, the latter statute is considered as a virtual repeal of the former, so far as relates to the punishment of the offence.(h) Where therefore a statute made an offence punishable with death and a subsequent statute imposed a forfeiture of twenty pounds for the same offence when first committed recoverable before justices of the peace, and made the second offence felony, the latter statute was held to be a virtual repeal of the former.(i) If also a later statute expressly alters the quality of an offence by making it a misdemeanor instead of a felony, the offence cannot be prosecuted under the former statute, and the same consequence follows from altering the procedure and the punishment.(k)¹

And where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; from whence it follows, that if it be not so laid in the indictment, it shall be punished but as the first offence: for the gentler method shall first be tried, which perhaps may prove effectual.(l) Where a statute makes an offence felony which was before only a misdemeanor, an indictment would not lie for it as a misdemeanor.(m)

The word *misdemeanor*, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name; and they may be punished, according to the degree of the offence, by fine or imprisonment, or both.(n) A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies and public nuisances.(o) Misdemeanors have been sometimes termed *misprisions*: indeed, the word *misprision*, in its larger sense, is used to signify every considerable misdemeanor which has not a certain name given to it in the

every person convicted of any felony, for which no punishment is specially provided, is punishable by penal servitude for seven years, or imprisonment, &c., under the 7 & 8 Geo. 4, c. 28, s. 8, *supra*, p. 3, 4.

(c) 1 Hale 703; 1 Hawk. P. C. c. 40, s. 2; Reg. v. Horne, 4 Cox C. C. 263.

(d) By Bayley, J., in Johnson's case, 3 M. & S. 556.

(e) Rex v. Salomons, R. & M. C. C. R. 292, overruling Rex v. Cale, R. & M. C. C. R. 11.

(f) Per Patteson, J., Reg. v. Williams, 7 Q. B. 253 (53 E. C. L. R.).

(g) 1 Hawk. P. C. c. 40, s. 3.

(h) 1 Hawk. P. C. c. 40, s. 5.

(i) Rex v. Davis, 1 Leach 271.

(k) Michell v. Brown, 2 E. & E. 267 (105 E. C. L. R.), and see Rex v. Cator, 4 Burr. R. 2026.

(l) 1 Hawk. P. C. c. 40, s. 4.

(m) Rex v. Cross, 1 Ld. Raym. 711; 3 Salk. 193.

(n) 3 Burn. Just., tit. *Misdemeanor*, citing Barlow's Justice, tit. *Misdemeanor*.

(o) 4 Blac. Com. 5, note 2; 3 Burn. Just., tit. *Misdemeanor*.

¹ As to what constitutes a felony, see *State v. Decon*, 65 N. C. 572; *People v. War*, 20 Cal. 117; *People v. Cornell*, 16 Ibid. 187; *Tharp v. Comm.* 3 Met. (Ky.) 411; *Buford v. Comm.* 14 B. Mon. 24; *Wilson v. State*, 1 Wis. 184; *State v. Bosse*, 8 Rich. 276; *Weaver v. Comm.*, 5 Casey 445.

law; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only, if the king please. (*p*) But generally *misprision of felony* is taken for a concealment of felony, or a procuring the concealment thereof, *80] *whether it be felony by the common law, or by statute; (*q*) and silently to observe the commission of a felony, without using any endeavors to apprehend the offender, is a misprision; a man being bound to discover the crime of another to a magistrate with all possible expedition. (*r*) If this offence were accompanied with some degree of maintenance given to the felon, the party committing it might be liable as an accessory after the fact. (*s*)

It is clear that all *felonies*, and all kinds of *inferior crimes of a public nature*, as misprisings, and all other contempts, all disturbances of the peace, oppressions, misbehavior by public officers, and all other misdemeanors whatsoever of a *public* evil example against the common law may be indicted. (*t*) And it seems to be an established principle, that whatever openly outrages decency and is injurious to public morals, is a misdemeanor at common law. (*u*) Thus the exposure of a man's person in a public place is indictable. (*v*) Also it seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it (*w*) But no injuries of a *private* nature are indictable, unless they in some way concern the king. (*x*)¹

(*p*) 1 Hawk. c. 20, s. 2, and c. 50, s. 1, 2; Burn. Just., tit. *Felony*.

(*q*) 1 Hawk. P. C. c. 59, s. 2. *Post*, Book II. Chap. xiii.

(*r*) 3 Inst. 140; 1 Hale 371-375.

(*s*) 1 Hawk. P. C. c. 59, s. 6. The concealment of *treasure trove* is misprision of felony: 4 Blac. Com. 121; 3 Inst. 133.

(*t*) 2 Hawk. P. C. c. 25, s. 4. As to misbehavior by public officers, see *post*, Book II., Chap. xiv.

(*u*) Blac. Com. 65 (*n*), 13th edit.; 1 Hawk. P. C. c. 5, s. 4; 1 East P. C. c. 1, s. 1, and see *Rex v. Sir Charles Sedley*, Sid. 168; 1 Keb. 620; and *Rex v. Crunden*, 2 Campb. 89. Cases of men indecently exposing their naked persons.

(*v*) *Reg. v. Holmes, Dears. C. C. R.* 207, and other cases, *post*, *Nuisance*.

(*w*) 2 Hawk. P. C. c. 25, s. 4, and see 1 Hawk. P. C. c. 22, s. 5, where it is laid down that every contempt of a statute is indictable. But it is questionable, where the party offending has been fined, if he may afterwards be indicted: and where a statute extends only to private persons, or chiefly relates to disputes of a private nature, it is said that offences against it will hardly bear an indictment: 2 Hawk. P. C. c. 25, s. 4.

(*x*) 2 Hawk. P. C. c. 25, s. 4.; *Rex v. Richards*, 8 T. R. 637. This distinction is stated also to have been taken in *Rex v. Bembridge & Powell* (cited in *Rex v. Southerton*, 6 East 136), who were indicted for enabling persons to pass their accounts with the Pay-office in such a way as to enable them to defraud the Government. It was objected, that this was only a private matter of account, and not indictable: but the Court held otherwise, as it related to the public revenue.

¹ Among many other acts which have been held indictable at common law in conformity to the principles stated in the text are: The exhibition of obscene pictures: *Comm. v. Sharpless*, 2 Serg. & R. 91; the utterance of obscene words in public: *Bell v. State*, 1 Swan 42; letting a house for purposes of prostitution: *Comm. v. Harrington*, 3 Pick. 26; *Smith v. State*, 6 Gill 425; casting a dead body into the river without the rites of sepulture: *Kanavan's case*, 1 Greenl. 226; repeated acts of open drunkenness: *Tipton v. State*, 2 Yerg. 542; *Hutchinson v. State*, 5 Humph. 142; *State v. Debosq*, 5 Ired. 371; throwing dead carcase into a well: *State v. Buckman*, 8 N. H. 203; keeping a large quantity of gunpowder: *People v. Sands*, 1 Johns. 78; going armed with unusual weapons: *State v. Huntley*, 3 Ired. 418; contra, *Simpson v. State*, 5 Yerg. 306; terrifying women: *Henderson's case*, 8 Grattan 708; *Comm. v. Taylor*, 5 Binn. 281; selling unwholesome meat: *Goodrich v. People*, 3 Parker C. R. 622; whatever amounts to a public wrong: *Resp v. Teischer*, 1 Dall. 335.

If a statute enjoin an act to be done without pointing out any mode of punishment, an indictment will lie for disobeying an injunction of the legislature: *Keller v. State*, 11 Md. 525; *Moon v. State*, 9 Yer. 353; *State v. Evans*, 7 Gill. & Johns. 290.

Acts of official misconduct by justices of the peace, done with corrupt motives, are

It is an indictable offence, in the nature of a misdemeanor, to refuse or neglect to provide sufficient food or other necessities for any infant of tender years, unable to provide for and take care of itself (whether such infant be child, apprentice, or servant), whom the party is obliged by duty or contract to provide for; so as thereby to injure its health.(y) Where an indictment stated that W., "an infant of tender years," was placed "under the care and control of" the prisoners as a servant, and that "it was their duty to supply her with sufficient food, &c., and also to permit her to have sufficient food, &c., and that they neglected to [81 supply her with sufficient food, &c., and refused to permit her to have sufficient food, &c.; whereby her health was injured. W. was between fourteen and seventeen years of age during the time of the ill-treatment alleged, and it did not appear that she was prevented from going out and complaining of the treatment she received. It was held, first, that W. was not an infant of tender years. A person of tender years is a person incapable of acting or judging for himself. And children of much earlier age may contract marriage and other relations, and are competent in law to act for themselves. Secondly, that the terms "under the care and control" of the prisoners meant under such control as to be prevented from acting for herself, and that this girl was a free agent; and, therefore, the indictment was not proved.(z)

In these cases it must be both alleged and proved that the health was injured. The indictment alleged that the prisoner was the mother, and had the care of an infant female child unable to support itself, and that it was the duty of the prisoner

(y) *Rex v. Friend and his Wife*, MS. Bayley, J., and R. & R. 20. *Chambre, J.*, differed, thinking it not an indictable offence, but a matter founded wholly on contract, in this which was the case of an apprentice. The indictment should state the infant was of tender years, and not able to provide for itself. And see *Rex v. Ridley*, 2 Campb. 650; *Rex v. Squire* and other cases, *post*, *Murder*. As to the neglect of paupers by overseers of the poor, see *post*, *Offences by persons in office*.

(z) Anonymous, 5 Cox C. C. 271, *Coleridge and Cresswell, JJ.* "If being of ordinary or even superior intellect and capacity, she was so under the control of the defendants, so impressed with fear either from being watched or being threatened, as to be unable to resort to the assistance of her natural defenders or of other persons, then a duty would devolve on the defendants greater than that arising from the civil contract:" per *Cresswell, J.*

indictable offences: *Wickersham v. People*, 1 Scam. 123; *State v. Johnson*, 1 Brevard 155; *People v. Coon*, 15 Wend.

When a public law imposes a public duty, the omission to perform the duty is indictable; but if it is not an absolute duty, but a conditional one, dependent upon the honest exercise of the judgment of the person or persons, to whom it is submitted, whether it is to be performed or not, the omission to perform it is not *per se*, an indictable offence: *State v. Williams*, 12 Ired. 172.

While it is true that every culpable neglect of duty, enjoined on a public officer, either by common law or by statute, is an indictable offence, yet the presentment in such case, unless the act of the officer is clearly illegal, must show with sufficient certainty, that it proceeded from corrupt or culpable motives: *State v. Buxton*, 2 Swan 57. Disobedience to an act of assembly is an indictable offence at common law: *Gearhart v. Dixon et al.*, 1 Barr 224. When the statute forbids the doing an act and prescribes a penalty recoverable by action, this excludes punishment by indictment: *State v. Mase*, 6 Humph. 17. Where the statute contains a general prohibitory clause, even if a specific remedy had been given by a subsequent clause, and no mention had been made of indictment, it may well be maintained that an indictment would lie for the misdemeanor contained in a violation of the prohibition: *State v. Thompson*, 2 Strob. 12. A person indicted for an offence created by statute cannot be convicted after a repeal of the statute, unless the repealing statute contains a saving clause, &c.: *Taylor v. State*, 7 Black. 93.

Solicitation to commit adultery is not indictable: *Smith v. Comm.*, 4 P. F. Smith 209; contra, *State v. Avery*, 7 Conn. 267; but solicitation of a witness not to attend a public prosecution is indictable: *State v. Keyes*, 8 Verm. 57; *State v. Carpenter*, 20 Ibid. 9; *Comm. v. Reynolds*, 14 Gray 87; words expressing a desire to fight with deadly weapons, may be so: *Comm. v. Tibbs*, 1 Dana 524; what are only private injuries are not indictable: *Comm. v. Warren*, 6 Mass. 72; *Comm. v. Kearney*, 1 Ibid. 137; *Comm. v. Morse*, 2 Ibid. 139; *Comm. v. Bangs*, 9 Ibid. 387; *Comm. v. Edwards*, 1 Ashm. 46; *People v. Jackson*, 3 Denio 101; *Illier v. Knight*, 4 Texas 312; *Wright v. People*, 1 Breese 66; *Lewis v. Comm.* 2 S. & R. 552; *Brown's case*, 3 Greenl. 177; *People v. Smith*, 5 Cowan 258; *State v. Wheeler*, 3 Verm. 344.

to support the child, but that the prisoner unlawfully neglected to support it, and unlawfully abandoned it without necessary food for a long space of time, whereby the child was greatly injured and weakened. The prisoner was the wife of a seaman, and received a portion of his pay, and was able to work and get her living if she chose; she left the child without food from Monday evening till Thursday morning, and but for the attention of a poor neighbor, the child must have suffered most severely, and might probably have died for want of food, and though it did suffer in some degree from want of food, it was not to any serious extent; and it was held that the conduct of the prisoner in absenting herself, irrespective of any actual injury to the child, was not a misdemeanor at common law, and therefore it was necessary to prove the averment that the child was greatly injured and weakened; and that the evidence that the child had suffered to some but not to any serious extent was not sufficient; as it did not show any injury to the health.^(a)

It has been laid down that it is the bounden duty of all persons having children of tender age, when they themselves cannot support them, to endeavor to obtain the means of getting them support; and if they wilfully abstain for several days from going to the union where they have by law a right to support, they are criminally responsible for the consequences ^(b)

An indictment alleged that the prisoner was a single woman and the mother of a child of very tender age and unable to provide for itself, and that it was the duty of the prisoner to provide food for the child, she "being able and having the means to perform her said duty," and that she unlawfully neglected to provide sufficient *82] food for the child, whereby its life was endangered. There was no evidence that the prisoner actually had the means of supporting the child; but it was proved that she could have applied to the relieving officer of the union, and, had she done so, she would have been entitled to and would have received relief for herself and the child adequate to their due support and maintenance, and that she had not made any such application; and it was held that there was no evidence that the prisoner had the means of maintaining the child, and therefore that allegation in the indictment was not proved.^(c)

But it is not an indictable offence for a brother to neglect to maintain another brother, even if he be an idiot, helpless, and an inmate of his house.^(d)

Where a count charged that B. S. was the illegitimate son of the prisoner, and that B. S. for a long space of time was of unsound intellect and incapable of taking care of himself, and during all that time had resided with the prisoner, who had sufficient means for the maintenance of herself and B. S.; whereupon it became the duty of the prisoner to take due and proper care of B. S., nevertheless the prisoner did not nor would take due and proper care of B. S., but on the contrary thereof during that time maliciously and unlawfully kept and confined B. S. in a dark cold and unwholesome room, and neglected to provide B. S. with proper clothing, and suffered the body of B. S. to be foul, &c., and divers large quantities of filth to collect in the said room and to cause noxious and unwholesome smells, and kept B. S. without sufficient and proper air, warmth, and exercise necessary for the health of B. S. The Court of Queen's Bench arrested the judgment, observing that "there was no averment that the lunatic was under the control of the prisoner, nor any alleged duty in her to take care of him shown. Again, even if such duty had been shown, acts of commission and omission were charged very likely to produce injury, but it was not alleged that injury was actually produced; and it is by no means a necessary consequence of such acts, nor was it alleged to have been the actual consequence of them, nor even to have continued so long that injury must, or probably would result. There was therefore nothing at most beyond a probable

(a) Reg. v. Phillpot, Dears. C. C. R. 179. See Reg. v. Cooper, 1 Den. C. C. 459, *post*; and Reg. v. Hogan, 2 Den. C. C. 277, *post*; and see now the 24 & 25 Vict. c. 100, s. 27, *post*.

(b) Per Erie, J. and Martin B.; Reg. v. Mabbet, 5 Cox C. C. 339, *post*, Murder.

(c) Reg. v. Chandler, Dears. C. C. R. 453.

(d) Rex v. Smith, 2 C. & P. 449 (12 E. C. L. R.), Burrough, J. See Reg. v. Marriott, 8 C. & P. 425 (34 E. C. L. R.), Patteson, J., *post*, Murder. A case of murder by confining an aged female, and not providing her with sufficient sustenance.

conjecture that the patient's suffering was at all connected with his mother's misconduct."^(e)

So where a count charged that the prisoner intending to injure B. S., being a person of unsound intellect and incapable of taking care of himself, *whilst* B. S. was under the care, custody and control of the prisoner, maliciously and unlawfully kept, confined and imprisoned B. S., &c.; the Court of Queen's Bench arrested the judgment for want of a positive averment that B. S. was under the care and control of the prisoner at the time she committed the acts alleged in the indictment. "They were all said to have been done *whilst* the unfortunate lunatic was under her care and control; but there was no averment that he ever was so."^(f)

*The 16 & 17 Vict. c. 96, s. 9, enacts that "if any superintendent, officer, nurse, attendant, servant or other person employed in any registered hospital or licensed house, or any person having the care or charge of any single patient, or any attendant of any single patient, in any way abuse or ill-treat or wilfully neglect any patient in such hospital, or house, or such single patient, or if any person detaining or taking or having the care or charge, or concerned or taking part in the custody, care, or treatment of any lunatic or person alleged to be a lunatic, in any way abuse or ill-treat or wilfully neglect such lunatic or alleged lunatic, he shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence or to forfeit for every such offence, on a summary conviction thereof before two justices, any sum not exceeding twenty pounds."

A person who has voluntarily taken upon himself the care of a lunatic brother in his own private house is a person "having the care and charge" of a lunatic within the 16 & 17 Vict. c. 96, s. 9, and is indictable for ill-treating him.^(ff)

The Criminal Lunatic Asylum Act, 23 & 24 Vict. c. 75, s. 13, enacts that "any superintendent, officer, nurse, attendant, servant, or other person employed in any asylum for criminal lunatics, who strikes, wounds, ill-treats, or wilfully neglects any person confined therein, shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, and, on conviction under the indictment, to fine or imprisonment, with or without hard labor, or to both fine and imprisonment at the discretion of the court, or to forfeit for every such offence, on summary conviction thereof before two justices, any sum not exceeding twenty pounds nor less than two pounds."

On an indictment under this clause it appeared that the prisoner and his wife were living together, and that she was a lunatic, and that he knew her to be so, and that during a considerable time he abused, ill-treated and neglected her, and it was held that the prisoner was not "a person having the care or charge" of a lunatic within this clause, which was not intended to apply to persons having a custody of a purely domestic character.^(g)

So long as an act rests in *bare intention*, it is not punishable: but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable.^(h)¹ Therefore an attempt to

(e) Reg. v. Pelham, 8 Q. B. 959 (55 E. C. L. R.).

(f) Reg. v. Pelham, *supra*. In *Urmston v. Newcoman*, 4 A. & E. 899 (31 E. C. L. R.), in answer to a remark by counsel, that, "by the common law if a child perish for want of proper care, it is murder in the party neglecting it," Lord Denman, C. J., said "if the person has the actual custody," and Patteson, J., added "or the child be part of his family." And as a person incapable of taking care of himself through imbecility of mind, is in contemplation of law in the same situation as an infant (*Rex v. Much Cowarne*, 2 B. & Ad. 861), it should seem that if a person, who is the parent, or has the actual custody of a lunatic, neglects to provide for such lunatic, though more than twenty-one years of age, whereby his health is injured, such person would be indictable in the same manner as if the lunatic were a child of such tender years as to be unable to provide for and take care of itself. See *Rex v. Friend*, *supra*. C. S. G.

(ff) Reg. v. Porter, L. & C. 394.

(g) Reg. v. Rundle, Dears. C. C. 482.

(h) Per Lord Mansfield, C. J., in *Schofield's case*, Cald. 397. The ancient writers, in

¹ A party is liable for a wrongful act, where there exists a criminal intent, although the

commit a felony is, in many cases, a misdemeanor.⁽ⁱ⁾ Thus abandoning a child without food with intent that it may die, is indictable,^(k) and an attempt to commit even a misdemeanor has been decided in many cases to be itself a misdemeanor.^(l) Thus *if a party makes a false oath before a surrogate to procure a marriage license, that is an act done and a misdemeanor.^(m) And the mere *soliciting* another to commit a felony is a sufficient act or attempt to constitute the misdemeanor. Thus, to solicit a servant to steal his master's goods, is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting.⁽ⁿ⁾ It was held not to be necessary, in order to show that this was only a misdemeanor to negative the commission of the felony; as none of the precedents of indictments for attempts to commit rape or robbery contain any such negative averment: but it is left to the defendant to show, if he please, that the misdemeanor was merged in the greater offence. But a person cannot be guilty of inciting another to commit a felony unless the party incited knows that the act intended is a felony.^(o) And it has been held, that the completion of an act, criminal in itself, is not necessary to constitute criminality.^(p) An attempt to commit a statutable misdemeanor, is as much indictable as an attempt to commit a common law misdemeanor.^(q) for when an offence is made a misdemeanor by statute, it is made so for all purposes.^(r) And the general rule is, that "an attempt to commit a misdemeanor is a misdemeanor, whether the offence is created by statute, or was an offence at common law."^(s)

treating of felonious homicide, considered the felonious intention in the same light in point of guilt as homicide itself. *Voluntas reputabatur pro facto*; a rule which has long been laid aside as too rigorous in the case of common persons, though retained in the statute of Treasons, 25 Ed. 3, st. 5, c. 2. But when the rule prevailed, it was necessary that the intention should be manifested by plain facts, not by bare words of any kind. *Hæc voluntas non intellecta fuit de voluntate nudis verbis aut scriptis propalata, sed mundo manifesta fuit per apertum factum*: 3 Inst. 5; Fost. 193.

(i) Higgins's case, 2 East R. 21; Rex v. Kinnersley & Moore, 1 Str. 196. But in 1 Hawk. P. C. c. 25, s. 3, is the following passage: "The bare intention to commit a felony is so very criminal, that at the common law it was punishable as felony where it missed its effect through some accident, no way lessening the guilt of the offender. But it seems agreed at this day, that felony shall not be imputed to a bare intention to commit it; yet it is certain that the party may be very severely fined for such intention." Probably the latter part of this passage was intended to relate to an intention manifested by some act. And see 1 Hawk. P. C. c. 55.

(k) Reg. v. Renshaw, 2 Cox C. C. 285.

(l) Per Grose, J., in Higgins's case, 2 East R. 8; and see Rex v. Phillips, 6 East 464, where an *endeavor* to provoke another to commit the misdemeanor of sending a challenge to fight, was held to be an indictable misdemeanor. And by Lawrence, J., in Higgins's case, "all such acts or attempts as tend to the prejudice of the community are indictable."

(m) Reg. v. Chapman, 1 Den. C. C. 432; 2 C. & K. 857.

(n) Higgins's case, 2 East R. 5, in which see many cases cited, where attempts to commit felonies and misdemeanors have been considered as misdemeanors.

(o) Reg. v. Welham, 1 Cox C. C. 192, Parke, B. and Patteson, J. *Sed quære*, for how can the guilt of the inciter depend on the state of mind of the incited? The inciting and the intention of the inciter constitute the offence. C. S. G.

(p) By Lord Mansfield, in Rex v. Schofield, Cald. 400.

(q) Rex v. Butler, 6 C. & P. 368 (25 E. C. L. R.), Patteson, J.; Rex v. Roderick, 7 C. & P. 795 (32 E. C. L. R.), Parke, B.; Le Blanc, J., in Rex v. Cartwright, East. T. 1806, Russ. & Ry. 107; but it seems the judges did not go into the point, as they decided that the paper by the production of which the defendant had attempted to obtain money at a banker's, and which was stated to be an order, was really no order: MS. Bayley, J.

(r) Parke, B., Rex v. Roderick, *supra*.

(s) Per Parke, B., *Ibid.*; Reg. v. Chapman, 1 Den. C. C. 432; 2 C. & K. 857 (61 E. C. L. R.).

act done is not that which was intended: State v. Ruhl, 8 Clarke 447. When a person is knowingly engaged in a criminal act, and commits a greater offence than the one intended, proof of an intent to commit the greater offence is not essential to a conviction for that offence; and this rule applies not merely to crimes which are *mala in se*, but to those which are *mala prohibita*: State v. Stanton, 37 Conn. 421. When the declaration and the act done are inconsistent, the intention is to be gathered from the act: State v. Shelledy, 8 Clarke 477. When the present ability to commit a felonious intent is wanting, he offence is not complete: State v. Swaits, 8 Ind. 524.

But an act is not indictable as an attempt to commit an offence, unless it is an act directly approximating to the commission of that offence.^(t) In many cases, however, acts in furtherance of a criminal purpose may be sufficiently proximate to an offence, and may sufficiently show a criminal intent to support an indictment for a misdemeanor, although they may not be sufficiently proximate to the offence to support an indictment for an attempt to commit it; as where a prisoner procures dies for the purpose of making counterfeit foreign coin,^(u) or where a person gives poison to another, and endeavors to procure that person to administer it.^(v)

The prisoner was indicted for attempting to commit a certain felony, that is to say, he did put one of his hands into the pocket of a certain woman whose name was unknown, with intent the property of the said woman in the said pocket then being to steal, &c. It was proved that the prisoner put his hand into the pocket of a lady, who said that she had lost nothing, but she did not appear as a witness. It was contended that to put a hand into an empty pocket was not an attempt to commit a felony; and, on a case reserved, Cockburn, C. J., after argument, said, "We are of opinion that this conviction cannot be supported, and in so holding it is necessary to observe that, from the case submitted to us, the question of whether there was anything in the pocket of the woman which might have been the subject of larceny, if the prisoner had not been interrupted, does not appear to have been left to the jury. The question we are asked seems to be whether an attempt at larceny can be committed by a person putting his hand into another's pocket for the purpose of committing a larceny, there being at the time nothing in the pocket. Now, we are far from saying that if the question, whether there was anything in the pocket, had been laid before the jury, there was not evidence upon which they might have found in the affirmative; but that question not having been put, we are of opinion that, assuming the fact to be that there was nothing in the pocket of the woman, the offence could not be committed. The question might have been submitted to the jury, and they might have found that there was something in the woman's pocket, but, that not having been done, the conviction cannot be sustained."^(vv) During the argument Crompton, J., said, "It is important to notice how the indictment is framed. The prisoners are charged with putting their hands into the pocket 'with intent the property of the said woman in the said gown pocket then being from the person of the said woman to steal.' As the putting a hand into a pocket with intent to steal is clearly an act accompanied by a criminal intent, though there be nothing in the pocket, it is a common law misdemeanor, and a count should in cases of this kind be framed to meet this view of the case."

Upon the same principles some earlier cases appear to have proceeded. Thus, it was held indictable to attempt to bribe a cabinet minister and a member of the privy council to give the defendant an office in the colonies.^(w) And an information was *granted against a man for promising money to a member of a corporation, to induce him to vote for the election of a mayor;^(x) an information also appears to have been exhibited against a person for attempting by bribery to influence a juryman in giving his verdict.^(y) And it is laid down generally, that if a party offers a bribe to a judge, meaning to corrupt him in the cause depending before him, and the judge takes it not, yet this is an offence punishable by law in the party that offers it.^(z) And an attempt to suborn a person to com-

(t) Reg. v. Eagleton, Dears. C. C. 515; Reg. v. Roberts, Ibid. 539.

(u) Reg. v. Roberts, *supra*.

(v) Reg. v. Williams mentioned in Reg. v. Eagleton, Dears. C. C. 547.

(vv) Reg. v. Collins, L. & C. 471.

(w) Vaughan's case, 4 Burr. 2494; and see Rex v. Pollman and others, 2 Campb. 229, where a conspiracy to obtain money, by procuring from the Lords of the Treasury the appointment of a person to an office in the Customs, was held to be a misdemeanor at common law.

(x) Plympton's case, 2 Lord Raym. 1377.

(y) Young's case, cited in Higgins's case, 2 East R. 14, 16.

(z) 3 Inst. 147; and see Rex v. Cassano, 5 Esp. 231, an information for attempting to bribe an officer of the Customs.

mit perjury, upon a reference to the judges, was unanimously holden by them to be a misdemeanor.^(a)

Where the defendant was indicted for having coining instruments in his custody, with *intent* to coin half guineas, shillings, and sixpences, and to utter them as and for the current coin, Lord Hardwicke doubted what the offence was. But the Court of King's Bench held the offence to be a misdemeanor; Lee, C. J., saying, that "all that was necessary in such a case was an act charged, and a criminal intention joined to that act."^(b) But though this doctrine be correct, it does not appear to have been applicable to the facts of the case as charged, which did not amount to a criminal *act* by the defendant. And this case was considered untenable in a case, in which it was holden that having counterfeit silver in possession with intent to utter it as good is no offence, there being no criminal act done. The prisoner had been found guilty of unlawfully having in his possession counterfeit silver coin with intent to utter it as good: but the judges were of opinion that there must be some *act* done to constitute a crime, and that the having in possession only was not an act.^(c) And this distinction was acted upon in a case where some counts charged the prisoner with preserving and keeping in his possession obscene prints, with intent unlawfully to utter the same, and others charged the prisoner with obtaining and procuring obscene prints with a like intent; and it was held that the former counts were bad, for they were consistent with the possibility that the prisoner might have originally had the prints in his possession with an innocent intention, and there was no act shown to be done which could be considered as the first step in the commission of a misdemeanor; but that the latter *86] counts were good, for the procuring of such prints was an act done *in the commencement of a misdemeanor.^(d) But the having a large quantity of counterfeit coin in possession, under suspicious circumstances and unaccounted for, is evidence of having procured it with intent to utter it as good, which is clearly a criminal *act* punishable as a misdemeanor. Thus upon an indictment for procuring counterfeit shillings with intent to utter them as good, the evidence was that two parcels were found upon the prisoner, containing about twenty shillings each, wrapped up in soft paper, to prevent their rubbing, and there was nothing to induce a suspicion that the prisoner had coined them; and the judges were of opinion unanimously, that procuring with an intent to utter was an offence, and that the having in possession unaccounted for, and without any circumstances to induce a belief that the prisoner was the maker, was evidence of procuring.^(e) But the effect of such evidence would be removed by circumstances sufficient to induce a suspicion that the prisoner was the maker of the coin found in his possession; and, upon the argument in the last case, Thomson, C. B., mentioned a case where he had directed an acquittal, because, from certain powder found upon the

(a) Anon., before Adams, B., at Shrewsbury, cited in Schofield's case, Cald. 400, and in Higgins's case, 2 East R. 14, 17, 22. This case is probably the same as Rex v. Edwards, MS. Sum. tit. Perjury.

(b) Sutton's case, Rep. temp. Hardw. 370; 2 Str. 1074. In this case there were cited, in support of the prosecution, a case of a conviction of three persons for having in their custody divers picklock keys *with intent* to break houses, and steal goods: Rex v. Lee and others, Old Bailey, 1689; and a case of an indictment for making coining instruments, and having them in possession *with intent* to make counterfeit money: Brandon's case, Old Bailey, 1698; and also a case where the party was indicted for buying counterfeit shillings with an intent to utter them in payment: Cox's case, Old Bailey, 1690. See *post*, as to the unlawful possession of coining implements.

(c) Rex v. Stewart, Mich. T. 1814, R. & R. 288; s. p. Rex v. Heath, East. T. 1810; R. & R. 184. See 24 & 25 Vict. c. 99, s. 11, as to this offence.

(d) Reg. v. Dugdale, 1 E. & B. 435 (72 E. C. L. R.); Dears. C. C. R. 64.

(e) Rex v. Fuller & Robinson, East. T. 1816, MS. Bayley, J., R. & R. 308. See Reg. v. Jarvis, Dears. C. C. 552, *post*, Coin. In the marginal note to Parker's case, 1 Leach 41, it is stated, that having the possession of counterfeit money with intention to pay it away as and for good money, is an indictable offence at common law. This may be criminal in some cases of such possession as we have seen above; but, *quære*, if the point, as stated in the marginal note, was actually decided in Parker's case.

¹ Miller v. People, 2 Scamm. 235; Sutton v. State, 9 Ohio 133.

prisoner, there was a presumption that he was the maker of the coin.(f) Upon an indictment for procuring counterfeit money with intent to utter it, the uttering the money, knowing it to be counterfeit, is evidence that it was procured with that intent.(g)

With respect to persons having implements for house-breaking, &c., in their possession with a *felonious intent*, the Legislature has made some provisions. The 5 Geo. 4, c. 83, s. 4, made persons having in their possession implements of house-breaking or weapons with intent to commit any felonious act, liable to be summarily convicted; and the 24 & 25 Vict. c. 96, s. 58, makes persons armed with offensive weapons, or in possession of implements of house-breaking, guilty of a misdemeanor. And in some instances an act, accompanied with a certain intent, has been made a felony by particular statutes; as by the 24 & 25 Vict. c. 96, s. 38, the severing with intent to steal the ore of any metal, or any coal, &c., from any mine, bed or vein thereof, is made felony punishable by two years imprisonment. And by the 24 & 25 Vict. c. 97, s. 14, the damaging certain articles in a course of manufacture, with intent to destroy them, and the entering certain places with intent to commit such offence, is made felony punishable by penal servitude for life or imprisonment, &c.

Where an offence is not so at common law, but *made an offence* by Act of Parliament, an indictment will lie where there is a substantive prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given.(h) *Thus, an unqualified person may be indicted for acting as an attorney contrary to the 6 & 7 Vict. c. 73, s. 2, although sec. 35 and sec. 36 enact, that in [*87 case any person shall so act he shall be incapable of recovering his fees, and such offence shall be deemed a contempt of court and punishable accordingly.(i) And it is stated as an established principle that when a new offence is created by an Act of Parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty; but he may proceed on the prior clause, on the ground of its being a misdemeanor.(k) And wherever a statute *forbids* the doing of a thing, the doing it wilfully, although without any corrupt motive, is indictable.(l) Thus, under the 3 & 4 Vict. c. 95, s. 15, which makes it a misdemeanor if any person "shall wilfully do, or cause to be done, anything in such a manner as to obstruct any engine or carriage using any railway," Maule, J., held, that if a person designedly placed on a railway substances having a tendency to produce an obstruction, he was within the Act, and that it was not necessary that he should have placed them there expressly with the view to obstruct an engine.(m) If a statute *enjoin* an act to be done, without pointing out

(f) Fuller & Robinson's case, *supra*.

(g) Brown's case, 1 Lew. 42, Holroyd, J. It is said the learned judge seemed to consider a procurement elsewhere, with intent to utter, a continuing procurement in the county where the uttering took place.

(h) Rex v. Wright, 1 Burr. 543; Rex v. Gregory, 5 B. & Ad. 555 (27 E. C. L. R.); 2 N. & M. 478; Reg. v. Crossley, 10 A. & E. 132 (37 E. C. L. R.).

(i) Reg. v. Buchanan, 8 Q. B. 883 (55 E. C. L. R.).

(k) By Ashurst, J., in Rex v. Harris, 4 T. R. 205. And this principle has been held to apply, where the clause annexing the penalty was in the same section of the statute. Thus the repealed clause, 5 Eliz. c. 4, s. 31, enacted, "that it shall not be lawful to any person to set up, &c., any craft, mystery, &c., except he shall have been brought up therein seven years as an apprentice," &c., upon pain that every person willingly offending or doing the contrary forfeit for every default forty shillings for every month; and the method of proceeding upon this statute was either by information *qui tam* in the court of oyer and terminer or sessions of the county, &c., where the offence was committed, to recover the penalty, or by indictment in those courts. See the cases collected in the note to Rex v. Kilderby, 1 Saund. 312 a. But it should be observed that a subsequent section (39) gave authority to proceed by indictment, or by information, &c.

(l) Rex v. Sainsbury, 4 T. R. 457, where it was held to be a misdemeanor in magistrates to grant an ale license where they had no jurisdiction. See Reg. v. Nott, 4 Q. B. 768 (45 E. C. L. R.), where Lord Denman, C. J., said, "If the statute in terms create an offence all persons are bound to know it. But if a statute enacts something without in terms making it an offence, and you would convict a person of misdemeanor in having disobeyed such an enactment, are you not bound to show that the disobedience was wilful, and in the nature of contempt?"

(m) Reg. v. Holroyd, 2 M. & Rob. 339; and see Jones v. Taylor, 1 E. & E. 20 (102 E. C.

any mode of punishment, an indictment will lie for disobeying the injunction of the Legislature.⁽ⁿ⁾ Thus, the father of a child is indictable if, being requested by the registrar within forty-two days of its birth so to do, he wilfully refuse to inform the registrar of the particulars required by the Act to be registered touching the birth, contrary to the 6 & 7 Will. 4, c. 86, s. 20.^(o) And this mode of proceeding in such case is not taken away by a subsequent statute pointing out a particular mode of punishment for such disobedience.^(p) Where the same statute which enjoins an act to be done contains also an enactment providing for a particular mode of proceeding, as commitment, in case of neglect or refusal, it has *88] been doubted whether an indictment *will lie.^(q) But where a statute only adds a further penalty to an offence prohibited by the common law, there is no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law.^(r) Where a statute makes that felony which before was a misdemeanor only, the misdemeanor is merged, and there can be no prosecution afterwards for the misdemeanor;^(rr) but if it gives a new punishment or new mode of proceeding for what before was a misdemeanor, without altering the class or character of the offence, the new punishment or new mode of proceeding is cumulative only, and the offender may be proceeded against as before for the common law misdemeanor. Therefore, notwithstanding the provisions of 9 & 10 Will. 3, c. 32, against blasphemy, it was held that a blasphemous libel might be prosecuted as a common law offence.^(s) It may be observed also, that it is an offence at common law to obstruct the execution of powers granted by statute.^(t) But where a public Act regulates rights which are merely private, an indictment will not lie for the infringement of those rights: as, if a statute empowers the setting out of private roads and the directing their repairs, an indictment does not lie for not repairing them.^(u)

Where the statute making a new offence only inflicts a forfeiture and specifies the remedy, an indictment will not lie.^(v) The true rule is stated to be this: Where the offence is punishable by a common law proceeding, *before* the passing of a statute which prescribes a particular remedy by a summary proceeding, then either method may be pursued, as the particular remedy is *cumulative*, and does not exclude the common law punishment; but where the statute creates a new offence by prohibiting and making unlawful anything which was lawful before, and appoints a particular remedy against such new offence by a particular sanction and particular method of proceeding, such method of proceeding must be pursued and no other.^(w) The mention of other methods of proceeding impliedly excludes that of indictment;^(x) unless such methods of proceeding are given by a separate

L. R.), as to the meaning of the words "*wilfully* trespass upon any railway" in the 3 & 4 Vict. c. 97, s. 16.

(n) *Rex v. Davis*, Say. 133.

(o) *Reg. v. Price*, 11 A. & E. 727 (39 E. C. L. R.).

(p) *Rex v. Boyal*, 2 Burr. 832; *Rex v. Balme*, Cowp. 648, cited in the notes to 2 Hawk. P. C. c. 25, s. 4. And, generally speaking, the Court of King's Bench cannot be ousted of its jurisdiction but by express words, or by necessary implication. By Ashurst, J., in *Cates v. Knight*, 3 T. R. 445.

(q) *Rex v. Cummings* and another, 5 Mod. 179; *Rex v. King*, 2 Str. 1268: Cases of indictments against overseers for neglecting to account, and for not paying over the balance within the time limited by the statute. But see the authorities: and, in 2 Nol. P. L. 453, it is stated that an indictment will lie in these cases, though the statute provides another remedy by commitment. See cases there cited.

(r) 2 Hawk. P. C. c. 25, s. 4; *Rex v. Wigg*, Lord Raym. 1163; 2 Salk. 460. And see the cases collected in *Rex v. Dickenson*, 1 Saund. 135 a, note (4).

(rr) But see now the 14 & 15 Vict. c. 100, s. xii.

(s) *Rex v. Carlisle*, 3 B. & A. 161, 164 (5 E. C. L. R.).

(t) *Rex v. Smith* and others, Dougl. 441. And an indictment for such offence need not, and ought not, to conclude *contra formam statuti*.

(u) *Rex v. Richards*, 8 T. R. 637.

(v) *Rex v. Wright*, 1 Burr. 543; *Rex v. Douse*, 1 Lord Raym. 672.

(w) *Rex v. Robinson*, 2 Burr. 805; *Rex v. Carlisle*, 3 B. & A. 163 (5 E. C. L. R.); *Rex v. Boyal*, 2 Burr. 832. See also *Hartley v. Hooker*, Cowp. 524; *Rex v. Wright*, 1 Burr. 543; *Rex v. Balme*, Cowp. 650. And see *Faulkner's case*, 1 Saund. 250, note (3).

(x) 2 Hawk. c. 25, s. 4.

and substantive clause.(y) Thus it has been held,(z) and seems now to be settled,(a) that where a statute making a new offence, not prohibited by the common law, appoints in the same clause a particular manner of proceeding against the offender, as by commitment or action of debt or information, without mentioning an indictment, no indictment can be maintained. By 21 Hen. 8, c. 13, s. 1, no spiritual person shall take land to farm on pain to *forfeit £10 per month; [*89 and it was decided on this statute, that as the clause prohibiting the act specified the punishment, the defendant was not liable to be indicted.(b) And it was held not to be an indictable offence to keep an alehouse without a license, because a particular punishment, namely, that the party be committed by two justices, was provided by the statute.(c) And an indictment for assaulting and beating a custom-house officer in the execution of his office was quashed, because the 13 & 14 Car. 2, c. 11, s. 6, appointed a particular mode of punishment for that offence.(d) So an indictment for killing a hare was quashed, on the ground that it was not indictable; the 5 Anne, c. 14, having appointed a summary mode of proceeding before justices.(e) In one case, where no appropriation of the penalty, nor mode of recovering it, was pointed out by the statute, the Court held that it could not be recovered by indictment; but it was in the nature of a debt to the Crown, and suable for in a Court of revenue only.(f)

Amongst other decisions as to cases which cannot be made the subject of indictment, it appears to have been ruled that an indictment will not lie for setting a person on the footway in a street to distribute handbills, whereby the footway was impeded and obstructed;(g) nor for throwing down skins into a public way, by which a personal injury is accidentally occasioned;(h) nor for acting, not being qualified, as a justice of peace;(i) nor for selling short measure;(k) nor for excluding commoners by enclosing;(l) nor for an attempt to defraud, if neither by false tokens or conspiracy;(m) nor for secreting

(y) *Anle*, p. 86.

(z) *Glass's case*, 3 Salk. 350.

(a) 2 Hawk. c. 25, s. 4.

(b) *Rex v. Wright*, 1 Burr. 543.

(c) *Anon.*, 3 Salk. 25; s. p. *Watson's case*, 1 Salk. 45; and *Rex v. Edwards*, 3 Salk. 27. And see *Faulkner's case*, 1 Saund. 248, and Mr. Serj. Williams's note (3) at page 250 c.

(d) *Anon.*, 2 Lord Raym. 991; 3 Salk. 189. So an indictment for keeping an alehouse was quashed, because the 3 Car. 1. c. 3, had directed a particular remedy: *Rex v. James*, cited in *Rex v. Buck*, 1 Stra. 679.

(e) *Rex v. Buck*, 1 Stra. 679.

(f) *Rex v. Malland*, 2 Stra. 828, a case upon the 12 Geo. 1, c. 25, which imposes a penalty of twenty shillings per thousand for burning place bricks and stock bricks together.

(g) *Rex v. Sermon*, 1 Burr. 516. But it was held by Lord Ellenborough that every unauthorized obstruction of a highway, to the annoyance of the King's subjects, is an indictable offence, in *Rex v. Cross*, 3 Campb. 227, where it was held to be an indictable offence for stage coaches to stand plying for passengers in the public streets.

(h) *Rex v. Gill*, 1 Stra. 190.

(i) *Castle's case*, Cro. Jac. 643.

(k) *Rex v. Osborn*, 3 Burr. 1697; but selling by false measure is indictable: *Ibid.*

(l) *Willoughby's case*, Cro. Eliz. 90.

(m) *Rex v. Channell*, 2 Stra. 793. Indictment against a miller for taking and detaining part of the corn sent to him; and *Rex v. Bryan*, 2 Stra. 866; *Anon.*, 6 Mod. 105; *Rex v. Wheatley*, 2 Burr. 1125; *Rex v. Wilders*, cited 2 Burr. 1128; and *Rex v. Haynes*, 4 M. & S. 214. This last case was an indictment against a miller, for receiving good barley, to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome. On the part of the prosecution, a note in 1 Hawk. P. C. c. 71, s. 1, referring to 1 Sess. Ca. 217, was cited, where it is laid down, "that changing corn by a miller, and returning bad corn instead of it, is punishable by indictment; for, being in the way of trade, it is deemed an offence against the public:" but it was held that the indictment would not lie. Lord Ellenborough, in giving judgment, said, that if the allegation had been that the miller delivered the mixture as an article for the food of man, it might possibly have sustained the indictment, but that he could not say that its being musty and unwholesome necessarily and *ex vi terminis* imported that it was for the food of man; and it was not stated that it was to be used for the sustentation of man, but only that it was a mixture of oat and barley meal. His Lordship then proceeds: "As to the other point, that this is not an indictable offence, because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit, if the case had been that this miller was owner of a soke-mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that the miller, abusing the confidence of this his situation, had made it a color for practising a fraud, this might have

*90] *another;(n) nor for bringing a bastard child into a parish;(o) nor for entertaining idle and vagrant persons in the defendant's house;(p) nor for keeping a house to receive women with child, and deliver them.(q)

Where an indictment charged that the prisoner contriving to injure the inhabitants of the parish of Barking, and unjustly to burthen the said parish with the charge and maintenance of a female child of very tender age, unlawfully did take the said child into the said parish, and there in a certain open highway unlawfully did leave and desert the said child contrary to her duty in that behalf, the said child being unable to take care of herself; after a verdict of guilty, the indictment was held to disclose no offence, as it did not allege that the child was settled elsewhere than in Barking.(r) So where an indictment alleged that the prisoner contriving to injure the inhabitants of the parish of Bathwicke, and unjustly to burthen them with the maintenance of her bastard child, being of very tender age and unable to move or walk, unlawfully did abandon the said child in the said parish without having provided any means for the support of the said child, the said child not being settled in the said parish; it was held that the indictment was bad, because the mere abandonment, the possible consequence of which might be to injure the parish, was not an indictable offence.(s)

Where an indictment stated that the prisoner intending to burthen the inhabitants of a parish with the maintenance of her *bastard child abandoned the said child in the said parish, and it appeared that the prisoner left the child in a dry ditch in a field in the parish; there was a pathway in the field by the ditch, and a lane separated from the ditch by a hedge, neither of which was much frequented; Parke, B., held that there was no ground for imputing any intention to burthen the parish, as it was not placed in a position where it was likely to come to the knowledge of the officers of the parish.(t)

It has been held that administering a poisonous ingredient with intent to hurt and damage the body, and whereby sickness and disorder of the body is caused, is not indictable.(u)

presented a different aspect; but as it now is, it seems to be no more than the case of a common tradesman, who is guilty of a fraud in a matter of trade or dealing; such as is adverted to in *Rex v. Wheatley*, and the other cases as not being indictable." And see also *Rex v. Bower*, Cowp. 323, as to the point that for an imposition, which a man's own prudence ought to guard him against, an indictment does not lie, but he is left to his civil remedy. But in *Rex v. Dixon*, 3 M. & S. 11, it was held, that a baker who sells bread containing alum, in a shape which renders it noxious, is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in the manner which would have rendered it harmless. See *post*, p. 168.

(n) *Rex v. Chaundler*, 2 Lord Raym. 1368: an indictment for secreting A, who was with child by the defendant, to hinder her evidence, and to elude the execution of the law for the crime aforesaid. But *qu.*

(o) *Rex v. Warne*, 1 Stra. 644, it appearing that the parish could not be burthened, the child being born out of it. But see a precedent of an indictment for a misdemeanor at common law, in lodging an inmate who was delivered of a bastard child, which became chargeable to the liberty: 2 Chit. Crim. Law, 700. And see also *id.* 699, and 4 Wentw. 353. Cro. Circ. Comp. (7th edit.) 648, precedents of indictments for misdemeanors at common law, in bringing such persons into parishes in which they had no settlements, and in which they shortly died, whereby the parishioners were put to expense. In a late case it is stated to have been held, that no indictment will lie for procuring the marriage of a female pauper with a laboring man of another parish, who is not actually chargeable: *Rex v. Tanner and Another*, 1 Esp. 304. But if the facts of the case will warrant a charge of conspiracy, the offence would be substantiated, if under the circumstances the parish might possibly be put to expense. See 1 Nol. P. L. Settlement by Marriage, Sec. I. in the notes; *Rex v. Seward*, 1 A. & E. 706 (28 E. C. L. R.); 3 N. & M. 557.

(p) *Rex v. Langley*, 1 Lord Raym. 790.

(q) *Rex v. Macdonald*, 2 Burr. 1646.

(r) *Reg. v. Cooper*, 1 Den. C. C. 459; 2 C. & K. 876. The indictment was also held bad, because it did not allege that the prisoner injured the child, or that it received any damage or was likely so to do. See now the 24 & 25 Vict. c. 100, s. 27, *post*, as to abandoning children.

(s) *Reg. v. Hogan*, 2 Den. C. C. 277. The indictment was also held bad, because it did not allege that the child suffered any injury.

(t) *Reg. v. Renshaw*, 2 Cox C. C. 285.

(u) *Reg. v. Hanson*, 2 C. & K. 912 (61 E. C. L. R.), Williams and Cresswell, JJ. This case would fall within the 24 & 25 Vict. c. 100, s. 24, *post*.

Cases of *non-feasance* and *particular wrong* done to another are not in general the subject of indictment: and it has been doubted whether a clergyman is indictable for refusing to marry persons who were lawfully entitled to be married; (v) but we have seen that circumstances may exist of mere *non-feasance* towards a child of tender years (such as the neglect or refusal of a master to provide sufficient food and sustenance for such a child, being his servant and under his dominion and control), which may amount to an indictable offence. (w)

It has been held, that where a mayor of a city, being a justice, made an order that a company in the city should admit one to be a freeman of that corporation, and the master of the company, being served with the order, refused to obey it, such refusal was not the subject of indictment. (x) And an indictment will not lie for not curing a person of a disease according to promise, for it is not a public offence, and no more in effect than a ground for an action on the case. (y) To keep an open shop in a city, not being free of the city, contrary to the immemorial custom there, has been held not to be indictable. (z)

With regard to *trespasses*, it has been held that a mere act of trespass (such as entering a yard and digging the ground, and erecting a shed or cutting a stable) committed by one person, unaccompanied by any circumstances constituting a breach of the peace, is not indictable; and the court quashed such indictment on motion. (a) And an indictment against one person for pulling off the thatch off a man's house, who was in the peaceable possession of it, was also quashed on motion. (b) So an indictment for taking away chattels must import that such a degree of force was used as made the taking an offence against the public. An indictment averred that the defendant with force and arms unlawfully, forcibly, and injuriously seized, took, and carried away, of and from J. S., and against his will, a paper-writing purporting to be a warrant to apprehend the defendant for forgery; and, after a conviction, a motion was made in arrest of judgment on the ground that the charge did not amount to an indictable offence. *Perryn, B.*, took time to consider until the subsequent assizes, and had the case argued before him; and then held the objection valid, as the indictment charged nothing but a mere private trespass, and neither the King nor the public appeared to have any interest therein. (c)

But where the indictment stated the entering a dwelling-house, and *vi et armis* and with strong hand turning out the prosecutor, the Court refused to quash it. (d) And an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace: (e) and though such goods are the prosecutor's own property, yet, if he take them in that manner, he will be guilty. (f)

With regard to the punishment of misdemeanors, it may be laid down as a general rule that all those offences less than felony, which exist at common law, and have not been regulated by any particular statute, are within the discretion of the Court to punish. (g) Fine and imprisonment appear to be the most ordinary judgments in cases of misdemeanor; but a fine cannot be imposed on a married woman, as she has nothing to pay the fine with. (h) The pillory was also a common punishment in these cases; but it was abolished by the 1 Vict. c. 23 and the 56 Geo. 3, c. 128; which by sec. 2 empowers the Court to pass such sentence of fine or imprisonment, or of both, in lieu of a sentence of pillory, as to the Court shall

(v) *Reg. v. James*, 2 Den. C. C. 1. The point was not decided, as there had been no sufficient demand to marry.

(w) *Ante*, p. 80.

(x) *Rex v. Atkinson*, 3 Salk. 188.

(y) *Rex v. Bradford*, 1 Lord Raym. 366; 3 Salk. 189. In an *Anon.* case, 2 Salk. 522, it appears to have been held, that if a pawnbroker refuses, upon tender of the money, to deliver the goods pledged, he may be indicted. But *Rex v. Jones*, 1 Salk. 379, is *contra*.

(z) *Rex v. George*, 3 Salk. 188. Nor is it an indictable offence to exercise trade in a borough contrary to the by-laws of that borough: *Rex v. Sharpless*, 4 T. R. 777.

(a) *Rex v. Storr*, 3 Burr. 1699.

(b) *Rex v. Atkins*, 3 Burr. 1706.

(c) *Rex v. Gardiner*, Salisbury, 1780, MS. Bayley, J.

(e) *Anon.*, 3 Salk. 187.

(d) *Rex v. Storr*, 3 Burr. 1699.

(f) *Ibid.* See *Blades v. Higgs*, 10 C. B. (N. S.) 713; 12 C. B. (N. S.) 501 (104 E. C. L. R.).

(g) 1 Ch. Cr. L. 710; *Rex v. Thomas*, C. T. H. 278.

(h) *Rex v. Thomas*, *supra*.

seem proper. Whipping also was ordinarily awarded in former times, but of later years it seems never to have been adjudged. In all cases of misdemeanor, in addition to any punishment that may be awarded, the court may require the defendant to find sureties to keep the peace and be of good behavior,⁽ⁱ⁾ and even a married woman may be required to find such sureties.^(k) But she cannot herself be bound by recognizance, because being a feme covert she cannot enter into it.^(l)

Where no particular punishment is prescribed by any statute for any felony, it is punishable under the 7 & 8 Geo. 4, c. 28, s. 8.^(m)

As questions occasionally arise as to the effect of the repeal of statutes creating offences, it may be well to notice this subject. "It has been long established that when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed."⁽ⁿ⁾ Where, therefore, a justice of the peace, under the 13 Geo. 3, c. 78, s. 24, presented the *inhabitant^{*93} of a parish for the non-repair of a highway, and the proceedings were removed into the Court of Queen's Bench, and the defendants pleaded, and issues of fact were joined, and a verdict found against the defendants, and the issues had been joined before, but tried after, the day on which the 5 & 6 Will. 4, c. 50, repealing the 13 Geo. 3, c. 78, came into operation, the judgment was arrested, on the ground that the power to give judgment upon a presentment made under the 13 Geo. 3, c. 78, was gone.^(o) So where the liability to repair certain highways in a parish was taken away from the parish by a statute, and cast upon certain townships, and the statute gave a form of indictment against the townships for non-repair, and one of the townships was indicted under the Act, but before the trial the Act was repealed, and a verdict was found against the township, the judgment was arrested, on the ground that, although whatever had been done under the Act before it was repealed was valid, the statute when repealed was, with regard to any future operation, as if it had never existed, and the effect of the repeal is the same whether the alteration affect procedure only or matter which is more of substance.^(p) So where a prisoner was indicted for privately stealing in a shop against the 10 & 11 Will. 3, c. 23, which was repealed after the offence was committed, but before the prisoner was tried, by the 1 Geo. 4, c. 117, s. 1, it was held that the prisoner could not be sentenced under the repealed Act.^(q)

Repealing Acts, however, sometimes contain clauses for the purpose of keeping alive the statutes they repeal so far as they relate to offences committed against them, and where a bankrupt had committed an offence against the 12 & 13 Vict. c. 106, s. 251, and an information had been laid before a magistrate for that offence, and a warrant issued for the prisoner's apprehension, before the 24 & 25 Vict. c. 134 came into operation, which by sec. 230 repeals the former Act, except as to "any proceeding pending," &c., "or any penalty incurred," &c., at the commencement of the Act, it was held that there was a proceeding pending within the meaning of this exception, and that the word "penalty" in it extended to any penal consequences whatever, and was not restricted to a pecuniary penalty, and, consequently, that the bankrupt might be convicted and sentenced under the former Act.^(r)

(i) Reg. v. Dunn, 12 Q. B. 1026 (64 E. C. L. R.); Rex v. Hart, 30 How. St. Tr. 1131; and see the new clause in the Acts of 1861, *ante*, p. 5.

(k) Rex v. Thomas, *supra*.

(l) Lee v. Lady Baltinglas, Styles 475; Bennet v. Watson, 3 M. & S. 1; Elsy v. Mawdit Styles 226; Anonymous, Styles 321. In 1 Ch. C. L. 100, the reason given is that the recognizance of a married woman cannot be estreated.

(m) *Ante*, p. 3.

(n) Per Lord Tenterden, C. J., Surtees v. Ellison, 9 B. & C. 752 (57 E. C. L. R.).

(o) Reg. v. Mawgan, 8 A. & E. 496 (35 E. C. L. R.).

(p) Reg. v. Denton, 18 Q. B. 761 (83 E. C. L. R.).

(q) Rex v. M'Kenzie, R. & R. 429.

(r) Reg. v. Smith, 1 L. & C. 131.

OF OFFENCES PRINCIPALLY AFFECTING THE GOVERNMENT, THE PUBLIC PEACE, OR THE PUBLIC RIGHTS.

*CHAPTER THE FIRST.

OF COUNTERFEITING OR IMPAIRING COIN—OF IMPORTING INTO THE KINGDOM COUNTERFEIT OR LIGHT MONEY—AND OF EXPORTING COUNTERFEIT MONEY.

Sec. 1.—Of Counterfeiting Coin.

THE Legislature has made provision against the counterfeiting of the following descriptions of coin, namely:—I. The King's current gold or silver coin. II. Foreign gold, silver, or copper coin. III. The copper money of this realm.

I. The first of these, usually called the King's money, was protected by enactments, which placed the offence of counterfeiting it in the highest class of crimes, upon the ground that the royal majesty of the Crown was affected by such offence in a great prerogative of government; the coining and legitimation of money, and the giving it its current value, being the unquestionable prerogatives of the Crown.^(a) But these enactments were repealed by the 2 Will. 4, c. 34, s. 1 (now repealed by the 24 & 25 Vict. c. 95)

The 26 & 27 Vict. c. 74, s. 1, enables the Queen to declare gold coins issued from Her Majesty's Branch Mint at Sydney, New South Wales, a legal tender for payments within the United Kingdom.

It appears that the coin or money of this kingdom consists properly of gold or silver only, with a certain alloy, constituting what is called *sterling*, coined and issued by the King's authority; and therefore such money is supposed to be referred to by any statute naming "money" generally.^(b) The weight, alloy, impression, and denomination, of money made in this kingdom are generally settled by indenture between the King and the master of the mint: but the 56 Geo. 3, c. 68, provided, with respect to the new silver coinage, that the bullion shall be coined into silver coins of a standard and fineness of eleven ounces two pennyweights of fine silver, and eighteen pennyweights of alloy in the pound troy, and in weight after the rate of sixty-six shillings to every pound troy, whether the same be coined in crowns, half-crowns, shillings, or *sixpence, or pieces of [*95 a lower denomination.^(c) A proclamation has in some cases been made as a more solemn manner of giving the coin currency: but the proclamation in general cases is certainly not necessary, and in prosecutions for coining need not be proved.^(d) And it is not necessary in such prosecutions to produce the indentures; though it may be of use in case of any new coin with a new impression, not yet familiar to the people, to produce either the indentures, or one of the officers of the mint cognizant of the fact, or the stamps used, or the like evidence. But in general, whether the coin, upon a question of counterfeiting or impairing it, be the King's money or not, is a mere question of fact which may be found

^(a) 1 Hale 188; 1 East P. C. 148

^(b) 1 East P. C. 147. And see 1 Hale, chaps. 17, 18, 19, 20.

^(c) See the 12 & 13 Vict. c. 41, extending the 56 Geo. 3, c. 68.

^(d) 1 East P. C. 142, where see some cases in which proclamation by the writ of proclamation under the great seal, or a remembrance thereof, is considered to be necessary to prove a coin current.

upon evidence of common usage or notoriety.^(e) It should be observed, that any coin, once legally made and issued by the King's authority, continued to be the current coin of the kingdom until recalled, notwithstanding any change in the authority by which it was constituted.^(f)¹

The 24 & 25 Vict. c. 99, which came into effect on the 1st of November, 1861,^(g) and applies to England, Scotland, and Ireland, enacts by sec. 1, that, "In the interpretation of and for the purposes of this Act, the expression, 'the Queen's current gold or silver coin' shall include any gold or silver coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's dominions, whether within the United Kingdom or otherwise; and the expression 'the Queen's copper coin' shall include any copper coin and any coin of bronze or mixed metal coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's said dominions; and the expression 'false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin' shall include any of the current coin which shall have been gilt, silvered, washed, colored, or cased over, or in any manner altered, so as to resemble or be apparently intended to resemble or pass for any of the Queen's current coin of a higher denomination; and the expression 'the Queen's current coin' shall include any coin coined in any of Her Majesty's mints, or lawfully current, by virtue of any proclamation or otherwise, in any part of Her Majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this Act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field, or *96] other place, open or enclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit or for that of any other person."^(h)

The words of the 2 Will. 4, c. 34, s. 21, were "coined in any of his Majesty's mints and lawfully current" in any part of his Majesty's dominions, whether within the United Kingdom or otherwise; and consequently did not include coin which was not coined in any such mint, but was current in any of the colonies by virtue of any proclamation or otherwise; this clause is so framed as to include all such coin, and by that means the provisions of this Act are extended to it.

The definition of the "Queen's current coin" is new.

In *Reg. v. Rogers*, 2 M. C. C. R. 85; *Reg. v. Gerrish*, 2 M. & Rob. 219; and *Reg. v. Williams*, 1 C. & M. 259, questions had arisen whether a person could be said to be in possession of coin within the meaning of the 2 Will. 4, c. 34, s. 21, which was with his knowledge in the personal possession of another, even though he were in company and acting in concert with such other, and the words "know-

^(e) 1 East P. C. 149. But in the case of old coin which has gradually fallen into disuse, though still the legal coin of the King, there can be no general notoriety of the fact.

^(f) 1 East P. C. 148, where it is said also, that this recall may be by proclamation; and long disuse may, it is conceived, be evidence of it. It has also been affected by Act of Parliament, as by 9 Will. 3, c. 2, and 6 Geo. 2, c. 26.

^(g) Sec. 43.

^(h) This clause is framed on the 2 Will. 4, c. 34, s. 21, and 22 & 23 Vict. c. 30.

¹ The courts of Massachusetts have jurisdiction of the offence of having false money counterfeited in the similitude of any gold or silver coin current by law or usage within the State, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true: *Commonwealth v. Fuller*, 8 Met. 313. The power vested in Congress by the Federal Constitution (Art. 157,) "to provide for the punishment of counterfeiting the current coin of the United States," may be exercised by the several States concurrently with Congress: *Harlan v. People*, 1 Dougl. 207. It seems that the States have no jurisdiction over the offence of counterfeiting money coined at the mint of the United States or any of its branches. But whether an indictment lies in the State courts under State statutes for counterfeiting foreign coin or passing coin so counterfeited. *Quære*. *Rouse v. State*, 4 Geo. 136.

ingly and wilfully having it in the actual custody or possession of any other person" were introduced to remove all doubt in such cases.

Sec. 2. "Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."⁽ⁱ⁾

Sec. 3. "Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the color or appearance of gold or of silver, or by any means whatsoever, wash, case over, or color any coin whatsoever, resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild or silver, or shall, with any wash or material capable of producing the color or appearance of gold or of silver, or by any means whatsoever, wash, case over, or color any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the color or appearance of gold, or by any means whatsoever, wash, case over, or color any of the Queen's current silver coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the color or appearance of gold or silver, or by any means whatsoever, wash, case over, or color any of the Queen's current cop- [*97 per coin, or file or in any manner alter such coin, with intent to make the same resemble or pass for any of the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."^(k)

The words, "by any means whatsoever," were introduced in order to include every process by which false metal can be made to appear like gold or silver, whether such appearance be produced by galvanism or otherwise howsoever.

The order of the words in the former clause was "wash, color, or case over," and it was advisedly altered.

Sec. 18. "Whosoever shall make or counterfeit any kind of coin not being the Queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."^(m)

Sec. 22. "Whosoever shall falsely make or counterfeit any kind of coin not being the Queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court,

⁽ⁱ⁾ This clause is taken from the 2 Will. 4, c. 34, s. 3. As to hard labor, &c., see *post*, p. 104. See the interpretation clause, *ante*, p. 95.

^(k) This clause is taken from the 2 Will. 4, c. 34, s. 4. As to hard labor, &c., see *post*, p. 104. See the interpretation clause, *ante*, p. 95.

^(m) This clause is framed from the 37 Geo. 3, c. 126, s. 2. As to hard labor, &c., see *post*, p. 104. See the interpretation clause, *ante*, p. 95.

for the first offence to be imprisoned for any term not exceeding one year, and for the second offence to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.’(n)

Sec. 23 provides for the summary conviction of persons in possession of such foreign coin as aforesaid without lawful excuse.

Sec. 14. “Whosoever shall falsely make or counterfeit any coin resembling or apparently intended to resemble or pass for any of the Queen’s current copper coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and *98] not less than three years,—or to be imprisoned *for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.”(o)

With respect to the offence of counterfeiting the coin in general it may be observed, that not only all such as counterfeit the King’s coin without his authority, but even such as are employed by him in the mint, come within the statute, if for their own lucre they make the money of baser alloy, or lighter than by their indentures they are authorized and bound to do: for they can only justify their coining at all under such an authority; and if they have not pursued that authority, it is the same as if they had none. But it is not any mistake in weight or alloy that will make them guilty; the act must be wilful, corrupt, and fraudulent.(p)

The moneys charged to be counterfeited must *resemble the true and lawful coin*:(q) but this resemblance is a matter of fact of which the jury are to judge upon the evidence before them; the rule being, that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world.(r) Thus a counterfeiting with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin (s)

Where, on an indictment for uttering a counterfeit half sovereign, the coin was, in reality, a Prince of Wales’s medal; and though on one side it bore some resemblance to a good half-sovereign, having Her Majesty’s head and the usual inscription, on the other side was the plume of the Prince of Wales, with the words “Prince of Wales’s model half-sovereign,” and it was held that it was a question for the jury whether this coin was intended by the maker to pass as counterfeit coin, or was merely designed for a plaything, a card-marker, &c.(t)

It is quite clear that there will be a sufficient counterfeiting where the counterfeit money is made to resemble coin, the impression on which has been *worn away by time*. In one case the shillings produced in evidence were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation, except their color, size, and shape; and the Master of the Mint proved that they were bad, but that they were very like those shillings the impression on which had been worn away by time, and might very probably be taken by persons having less skill than himself for good shillings; and the Court were of opinion that a *blank* that is smoothed and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of this realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks hav-

(n) This clause is framed from the 43 Geo. 3, c. 139, s. 3. As to hard labor, &c., see *post*, p. 104. See the interpretation clause, *ante*, p. 95. See sec. 37 for the form of an indictment for a second offence, &c., *post*, p. 121.

(o) This clause is taken from part of sec. 12 of the 2 Will. 4, c. 34. As to hard labor, &c., see *post*, p. 104. See the interpretation clause, *ante*, p. 95.

(p) 1 East P. C. c. 4, s. 15, p. 126; 1 Hale 113; 1 Hawk. P. C. c. 17, s. 55; 3 Inst. 16, 17; 4 Blac. Com. 84.

(q) 1 Hawk. P. C. c. 17, s. 81.

(r) 1 Hale 178, 184, 211, 215.

(s) 1 East P. C. c. 4, s. 13, p. 164, citing 1 MS. Sum. 50, and Ridgeley’s case, Old Bailey, Dec. 1778.

(t) Reg. v. Byrne, 6 Cox C. C. 475, Crampton, J.

ing some reasonable likeness to that coin which has been defaced by time, and yet passed in circulation.(u) In a subsequent case the counsel for *the prisoners having objected, upon the fact of no impression of any sort or kind being [*99 discernible upon the shillings produced in evidence, that they were not counterfeited to *the likeness and similitude of the good and legal coin of the realm*, the judges were of opinion, that it was a question of fact whether the counterfeit moneys were of the likeness and similitude of the lawful current silver coin called a shilling. And the jury having so found it, the want of an impression was immaterial; because, from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected; the counterfeit therefore was perfect for circulation, and possibly might deceive the more readily from having no appearance of an impression; and in the deception the offence consists.(v) Before the 2 Will. 4, c. 34, where the imitation of the real coin had not proceeded so far as to fabricate a false coin sufficiently perfect to be circulated, the offence of counterfeiting was not complete. Thus, where the prisoner had forged the impression of a half-guinea on a piece of gold, which was previously hammered, but was not round, nor would pass in the condition it then was, upon reference to the judges, it was held that the crime of counterfeiting was incomplete.(w) And where the prisoners were convicted under the 25 Edw. 3, c. 2, and it appeared that no one piece of the base metal found upon them was in such a state as to make it passable, the conviction was held to be wrong.(x) But by the 24 & 25 Vict. c. 99, s. 30, the offence of counterfeiting shall be deemed complete, although the coin be not in a state fit to be uttered, or the counterfeiting not finished or perfected.(y)

Upon an indictment on the 8 & 9 Will. 3, c. 26, s. 4 (now repealed), it appeared that the color of silver was produced by melting a small portion of good silver with a large portion of base metal, and throwing it, after it had been cut up into round blanks, into *aqua fortis*, which has the effect of drawing to the surface whatever silver there may be in the composition, and giving the metal the color and appearance of real silver. A doubt therefore arose, whether this process of extracting the latent silver by the power of the wash from the body to the surface of the blank was coloring with "a wash and materials" within the meaning of the statute; or whether the Legislature did not intend such a coloring only as is produced by some external application on the surface of the blank. But the judges thought that this process of extracting the latent silver from the body to the surface of the base metal by the power of *aqua fortis* was a *coloring* within the words of the statute;(z) and they also thought that it might be charged as a coloring with silver; for the effect of the *aqua fortis* is to corrode the base metal, and leave the silver only on the superficies; and so the copper is colored or cased with silver.(a)

So though it was necessary that the blanks should be *rubbed* after they were taken out of the wash, in order to give them the appearance of silver, the preparing and steeping them in the wash was *held to be a *coloring* within the [*100 8 & 9 Will. 3, c. 26, s. 4. The prisoner was apprehended in the very act of steeping round blanks composed of brass and silver in *aqua fortis*: none of them were in a finished state; but many were taken out of the liquor, and others were found dry. These blanks exhibited the appearance of lead, and some of them had the impression of a shilling, and *by rubbing them* they might be made perfectly to resemble silver coin; but in their then state the jury found that none of them would pass current. The question was, whether the offence was completed, inasmuch as the color of silver had not been produced on any of the blanks. There was some difference of opinion amongst the judges upon a case reserved. One judge said, he understood the words "color, &c.," to mean producing on the piece of metal the color of silver, which was not done here; for, without rubbing, the

(u) Wilson's case, Old Bailey, 1783; 1 Leach 285.

(v) Rex v. Welsh, 1 Leach 364; 1 East P. C. c. 4, s. 13, p. 164.

(w) Varley's case, 1 Leach 76; 1 East P. C. c. 4, s. 13, p. 164; 2 Blac. Rep. 682.

(x) Rex v. Harris, 1 Leach 135.

(y) Post, p. 103.

(z) Rex v. Lavey, 1 Leach 153.

(a) s. c., 1 East P. C. c. 4, s. 14, p. 166.

money coined would not pass: and another observed, that the word in the statute was "*producing*" in the present tense, and not materials *which would produce*. But the other judges thought the conviction right. They considered that the offence was complete when the piece was colored; for it was then colored with materials which produce the color of silver; and that it was not necessary that the piece so colored should be current, for the coloring of blanks was an offence within the clause. And it was observed, that a contrary construction would prevent any conviction until a wash was discovered, which would in the first instance produce a perfect bright shilling or sixpence.(b)

Upon an indictment on the 2 Will. 4, c. 34, s. 4. which alleged that the prisoner three sixpences "feloniously did gild with materials capable of producing the color of gold," it was proved that the prisoner was apprehended in the act of gilding sixpences with gold, three of which so gilt were found in the room where he was taken: it was objected that the indictment was not proved, as the prisoner had used gold and not materials capable of producing the color of gold. It was answered, that the latter words might be rejected; to which it was replied, that they could not, as they qualified the word gold, and showed it was not used in the strict sense of the word. A verdict having been directed for the Crown, it was moved, in arrest of judgment, in case the objection should be one on the record. Upon a case reserved, the judges present were unanimous that the indictment was proved, and all, except two,(c) considered the indictment good.(d)

If there be a counterfeiting in fraud of the King, the offence is complete before any uttering, or attempt to utter.(e)

One count charged the prisoner with unlawfully causing to be made two dies, one of the obverse side, the other of the reverse side of a silver half-dollar of Peru, with intent feloniously to make counterfeit Peruvian half-dollars; another count charged him with attempting feloniously to coin by making the dies, with intent *101] to use them in coining such counterfeit coins. The prisoner, *without any authority or license so to do, caused to be made by one Jackson, a die sinker (who, though he executed the order, gave notice to the police, and committed no offence against the law), the necessary dies for making a counterfeit dollar of the Republic of Peru. The dies, though suitable and necessary for making such counterfeit coin could not alone produce it; a press, copper blanks, galvanic battery, and a preparation of silver being also necessary for that purpose. The prisoner had procured galvanic batteries, and had been in negotiation for the purchase of a press and copper blanks for the aforesaid purpose; but he had not actually procured either press, blanks or preparation of silver. There was no doubt that the prisoner intended to use the whole apparatus when procured in making counterfeit Peruvian dollars, and the only doubt was whether he intended to coin in Peru only, or in this country also; and it was contended that, if he only intended to make the coin in Peru, no offence had been committed; and even if he did intend to coin in this country, that intention, though coupled with the act of causing the dies to be made in pursuance of such intention, fell short of an attempt to commit a felony. The jury found that the intention of the prisoner was to cause to be made and procure the dies and other apparatus in order therewith to coin counterfeit Peruvian half-dollars, and to make a few only of the counterfeit coin in England by way of trying whether the apparatus would answer before sending it out to Peru, to be there used in making the counterfeit coin, and convicted the prisoner; and upon a case reserved, it was held that the conviction was right. This was not an indictment for an attempt to commit a statutable offence; but the indictment was founded on a criminal intent coupled with an act immediately connected with the offence. Nobody could doubt that the prisoner was in possession of machinery necessarily connected with the offence, for the

(b) *Rex v. Case*, 1 East P. C. c. 4, s. 14, pp. 165, 166; 1 Leach 154, note (a). This case probably caused the use of the terms, "materials capable of producing the color of gold or silver," in the 2 Will. 4, c. 34, s. 4, instead of the terms, "materials producing the color of gold or silver," in the 8 & 9 Will. 3, c. 26, s. 4. C. S. G.

(c) *Littledale, J., and Parke, B.*

(d) *Reg. v. Turner*, 2 M. C. C. R. 42.

(e) 3 Inst. 61; 1 Hale 215, 228; 1 Hawk. c. 17, s. 55; 1 East P. C. c. 4, s. 13, p. 165.

express purpose of committing it, and which was obtained, and could be obtained, for no other purpose. No doubt the act was done with intent to commit a felony, and was sufficient to support such an indictment as the present. It was an act immediately connected with the offence, and the prisoner could have no other object than to commit the offence.^(f)

By the 24 & 25 Vict. c. 99, s. 35, "In the case of every felony punishable under the Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall be liable to be imprisoned for any term not exceeding two years with or without hard labor."^(g)

Accomplices or receivers, in those offences concerning the coin which amount to felony, follow the general rule applicable to felony. Two agree to counterfeit, and one does it in consequence of that agreement; they are both guilty. One counterfeits, and another by agreement beforehand afterwards puts it off; the latter ^{is a principal}: so if he put it off afterwards, knowing that the other coined ^{it}; for that makes him an aider: so if he furnished the coiner with tools, [*102 or materials for coining.^(h)

Proof that a man occasionally visited coiners; that the rattling of money was occasionally heard with them; that he was seen counting something as if it was money when he left them; that, on coming to the lodgings just after their apprehension, he endeavored to escape, and was found to have bad money about him; is not sufficient evidence to implicate him, as counselling, procuring, aiding, and abetting the coining. Two women were indicted for coloring a shilling and sixpence, and a man (Isaacs) as counselling them, &c. The evidence against him was, that he visited them once or twice a week; that the rattling of copper money was heard whilst he was with them; that once he was counting something just after he came out; that on going to the room just after their apprehension he resisted being stopped, and jumped over a wall to escape; and that there were then found upon him a bad three-shilling piece, five bad shillings, and five bad sixpences; but upon a case reserved the judges thought the evidence too slight to convict him.⁽ⁱ⁾

Sec. 28. "Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the day of such first mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing,⁽ⁱⁱ⁾ or where two or more persons, acting in concert in different counties or jurisdictions, shall commit any offence against this Act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed, in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction."^(k)

The first part is introduced to remove a doubt which had risen whether a person tendering, &c., coin in one jurisdiction, and afterwards tendering, &c., coin in another jurisdiction within sec. 10 (*post*, p. 120), could be tried in either. As the offence created by that section is only a misdemeanor, probably there was no substantial ground for that doubt, but it was thought better to set the matter at rest.

Sec. 36. "All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishments as if

^(f) *Reg. v. Roberts*, Dears. C. C. 539. The Court seem to have been clear that making a few specimens to ascertain whether they would answer the purpose would have been a felony within the statute; and that even making a few specimens to put in a cabinet would be so also.

^(g) This clause is taken from the 2 Will. 4, c. 34, s. 18. As to hard labor, see *post*, p. 104.

^(h) 1 East P. C. c. 4, s. 31, p. 186.

⁽ⁱ⁾ *Rex v. Isaacs*, Hil. T. 1813, MS. Bayley, J.

⁽ⁱⁱ⁾ The preceding part of this section is new.

^(k) This clause is taken from the 2 Will. 4, c. 34, s. 15.

they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if the same had been actually committed in that county or place, and in any indictment for any such offence, or for being accessory to any such offence, the venue in the margin shall be the same as if such offence had been *103] committed in such county or place, and the offence *itself shall be averred to have been committed 'on the high seas;' [and where any of the crimes and offences, or high crimes and offences, mentioned in this Act, shall be committed at sea, and the vessel in which the same shall be committed shall be registered in Scotland, or touch at any part thereof, the courts of criminal law of Scotland may inquire, try, and determine the same in the same manner as if such crime and offence, or high crime and offence, had been committed in Scotland;] (kk) provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces."

Sec. 34. "All high crimes and offences, and crimes and offences, against this Act, which may be committed in Scotland, shall be proceeded against and tried according to the rules and procedure of the criminal law of Scotland, [and all proceedings by this Act made competent before any justice or justices, and all and every the powers and authorities by this Act given to or conferred upon any such justice or justices, shall, in Scotland, be competent before and may be exercised by any sheriff, magistrate, or justice of the peace.]"(l)

Sec. 29. "Where, upon the trial of any person charged with any offence against this Act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer, or other officer of Her Majesty's Mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness."(m)

Sec. 30. "Every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off, any false or counterfeit coin, against the provisions of this Act, shall be deemed to be complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

This clause is taken from the 2 Will. 4, c. 34, s. 3, which was limited in terms to making or counterfeiting gold or silver coin, and consequently it was held that it did not apply to a case of selling counterfeit coin. The words in *italics* have therefore, been added in order to include all cases of "buying, selling," &c.(mm)

Sec. 31. "*It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence or crime and offence, against this Act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed as soon as reasonably may be before a justice of the peace or some other proper officer, to be dealt with according to law.*"(n).

*104] *This clause is new, and clearly unnecessary, as far as it relates to any felony or indictable misdemeanor, for there is no doubt whatever that any person in the act of committing any such offence is liable by the common law to be apprehended by any person; but it was introduced at the instigation of the Solicitors of the Treasury, as it had been found that there was great unwillingness to apprehend in such cases, in consequence of doubts that prevailed among the public as to the right to do so.

(kk) The part between brackets is new.

(l) The earlier part of this clause is framed on the 2 Will. 4, c. 34, s. 15. The part between brackets was added at the suggestion of the Lord Advocate.

(m) This clause is taken from the 2 Will. 4, c. 34, s. 17.

(mm) Reg. v. Bradford, 2 C. & D. 41.

(n) Sec. 33 provides for notice of action, tender of amends, &c. Sec. 32 takes away the *certiorari*, &c. Sec. 41 provides for summary proceedings.

The words, "or officer of police," were introduced in the House of Commons quite unnecessarily, as without doubt every officer of police is a peace officer; and they render this clause inconsistent with other clauses in some of the other Acts.

Sec. 38. "Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act the Court may, if it shall think fit, in addition to or in lieu of any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace and being of good behavior; and in case of any felony punishable under this Act, the Court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized; provided that no other person shall be imprisoned under this clause, for not finding sureties, for any period exceeding one year."⁽ⁿⁿ⁾

Sec. 39. "Whenever imprisonment, with or without hard labor, may be awarded for any indictable offence under this Act, the Court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labor, in the common gaol or house of correction."

Sec. 40. "Whenever solitary confinement may be awarded for any offence under this Act, the Court may direct the offender to be kept in solitary confinement for any portion or portions of his imprisonment, or of his imprisonment with hard labor, not exceeding one month at any one time, and not exceeding three months in any one year."

Sec. 42. "In all prosecutions for any offence against this Act in England, which shall be conducted under the direction of the Solicitors of Her Majesty's Treasury, the Court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England which shall not be so conducted it shall be lawful for such Court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony."⁽ⁿⁿ⁾

Before the passing of this Act the costs of mint prosecutions were paid by the Treasury wherever they were conducted by the Solicitors of the Treasury; but in no other case. As the Solicitors of the Treasury were accustomed to employ attorneys in the country to conduct these prosecutions, and they did not always like to pay the witnesses before they had received the costs of the prosecution from the Treasury, it sometimes happened that the witnesses did not get their expenses till a considerable time after the trial, and the earlier part of this clause was introduced in order that the attorneys might at once obtain the costs of the prosecutions, and pay the witnesses their expenses; and, as in all mint prosecutions so conducted the expenses were invariably paid, the first part of the clause is imperative, and the Court must allow the expenses.

It sometimes also happened that private individuals conducted mint prosecutions, after the officers of the mint had declined to prosecute, and, considering the importance of bringing offenders in such cases to justice, it was thought expedient to give the costs in some of these cases; the second part of the clause therefore gives the Court a *discretion* to grant the costs in such cases, provided a conviction takes place, but not otherwise. This provision will on the one hand encourage prosecutions where there are substantial grounds for them, and on the other hand it will prevent speculative prosecutions where the evidence is unsatisfactory.

This clause is confined to England, as it was introduced to provide for the state of things there existing.

In many instances of offences relating to the counterfeiting coin, the Legislature have made special provisions for securing the base coin, and also the tools of the offenders; in order that they may be produced in evidence, and afterwards be disposed of in a proper manner.^(o)

⁽ⁿⁿ⁾ This clause is new.

^(o) The Legislature has made other provisions for the suppression of base coin, or coin

By the 24 & 25 Vict. c. 99, s. 27, "If any person shall find or discover in any place whatever, or in the custody or possession of any person having the same without lawful authority or excuse, any false or counterfeit coin, resembling **106]* apparently intended to resemble or pass for any of the **Queen's current gold, silver or copper coin, or any coin of any foreign prince, state, country, or any instrument, tool, or engine whatsoever, adapted and intended for the counterfeiting of any such coin, or any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by diminishing or lightening any of the Queen's current gold or silver coin,* it shall be lawful for the person so finding or discovering and he hereby required to seize the same, and to carry the same forthwith before some justice of the peace; and where it shall be proved, on the oath of a credible witness before any justice of the peace, that there is reasonable cause to suspect that any person has been concerned in counterfeiting the Queen's current gold, silver, copper coin, or any such foreign or other coin as in this Act before mentioned, has in his custody or possession any such false or counterfeit coin, or any instrument, tool, or engine whatsoever adapted and intended for the making or counterfeiting of any such coin, *or any other machine used or intended to be used for making or counterfeiting any such coin, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution, or otherwise* as aforesaid, it shall be lawful for any justice of the peace, by warrant under his hand, to cause and place whatsoever belonging to or in the occupation or under the control of such suspected person to be searched, either in the day or in the night, and if any such false counterfeit coin, or any such instrument, tool, or engine, *or any such machine, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution, otherwise* as aforesaid, shall be found in any place so searched, to cause the same to be seized and carried forthwith before some justice of the peace; and whensoever any such false or counterfeit coin, or any such instrument, tool, or engine, *or any such machine, or any such filings, clippings, or bullion, or any such gold or silver in dust, solution, or otherwise* as aforesaid, shall in any case whatsoever be seized and carried before a justice of the peace, he shall, *if necessary,* cause the same to be secured, for the purpose of being produced in evidence against any person who may be prosecuted for any offence against this Act; and all such false and counterfeit coin, and all instruments, tools, and engines adapted and intended for the making or counterfeiting of coin, *and all such machines, and all such filings, cli*

inferior in value, where there is no criminal charge imputed to the person who may happen to tender it. The 56 Geo. 3, c. 68, s. 7, enacts, that after the period to be mentioned in a proclamation, any persons are required to cut, &c., any piece or pieces of a silver coin of this realm, current at any time before the passing of that Act, which shall be tendered to them in payment, and which shall be of less value than the denomination thereof shall import, and the person tendering the same shall bear the loss; but if a such piece so cut, &c., shall appear to be of the full value which its denomination shall import, the person who shall cut, &c., is required to take the same at the rate it was coined for; and disputes about the value are to be determined by the mayor, &c., or other chief officer of any city, &c., where such tender shall be made; or if the tender be made out of any city, &c., then by some justice of the peace of the county inhabiting or being near the place where the tender shall be made. And by sec. 26 of the new Act, "When any coin shall be tendered *as the Queen's current gold or silver coin* to any person who shall suspect the same to be diminished otherwise than by reasonable wearing or to be counterfeit, it shall be lawful for such person to cut, break, *bent,* or deface such coin, and if a coin so cut, broken, *bent,* or defaced shall appear to be diminished otherwise than by reasonable wearing, or to be counterfeit, the person tendering the same shall bear the loss thereof; but if the same shall be of due weight, and shall appear to be lawful coin, the person cutting, breaking, *bending,* or defacing the same is hereby required to receive the same at the rate it was coined for; and if any dispute shall arise whether the coin cut, broken, *bent,* or defaced be diminished in manner aforesaid, or counterfeit, it shall be heard and finally determined in a summary manner by any justice of the peace, who hereby empowered to examine upon oath as well the parties as any other person, in order to the decision of such dispute; and the tellers at the receipt of Her Majesty's Exchequer and their deputies and clerks, and the receivers general of every branch of Her Majesty's revenue, are hereby required to cut, break, or deface, or cause to be cut, broken, or defaced, every piece of counterfeit or unlawfully diminished gold or silver coin which shall be tendered to them in payment of any part of Her Majesty's revenue."

ings, and bullion, and all such gold and silver in dust, solution, or otherwise as aforesaid, after they shall have been produced in evidence, or when they shall have been seized, and shall not be required to be produced in evidence, shall forthwith be delivered up to the officers of Her Majesty's Mint, or to the solicitors of Her Majesty's Treasury, or to any person authorized by them to receive the same."(p)

The parts in *italics* are introduced in order to provide for the seizure of filings of coin, gold or silver dust, and machines mentioned in the preceding clauses of the Act.

The solicitors of the Treasury now superintend all mint prosecutions.(q)

*Sec. II.—Impairing and Defacing Coin.

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The 24 and 25 Vict. c. 99, s. 4, enacts that, "Whosoever shall impair, diminish, or lighten any of the Queen's current gold or silver coin, with intent *that* the coin so impaired, diminished, or lightened *may* pass for the Queen's current gold or silver coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."(qq)

This clause is taken from the 2 Will. 4, c. 34, s. 5, the words of which were "with intent to *make* the coin pass," &c., which intent never existed; for the coin was not impaired in order to *make* it pass, but in order to obtain some metal from the coin, and that it *might* nevertheless pass in circulation. The words in *italics* have therefore been substituted for those of the former enactment.

Sec. 5. "Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing or lightening any of the Queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."(r)

Sec. 16. "Whosoever shall deface any of the Queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labor."

This clause is taken from the 16 & 17 Vict. c. 102, s. 1, which contained the words "or shall use any machine or instrument for the purpose of bending the same," but it was considered that this provision was much too comprehensive, and therefore it was omitted.

*Sec. 17. "No tender of payment in money made in any gold, silver, or copper coin so defaced by stamping as in the last preceding section mentioned shall be allowed to be a legal tender; and whosoever shall tender, utter, or put off any coin so defaced shall, on conviction thereof before two justices, be liable to forfeit and pay any sum not exceeding forty shillings: Provided that it shall not be lawful for any person to proceed for any such last-mentioned penalty with-

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(p) This clause is framed on 2 Will. 4, c. 34, s. 14; 37 Geo. 3, c. 126, s. 7; and 43 Geo 3, c. 139, s. 7.

(q) See the interpretation clause, *ante*, p. 95.

(qq) As to hard labor, &c., see *ante*, p. 104. See the interpretation clause, *ante*, p. 95.

(r) This clause is new. As to hard labor, &c., see *ante*, p. 104. See the interpretation clause, *ante*, p. 95.

out the consent, in England or Ireland, of Her Majesty's Attorney-General in England or Ireland respectively, or in Scotland of the Lord Advocate."(*rr*)

With a view of more effectually preventing the clipping, diminishing or impairing the current coin of the kingdom, the 6 & 7 Will. 3, c. 17, s. 8, made provision for breaking open houses and searching for bullion; and for the punishment of the person in whose possession bullion was found, not proving it to be law silver, and that the same was not before the melting thereof coin nor clippings. Provisions concerning *melting* down coin were made by the 17 Edw. 4, c. 1, s. 13 & 14 Car. 2, c. 31.(*t*) And if money, false or clipped, be found in the hands of any that is suspicious, he may be imprisoned till he hath found his warrant. *statutum de monetâ*.(*u*)

Sec. III.—Of Importing into the Kingdom Counterfeit or Light Money.

By the 24 & 25 Vic. c. 99, s. 7, "Whosoever, *without lawful authority or cause (the proof whereof shall lie on the party accused)*, shall import or receive into the United Kingdom from beyond the seas any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England or Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, with or without solitary confinement,"(*v*)

The first words in *italics* were introduced for the reason mentioned in the note to sec. 6.(*w*)

The words "or receive" were added to include cases where the offender received coin which had come from abroad, but there was no evidence to bring his offence within the term "import."

Under the 1 & 2 Ph. & M. c. 11 (now repealed), it was held that the words "false or counterfeit coin or money being current *within this realm," *109] referred to gold or silver coin of foreign realms, current here by the sanction and consent of the Crown, which must be by proclamation, or by writ under the great seal. And the money, the bringing in of which was prohibited by 25 Edw. 3, st. 5, c. 2, and 1 & 2 Ph. & M. c. 11 (both now repealed) must be brought from some foreign place out of the King's dominions into some place within the same, (*x*) and not from Ireland or some other place subject to the Crown of England, for though to some purposes they are distinct from England yet as the counterfeiting is punishable there as much as in England, the bringing of money from such places is not within those Acts.(*y*) It may be observed that these Acts were confined to the *importer*, and did not extend to a *receiver* on a second hand; and such importer must also have been averred and proved to have known that the money was counterfeit.(*z*)

It seems to have been the better opinion, that it was not necessary that such false money should be actually paid away or merchandized with, for the words of the 25 Edw. 3 are, to "merchandize or make payment," &c., which import an *intention* to do so, and are fully satisfied whether the act intended be performed or not;(*a*) and it is clear that bringing over money counterfeited

(*rr*) This clause is taken from the 16 & 17 Vict. c. 102, s. 2. See the interpretation clause, *ante*, p. 95.

(*s*) These provisions seem to be repealed by the 59 Geo. 3, c. 49, s. 12.

(*t*) This Act and every Act in force before its passing, whereby the melting, &c., of counterfeit money was prohibited, are repealed by the 59 Geo. 3, c. 49, s. 11.

(*u*) 3 Inst. 18.

(*v*) This clause is taken from the 2 Will. 4, c. 34, s. 6. As to hard labor, &c., see p. 104. See the interpretation clause, *ante*, p. 95.

(*w*) *Post*, p. 134.

(*x*) 1 East P. C. c. 4, ss. 1, 4, 5, 6, 21, 22. (*y*) 1 Hawk. c. 17, s. 87.

(*z*) 1 Hale 227, 228, 317; 1 Hawk. c. 17, s. 86, 88; 1 East P. C. c. 4, s. 22, p. 175. The words of the 25 Ed. 3, were, "if any man *bring*;" of the 1 & 2 Ph. & M. "if any person shall *bring*."

(*a*) 1 Hawk. c. 17, s. 89. But Lord Coke and Lord Hale seem to have thought differently: 3 Inst. 18; 1 Hale 229. But see 1 East P. C. c. 4, s. 22, pp. 175, 176, where

according to the similitude of foreign coin was treason within the 1 & 2 Ph. & M. c. 11.(b)

By the 24 & 25 Vict. c. 99, s. 19, "Whosoever *without lawful authority or excuse (the proof whereof shall lie on the party accused)*, shall bring or receive into the United Kingdom(c) any such false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."(d)

From the words of the statute, an importation of counterfeit foreign coin, with a knowledge that it is counterfeit, is clearly sufficient, without any actual uttering. The present clause omits the words "to the intent to utter the same," which were in the former Act.

*It seems that this statute does not provide for the case of a person collecting the base money therein mentioned from the vendors of it in this country, with intent to utter it within the realm, or the dominions of the realm.(f)

Considerable quantities of old silver coin of the realm, or coin purporting to be such, below the standard of the Mint in weight, were formerly imported, to the public detriment at that time; in consequence of which the 14 Geo. 3, c. 42, prohibited the bringing into the kingdom any such coin, and provided that if any silver coin, being or purporting to be the coin of this realm, exceeding in amount the sum of five pounds, should be found by any officer of His Majesty's Customs on board any ship, &c., or in the custody of any person coming directly from the water-side, or, upon the information of one or more persons, in any house or other place on search there made in the manner directed by a statute of 14 Car. 2, the officer might seize the same; and if, upon examination, it should appear to be of the standard weight, it should be restored; but if it should be less in weight than the standard of the Mint, that is to say, at and after the rate of sixty-two shillings to every pound troy, it should be forfeited. This Act was revived and made perpetual by 39 Geo. 3, c. 75; but the 56 Geo. 3, c. 68, s. 2, enacts that so much of the 14 Geo. 3, c. 42, as enacts that any silver coin of the realm less in weight than after the rate of sixty-two shillings for every pound troy shall be forfeited, and of any Act or Acts for reviving or continuing or making perpetual the provisions of the said Act, in this respect, shall from the passing of that Act be repealed; and the 6 Geo. 4, c. 105, seems wholly to repeal the 14 Geo. 3, c. 42, and 39 Geo. 3, c. 75.(g)

Sec. IV.—Of Exporting Counterfeit Money.

By the 24 and 25 Vict. c. 99, s. 8, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall export, or put on board any ship, vessel, or boat for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the Queen's current coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in

said that though the best trial and proof of an intent be by the act done, yet it may also be evinced by a variety of circumstances, of which the jury are to judge.

(b) 1 Hawk. c. 17, s. 89. It is to be observed, that the new statute has neither the words "to merchandize or make payment," which were in the 25 E. 3, nor the words "to the intent, to utter or make payment with the same," which were in the 1 & 2 Ph. & M. The crime, therefore seems now to consist in importing counterfeit coin knowing it to be counterfeit. C. S. G.

(c) See the note to sec. 6, *post*, p. 134.

(d) This clause is framed from the 37 Geo. 3, c. 126, s. 3.

(f) 1 East P. C. c. 4, s. 23, p. 177.

(g) The terms of this repeal are very obscure.

Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years with or without hard labor, and with or without solitary confinement."(*a*)

This clause will include all cases of exporting counterfeit colonial coin.

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*CHAPTER THE SECOND.

OF FRAUDS RELATING TO BULLION, AND OF COUNTERFEITING BULLION.

Sec. I.—Of Frauds relating to Bullion.

BULLION signifies properly either gold or silver in the mass; but is sometimes used to denote those metals in any state other than that of authenticated coin comprising in this latter sense gold and silver wares and manufactures. Many statutes have been passed for the prevention of frauds with respect to such bullion by creating offences in making, working, putting to sale, exchanging, selling, or exporting, any gold or silver manufactures of less fineness than the standards respectively fixed at the time by the several Acts. But it is not intended to make any particular mention of those statutes; (*a*) the punishments inflicted by them being in general certain penalties and forfeitures, or, in default of payment, commitment to the house of correction. The knowingly exposing to sale and selling wrought gold under the sterling alloy for gold of the true standard, though indictable in *goldsmiths*, is a private imposition only in a *common person*, and the party injured is left to his civil remedy. (*b*)

It is conceived also that offenders fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat. *J. Fabian*, a working goldsmith, was indicted for falsifying plate, by putting in too much alloy, and then corrupting one of the assay master's servants to help him to the proper marks, with which he stamped his plate, and sold it to the goldsmiths; and being convicted, he was fined £100 and adjudged to stand three times in the pillory; and was also forbidden of his trade that he should not use that trade again as a master workman. This judgment must have been at common law. (*c*)

The offences of counterfeiting the assay marks on bullion or plate, or transposing such marks from one piece of manufacture to another, will be mentioned in a subsequent part of the work.

Provisions were made by several statutes to prevent the fraudulent exportation of bullion, but these statutes are either repealed, or their provisions do not fall within the scope of this work.

(*a*) This clause is new. As to hard labor, &c., see *ante*, p. 104. See the interpretative clause, *ante*, p. 95.

(*a*) See them collected in 1 East P. C. c. 4, s. 32, pp. 188 to 194. The 28 Ed. 1, st. 1, c. 20, mentioned here in the last edition, was repealed by the 19 & 20 Vict. c. 64.

(*b*) *Rex v. Bower*, Cowp. 323.

(*c*) *Fabian's case*, Old Bailey, Dec. Sess. 1664; 1 East P. C. c. 4, s. 34, p. 194; *Kel.* 31.

*CHAPTER THE THIRD.

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OF THE MAKING, MENDING, OR HAVING IN POSSESSION ANY INSTRUMENTS FOR COINING.

By the 24 & 25 Vict. c. 99, s. 24, "Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused). shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession, any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be *adapted and* intended to make or impress, the figure, stamp, or apparent resemblance of both or either of the sides of any of the Queen's current gold or silver coin, *or of any coin of any foreign prince, state, or country*, or any part or parts of both or either of such sides; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any edger, edging *or other* tool, collar, instrument, or engine adapted or intended for the marking of coin round the edges with letters, grainings, or other marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession, any press for coinage, or any cutting engine for cutting by force of a screw or of any other contrivance, round blanks out of gold, silver, or other metal *or mixture of metals, or any other machine*, knowing such press to be a press for coinage, or knowing such engine *or machine* to have been used, or to be intended to be used, for or in order to the *false making or counterfeiting* of any such coin as in this section aforesaid, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."^(a)

This clause is framed from the 2 Will. 4, c. 34, s. 10, and is extended to tools for making foreign coin, and to other tools and machines than those mentioned in the former enactment, and to tools for cutting blanks out of mixed metals.

Where two galvanic batteries were found in the prisoner's house, with white metal and other things plainly indicating that they had been used for coining, and it was proved that counterfeit coin is electro-plated before it is put in circulation, and that that *is generally done by the aid of galvanic batteries, it was held that the batteries were machines within the meaning of this section.^(b) [*113

Sec. 25. "Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly convey out of any of Her Majesty's mints any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging *or other* tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal, or mixture of metals, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."^(c)

Sec. 14. "Whosoever, without lawful authority *or excuse* (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed

(a) As to hard labor, &c., see *ante*, p. 104. See the interpretation clause, *ante*, p. 95.

(b) *Reg. v. Grover*, 9 Cox C. C. 282. The Common Serjeant, after consulting Keating, J.

(c) This clause is taken from the 2 Will. 4, c. 34, s. 11. As to hard labor, &c., see *ante*, p. 104; and the interpretation clause, *ante*, p. 95.

to make or mend, or buy or sell, or have in his custody or possession, any instrument, tool, or engine adapted and intended for the counterfeiting any of the Queen's current copper coin, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, or with or without solitary confinement." (d)

Several points arose as to the tools or instruments which were within the words of the 8 & 9 Will. 3. Where the prisoner was indicted for *having in his custody a press for coinage* without any lawful authority, a question was raised whether a press for coinage was one of the tools or instruments within that clause of the Act on which the indictment was founded; and a majority of the judges held that it was. (e) In another case, the prisoner was convicted of *having in his custody*, without lawful excuse, one *mould made of lead*, on which was impressed the resemblance of one of the sides of a shilling, viz., the head side of a shilling; and it was submitted to the judges whether the mould found in the prisoner's custody was comprised under the general words "*other tool or instrument before mentioned*," so as to make the unlawful custody of it high treason; and also whether, if it were so comprised, it should not have been laid in the indictment to be a *tool or instrument* in the words of the Act. And the judges were unanimously of opinion that this mould was a tool or instrument mentioned in the former part of the statute, and therefore comprised under these general words; and that as a mould is expressly mentioned by name in the first clause of the Act which respects the making or mending, it need not be averred to be a tool or instrument so mentioned. (f)

The prisoner was indicted for having in his custody a puncheon made of iron and steel, upon which was impressed the resemblance of the head side of a shilling without lawful authority, &c. Several puncheons were found in the prisoner's lodgings, together with a quantity of counterfeit money, and he had them knowingly for the purposes of coining. These puncheons were ready for use; but it was impossible to say that the shillings which were found were actually made with these puncheons, the impressions being too faint to be exactly compared; but they had the appearance of having been made with them. The manner of making these puncheons was as follows: a true shilling was cut away to the outline of the head; that outline was fixed on a piece of steel, which was filed or cut close to the outline, and this made the puncheon; the puncheon made the die, which is the counter-puncheon; a puncheon is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never made at the mint; but after the die is struck the letters are engraved on it; a puncheon alone, without the counter-puncheon, will not make the figure; but to make an old shilling or a base shilling current, nothing more is necessary than to

(d) This clause is taken from part of sec. 12 of the 2 Will. 4, c. 34. As to hard labor, see *ante*, p. 104. See the interpretation clause, *ante*, p. 95.

(e) Bell's case, Fost. 430.

(f) Lennard's case, 1 Leach 90; 1 East P. C. c. 4, s. 17, p. 170. Another point was afterwards raised in this case upon the form of the indictment. The doubt was, whether the mould which was found in the prisoner's custody, it having only the resemblance of a shilling *inverted*, viz., the convex parts of the shilling being concave in the mould, and *vice versa*, the head or profile being turned the contrary way of the coin, and all the letters of the inscription reversed, was not properly an instrument which would make and impress the resemblance, stamp, &c., rather than an instrument on which the same were made and impressed, as laid in this indictment, the statute seeming to distinguish between such as will make and impress the similitude, &c., as the matrix, die, and mould; and such on which the same is made and impressed, as a puncheon, or counter-puncheon, or pattern. But a great majority of the judges were of opinion that this evidence sufficiently maintained the indictment; because the stamp of the current coin was certainly impressed on the mould in order to form the cavities thereof. They agreed, however, that the indictment would have been more accurate had it charged that "he had in his custody a mould that would make and impress the similitude," &c., and in this opinion some, who otherwise doubted acquiesced.

instrument now produced. They may be used for other purposes, such as making seals, buttons, medals, or other things, where such impressions are wanted. Eleven of the judges (*absente*, De Grey, C. J.) were unanimously of opinion that this was a puncheon within the meaning of the Act; for the word "puncheon" is expressly mentioned in the statutes, and will, by the means of the counter-puncheon or matrix, "make or impress the figure, stamp, resemblance, or similitude of the current coin;" and these words do not mean an exact figure, but if the instrument impress a resemblance in fact, such as will impose on the world, it is sufficient, whether the letters are apparent on the puncheon or not; otherwise the Act would be quite evaded, for the letters would be omitted on purpose. The puncheon in question was one to impress the head of King William; and the shillings of his reign, though the letters are worn out, are current coin of the kingdom. The puncheon made an impression like them, and the coin stamped with it would resemble them on the head side, though there were no letters. This was compared to the case mentioned *by Sir Matthew Hale, (g) that the omission or [115 addition of words in the inscription of the true seals, for the purpose of evading the law, would not alter the case. (h)

The part of the 8 & 9 Will. 3, c. 26, which related to instruments to mark the edges of coins, was not confined to such instruments as were in use when the Act passed; but extended to newly-invented instruments, which would produce the same effect; and it was not confined to such instruments as, used by the hand, unconnected with any other power, would produce the effect. A collar, therefore, marking the edge of coin, by having the coin forced through it by machinery, is an instrument within the 8 & 9 Will. 3, c. 26, though this mode of marking the edges is of modern invention, and though the collar cannot be used by itself, but must be used in conjunction with other machinery. (i)

It was decided, that having a tool or instrument (of such sort as is included in the 8 & 9 Will. 3, c. 26) in possession for the purpose of coining foreign gold coin not current here, was not within that statute; (ii) but it is expressly included in the present clause.

Where a die calculated to make shillings is made by an innocent agent, the party procuring him to make such die is the principal. The prisoner was indicted for feloniously making a die which would impress the resemblance of the obverse side of a shilling. The prisoner applied to a die-sinker to sink dies for counters for two whist clubs, stating that it was their practice to play with counters with one side resembling coins, and that they wished to have counters stamped by dies made under the following directions:—"Four dies for whist counters, obverse head of Queen Victoria, as in the shilling coin. Reverse, 'Blandford Whist Club, established 1800.' Obverse the shilling, as in coin, with wreath, &c. Reverse, 'Exeter Whist Club, established 1800.'" The die-sinker, entertaining suspicions, applied to the agent of the Mint, and communicated the order to him. The agent sent to the officers of the Mint in London, and the die-sinker was by them directed to execute the prisoner's order. The prisoner afterwards desired to have the obverse of one of the pieces, and the obverse of the other finished first, and they were so. When they were finished, they formed a die for the coining of a shilling. For the prisoner, it was objected that he could not be convicted, as he had not himself done anything in the making of the die, and that he was not answerable in this form of charge for the act of the die-sinker; that the die-sinker having acted under the instructions of the Mint, no felony whatever had been committed, and that the prisoner should have been indicted for a misdemeanor in inciting the die-sinker to commit a felony. But, upon a case reserved, the judges thought the die-sinker an innocent agent, and held the conviction good. (h)

On an indictment for having in possession a die made of iron and steel, proof of

(g) 1 Hale 184; 2 Hale 212, 215; Robinson's case, 2 Roll. Rep. 50; 1 East P. C. c. 2, s. 23, p. 86.

(h) Ridgely's case, 1 Leach 189; 1 East P. C. c. 4, s. 18, p. 171.

(i) Rex v. Moore, R. & M. C. C. R. 122; s. c., 2 C. & P. 235.

(ii) Bell's case, 1 East P. C. c. 4, s. 17, p. 169; Fost. 430.

(k) Reg. v. Bannen, 2 M. C. C. R. 309; 1 C. & K. 295 (47 E. C. L. R.).

a die made of either material will be sufficient; and it seems that if the indictment ~~does not~~ state that the die was made of *iron, steel, and other materials, proof ~~that~~ at *116] it was made of any material would be sufficient; and that it would not ~~be~~ necessary even to prove the exact material. The indictment was for having i ~~in~~ possession a die made of iron and steel, a witness who saw the die said it was made ~~of~~ of iron; another witness, who had not seen it, said that dies were usually made ~~of~~ of steel, and that iron dies would not stand; and the judges held that this evidence ~~could~~ would support the indictment, for it was immaterial to the offence of what the die ~~was~~ was made, and proof of a die either of iron or steel, or both, would satisfy th ~~is~~ charge.(l)

In proceeding upon the 8 & 9 Will. 3, c. 26, it was not necessary to prove the ~~that~~ money was actually made with the instrument in question.(m)

The having tools for coining in possession, with intent to use them, is a misde ~~meanor~~ meanor at *common law*. An indictment, which was framed as for a misde ~~meanor~~ meanor at *common law*, charged that the defendant, without any lawful authority, had i ~~n~~ his custody and possession two iron stamps, each of which would make and impre ~~ss~~ the figure, resemblance, and similitude of one of the sceptres impressed upon th ~~e~~ current gold coin of this kingdom, called half-guineas, with intent to make the in ~~pression~~ pression of sceptres on divers pieces of silver coin of this realm, called sixpence ~~s~~, and to color such pieces of the color of gold, and fraudulently to utter them a ~~s~~ lawful half-guineas. Lord Hardwicke, at the assizes, doubted whether the bar ~~of~~ possession was unlawful, unless made use of, or unless made criminal by statute ~~s~~ but upon the indictment being removed into the Court of King's Bench by *certio* ~~rari~~,(n) Page, Probyn, and Lec, justices, held, that the bare having such instru ~~ments~~ in possession, with the intent charged, was a misdemeanor.(o)¹

It seems that the degree of similitude to the real coin which the tools or instru ~~ments~~ must be capable of impressing in order to bring the case within the statute ~~must~~ must be governed by considerations similar to those which have been stated with respect to the counterfeit coin itself (p) Whether the instrument in question be ~~calculated~~ calculated to impress the figure, stamp, resemblance, or similitude of the coin ~~current~~ current is a question for the jury; and it is clear, that the offence is not confined to an *exact imitation* of the original and proper effigies of the coin.(q)

Upon an indictment which alleges that a prisoner feloniously had in his posses ~~sion~~ sion a mould having the resemblance of the obverse side of a shilling impressed upon it, it must be proved that the entire impression was upon the mould. The prisoner was charged in one count with having in his possession a mould, "upon which was impressed the figure and apparent resemblance of one of the sides (that is to say) the obverse side of the King's current coin called a shilling," and in another count the word "reverse" was substituted for "obverse;" the moulds when *117] produced appeared not to have a complete *impression of the obverse and reverse sides of a shilling, but only the outside rim, and a slight portion of the other parts of the impression, the entire impressions, however, appeared to have been upon them at one time, but part had been obliterated. It was held, that if the jury believed that no more than part of the impression was impressed upon the moulds while the prisoner was in possession of them, that he ought to be acquitted.(r) But where an indictment charges that the prisoner made a

(l) *Rex v. Oxford*, East. T. 1819, MS. Bayley, J., and R. & R. 382; s. r., *Rex v. Phillips*, R. & R. 369.

(m) *Ridgelay's case*, 1 East P. C. c. 4, s. 18, p. 172.

(n) The defendant was brought up by *habeas corpus*, and committed to Newgate.

(o) *Rex v. Sutton*, Rep. temp. Hardw. 370. But see the remarks on this case, *ante*, p. 85.

(p) *Ante*, p. 98.

(q) 1 East P. C. c. 4, s. 18, p. 171.

(r) *Rex v. Foster*, 7 C. & P. 494 (32 E. C. L. R.), Patteson, J.

¹ On an indictment for counterfeiting coin, the criminal participation of the defendant may be inferred by the jury from the fact that a large quantity of spurious coin and various instruments and appliances for coining were found in his possession, unless such possession be satisfactorily explained by him: *United States v. Burns*, 5 M'Lean 23; *United States v. King*, *ibid.* 208; *State v. Antonia*, 3 Brevard 562; *State v. Odell*, *ibid.* 552.

mould, which was intended to impress the resemblance of the obverse side of a shilling, it is sufficient to prove that the prisoner made a mould, which would make a part of the impression. One count charged the prisoner with making a mould, "which said mould was intended to make and impress the figure and apparent resemblance" of the obverse side, and another the reverse side, of a shilling: the evidence being the same as in the former case; it was held, that the term "intended" did not mean in a state to make an entire impression, and therefore if the prisoner had only begun to make, the intention to make the whole might be inferred, though only part was actually made, and consequently that the evidence was sufficient.^(s)

But where upon an indictment for having in possession a mould, upon which was made the figure of one of the sides of a shilling, it appeared that the mould had a perfect impression on one side of it; but that there was no channel, through which the metal runs, and the previous case was cited; Maule, J., held that a mould must be a thing by means of which a person may be able to make a coin; and that a thing, by means of which coin cannot be made, cannot be a mould; for it requires something to be done to make it a mould. The proof, therefore, was insufficient. As to the words "any part or parts" contained in the clause, they did not refer to any part of the mould, but to any part of the impression.^(t)

Where a mould was made to resemble the whole of one side of a coin, which had been worn partly away by use, an indictment under the 2 Will. 4, c. 34, s. 10, might charge the possession of a mould on which was impressed the figure of one of the sides of such coin, as the words "part or parts" of the sides in that section applied to cases where several moulds were used to make one side of a coin.^(u)

An indictment charging that the prisoner had in his possession a mould "upon which was made and impressed the figure" of one of the sides of a coin, is bad for not showing that the figure was on the mould at the time when the prisoner had it in his possession. The words "then and there" should be introduced before the word "made."^(u)

Weeks and two other men and two women were indicted for having in their possession a mould impressed with one side of a half-crown. Weeks had occupied a house for a month, and the police one night went to the house and found the other prisoners there. The men attacked the police, whilst the women snatched up something which they threw into the fire. The police preserved *part of this, which proved to be fragments of a plaster of Paris mould of a [*118 half-crown, *parts of which were still wet*. Weeks shortly afterwards came to the house. The women called out to him that the police were there. He nevertheless came in. The house had two rooms on each floor, and a quantity of plaster of Paris was found in a cupboard up stairs, with several bottles of liquid. In a cupboard down stairs an iron ladle, such as might have been used for melting metal, was found: on the hearth in one of the rooms up stairs was found a small portion of white metal and some fragments of plaster of Paris moulds. Thirteen days before Weeks had passed a bad half-crown; but there was no evidence to show that it was made in the mould found in the house. The jury found that Weeks knew that the mould was in his house. It was held that Weeks was rightly convicted, as the mould was found in the house of which he was the master, and that the evidence of the uttering of the half-crown by him was rightly admitted to establish the scienter.^(v)

On an indictment against husband, wife and boy aged ten years, for having in possession a mould on which was impressed the obverse side of a shilling, it appeared that the boy was apprehended whilst passing a counterfeit half-crown, and on the officer going to the house where he said he resided the husband was found in an upper room. In the lower room the mould and various coining implements were found, and whilst the officer was searching the wife came in, and soon after-

(s) *Rex v. Foster*, 7 C. & P. 495 (32 E. C. L. R.), Patteson, J.

(t) *Reg. v. Macmillan*, 1 Cox C. C. 41.

(u) *Reg. v. Richmond*, 1 C. & K. 240 (47 E. C. L. R.), Rolfe, B. See *Rex v. Silcot*, 3 Mod. 280.

(v) *Reg. v. Weeks*, 1 L. & C. 18.

wards broke up a mould used in casting counterfeit shillings; on her counterfeit money was found, but none on her husband. Talfourd, J., held that as the husband occupied the room in which the mould was found, *prima facie* he must be presumed to be in possession of what the room contained; but that presumption might be rebutted, and the jury must consider all the circumstances, and see whether they satisfied them that the trade was carried on there with his sanction. If they were satisfied that the husband was in possession of the mould, they ought to acquit the wife, as she could not in law be said to have any possession separate from her husband; but if they thought that the criminality was on her part alone, and that he was entirely guiltless of any participation in her conduct, she might be convicted. If they thought she broke the mould to screen him from detection, that would not affect the case. Either husband or wife might be convicted on the evidence, but not both. As to the boy, it would be going too far to say that he was a joint possessor with either of his parents. (w)

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*CHAPTER THE FOURTH.

OF UTTERING, TENDERING, &C., COUNTERFEIT COIN.

IN some cases formerly the putting off counterfeit money might amount to treason: as if A. counterfeited the gold or silver coin current, and by agreement before that counterfeiting B. was to take off and vent the counterfeit money, B. was an aider and abettor to such counterfeiting, and consequently a principal traitor within the law. (a) And in the case of the copper coin, B. acting a similar part was an accessory before the fact to the felony, within the statute 11 Geo. 2, c. 40 (now repealed). (b) And if B., knowing that A. had counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be as a receiver of A. because he maintains him. (c)

If A. counterfeit money, and B. knowing the money to be counterfeited vented the same for his own benefit, B. was neither guilty of treason, nor misprison of treason. But he might be proceeded against under the 15 Geo. 2, c. 28 (now repealed), before which statute he was only liable to be punished as for a cheat and misdemeanor. (d) Where the defendant was indicted for "unlawfully uttering and tendering in payment to T. H. ten counterfeit halfpence, knowing them to be counterfeit," and convicted on a count laying this generally, upon reference to all the judges they held it was not an indictable offence. (e) And upon the principles which have been mentioned in a former part of this work, (f) the unlawful procuring of counterfeit coin with intent to circulate it, though no act of uttering be

(w) Reg. v. Boober, 4 Cox C. C. 272.

(a) 1 Hale 214.

(b) 1 East P. C. c. 4, s. 26, p. 178.

(c) 1 Hale 214.

(d) 1 East P. C. c. 4, s. 26, p. 179; 1 Hale 214. See precedents of indictments for a misdemeanor at common law in uttering a counterfeit half-guinea: Cro. Circ. Comp. 315 (7th edit.); Starkie 466; 2 Chit. Crim. Law 116. See also a precedent of an indictment for a misdemeanor at common law, against a man for uttering a counterfeit sixpence, and having another found in his custody: Cro. Circ. Comp. 315 (7th edit.); 2 Chit. Crim. Law 117. The uttering of false money, knowing it to be false, is mentioned as a misdemeanor in the recital to the 15 Geo. 2, c. 28, s. 2. There is also a precedent for a misdemeanor at common law, in uttering, and causing to be uttered, guineas filed and diminished as good guineas: Cro. Circ. Comp. 317 (7th edit.), and 2 Chit. Crim. Law 116; and also a precedent for a misdemeanor at common law in selling counterfeit Dutch guilders: Cro. Circ. Comp. 313 (7th edit.); 2 Chit. Crim. Law, 219, 120.

(e) Cirwan's case, Oxford Sum. Ass. 1794, MS. Jud.; 1 East P. C. c. 4, s. 28, p. 182; 2 Leach 834, note (a).

(f) *Ante*, p. 85.

proved, is a misdemeanor; and the possession of counterfeit coin unaccounted for was held to be evidence of an unlawful procurement with intent to circulate.^(g)¹

*But the receiving, uttering, or tendering in payment counterfeit money [§120] are provided for by the late statute.

Sec. I.—Of uttering, &c., Counterfeit Coin of the Realm.

By the 24 & 25 Vict. c. 99, s. 9, "Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labor, and with or without solitary confinement."^(h)

Sec. 10. "Whosoever shall tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, or shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."⁽ⁱ⁾

(g) *Rex v. Fuller & Robinson*, *ante*, p. 86. The possession in this case was under particularly suspicious circumstances; the coin being wrapped up in parcels with soft paper to prevent it from rubbing. The marginal note to Parker's case, 1 Leach 41, states, that "having the possession of counterfeit money, with intention to pay it away as and for good money, is an indictable offence at common law." But, *quære*, if the point stated in the marginal note was actually decided in Parker's case; and see *ante*, p. 85.

(h) This clause is taken from the 2 Will. 4, c. 34, s. 7. As to hard labor, &c., see *ante*, p. 104. See the interpretation clause, *ante*, p. 95.

(i) This clause is taken from the 2 Will. 4, c. 34, s. 7. The words "any other piece" are substituted for "one or more piece or pieces," and the words "any false or counterfeit coin" for "any more or other false or counterfeit coin." As to hard labor, &c., see *ante*, p. 104. See the interpretation clause, *ante*, page 95.

¹ An indictment for fraudulently passing counterfeit money must charge an intent to defraud the person to whom it was passed; and to sustain such indictment it must appear that the money was delivered with a knowledge of its character and with intent to defraud the person to whom it was passed; and the indictment will not be sustained by proof of a sale of counterfeit money to a person who knew it to be counterfeit: *Harper v. State*, 8 Humph. 93. To support an indictment against the defendant for having in his possession a counterfeit bank bill, knowing it to be counterfeit, and with intention to pass the same as good, the government must prove the possession, knowledge and intent to pass, and proof of possession is not sufficient to throw on the defendant the burthen of explaining his possession and that he did not intend to pass the same: *Brown v. People*, 4 Gilm. 439. When the prosecutor in an information against A. for putting off a counterfeit bank bill, knowing it to be counterfeit, having given evidence to prove that A. & B. had entered into a conspiracy to put off counterfeit bills similar to the bill described in the information, attempted to show that A. knew the bill in question to be counterfeit, and for this purpose he offered evidence to prove that at two different places, a day or two previous to the alleged offence, and at another place soon after its commission, B. put off other counterfeit bills of the same bank, A. being in company with B. immediately before and after such putting off by B. but not actually present with him at those times, it was held that the whole of such evidence was proper to go to the jury; and if they were satisfied that such conspiracy existed between A. & B. and that B. in pursuance thereof, put off such counterfeit bills in the manner stated, these acts of B. were as strong evidence against A. to prove his knowledge of the bill in question being counterfeit as though he had personally done the same acts: *State v. Spalding*, 19 Conn. 233.

Sec. 11. "Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or be imprisoned for any term not exceeding two years with or without hard labor, and with or without solitary confinement." (*k*)

*121] *Sec. 12. "Whosoever having been convicted, *either before or after the passing of this Act*, of any such misdemeanor or crime and offence as in any of the last three preceding sections mentioned, *or of any felony or high crime and offence against this or any former Act relating to the coin*, shall afterward commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement." (*l*)

This clause is taken from the 2 Will. 4, c. 34, ss. 7, 8, but those sections only applied to offences committed after a conviction for a misdemeanor: but it was expedient to extend the clause to convictions after a previous conviction for felony for such previous conviction rendered the offender deserving of at least as high punishment as if he had been previously convicted of any misdemeanor mentioned in any of the three preceding sections, and it sometimes happened that it was easier to prove a previous conviction for felony than for such a misdemeanor; and the former might have taken place in the same county where the subsequent offence was committed, but not the latter.

Sec. 37. "Where any person shall have been convicted of any offence against this Act, or any former Act relating to the coin, and shall afterwards be indicted for any offence against this Act committed subsequent to such conviction, it shall be sufficient in any such indictment, after charging such subsequent offence, to state the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous offence, purporting to be signed by the clerk of the court or other officer having or purporting to have the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer, shall upon proof of the identity of the person of the offender, be sufficient evidence of the previous conviction, without proof of the signature or official character or authority of the person appearing to have signed the same, or of his custody or right to the custody of the records of the court, and for every such certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken; and the proceedings upon any indictment for committing any offence after a previous conviction or convictions shall be as follows; (that is to say), the offender shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the Court order a plea of not guilty to be entered on his behalf, the jury shall be charged, in the first instance, to inquire concerning such subsequent offence only; and if they find him *122] guilty, or if on an arraignment he plead guilty, he shall then, and not *before he is asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the Court may proceed to sentence him accordingly, but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question the jury shall then be charged to inquire concerning such previous conviction or convictions, and in such case it shall not be necessary to swear the jury again, but

(*k*) This clause is taken from the 2 Will. 4, c. 34, s. 8, with the addition of the words in italics. As to hard labor, &c., see *ante*, p. 104. See the interpretation clause, *ante*, p. 95

(*l*) As to hard labor, &c., see *ante*, p. 104.

the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry; Provided that if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence."

This clause is principally new. Under the 2 Will. 4, c. 34, it was necessary in an indictment for a subsequent offence, to set out at length the previous indictment, &c., and to give in evidence a copy of that indictment, &c.: this was very objectionable, and therefore this clause has provided for a short statement in the indictment, and for a certificate containing the substance and effect of the former indictment, &c., it has also provided for the proceedings on the arraignment, and in the same manner as on an indictment for larceny after a previous conviction for felony.

The words "after charging the subsequent offence" was inserted in order to render it absolutely necessary always to charge the subsequent offence or offences first in the indictment, and after so doing to allege the previous conviction or convictions. This was the invariable practice on the Oxford Circuit, and the Select Committee of the Commons were clear that it ought to be universally followed, so that the previous conviction should not be mentioned, even by accident, before a verdict of guilty of the subsequent offence had been delivered.

The proceedings on the arraignment and trial are now to be as follows:

The defendant is first to be arraigned on that part only of the indictment which charges the subsequent offence; that is to say, he is to be asked whether he be guilty or not guilty of that offence. If he plead not guilty, or if the Court order a plea of not guilty to be entered for him under the 7 & 8 Geo. 4, c. 28. s. 2, or 9 Geo. 4, c. 54, s. 8 (I.), where he stands mute or will not answer directly to the charge, then the jury are to be charged in the first instance to try the subsequent offence only. If they acquit of that offence, the case is at an end; but if they find him guilty of the subsequent offence, or if he plead guilty to it on arraignment, then the defendant is to be asked whether he has been previously convicted as alleged, and if he admit that he has, he may be sentenced accordingly; but if he deny it, or stand mute of malice, or will not answer directly to such question, then the jury are to be charged to try whether he has been so previously convicted, and this may be done without swearing them again, and then the *previous conviction is to be proved in the same manner as before this Act passed. (m) [*123

A doubt has been raised as to the mode of proceeding where a prisoner is indicted after this Act came into operation for an offence against the former Act. Where the prisoner was indicted for feloniously uttering counterfeit coin on the 19th of October, 1861, after a previous conviction, and tried in the November following, the Recorder and Common Serjeant held that the proceedings at the trial must be as before the new Act passed. (n) But where the same question arose in an ordinary case of felony, Byles, J., was of opinion that, as far as the offence was concerned, the offence was governed by the former statute; but as to the procedure at the trial, that was to be regulated by the Act which was in force at the time of the trial. (o) But Martin, B., is said to have subsequently held that the former view was correct. (p)

(m) See also the note Greaves' Cr. Acts, 199, 2d edit.

(n) Reg. v. Montrion, 9 Cox C. C. 27.

(o) Anonymous, 9 Cox C. C. 28.

(p) Anonymous, Ibid. It seems quite clear that Byles, J., fell into a misapprehension. The old Acts are all kept alive by sec. 3 of 24 & 25 Vict. c. 95, as to all offences committed before the 1st of Nov. 1861, and that section in addition, expressly provides that every such offence "shall be dealt with, tried," &c., in the same manner as if the repealing Act had not passed; and sec. 37 of the Coin Act and sec. 116 of the Larceny Act provide in the commencement for the indictment for offences against those Acts, and the subsequent parts of those sections ought to be held to apply to those cases only. See the note, Greaves' Cr. Acts, 199, 2d edit.

It is clear from the terms of the clause that the certificate is admissible, if it be apparently regularly framed, without any additional evidence.

Two cases are reported, in which it is said that Cresswell, J., held that, where a certificate was produced purporting to be signed by a clerk of the peace, there must be some evidence in addition that the certificate is genuine and comes from the proper custody, as by proof of the handwriting, or that the document came from the office of the clerk of the peace.^(g)

The proviso as to giving evidence of the previous conviction, if the prisoner give evidence of his good character, remains unaltered.

If the prisoner, whether by himself or his counsel, attempts to prove a good character for honesty, either directly, by calling witnesses, or indirectly, by cross-examining the witnesses for the Crown, the prosecution may give the previous conviction in evidence against the prisoner.^(r) If, however, a witness for the prosecution were asked by the prisoner's counsel some question, which has no reference to character, and he happened to say something favorable to the prisoner's character, the prisoner would not be said to give evidence as to his character, and the previous conviction ought not to be admitted.^(s)

Sec. 15. "Whosoever shall tender, utter, or put off any false or counterfeit coin *124] resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labor, and with or without solitary confinement."^(t)

The prisoner was indicted for uttering a counterfeit coin intended to resemble a piece of the current coin called a groat. All the witnesses called the coin a fourpenny-piece, except the Inspector for the Mint, who called it a groat, and said he had had that name, he believed, from the earliest period. It had the word "fourpence" upon it, but the original name was groat in the time of Edward III. The groats were not then the same size and weight as this. He had heard them called groats; they were called groats as well as fourpenny pieces in the proclamation. It was contended for the prisoner that the coin was not proved by legal evidence to be a groat, the proclamation not having been produced. Maule, J., Erskine, J., being present, in summing up, said: "A groat is a common word belonging to our own mother tongue, such as 'uttering,' 'public-house,' 'half-pint,' and many other expressions; and you are here as Englishmen to use your own knowledge of your own language; and if, understanding the matter without any evidence, you are satisfied that a fourpenny-piece and a groat are the same thing, then the prisoner is rightly indicted. It is very true that a groat in Edward the Third's time weighed a great deal more than a fourpenny-piece does now; and so it is with respect to other coins. Things have kept their names, though they have changed their value."^(u)

Under the 8 & 9 Will. 3, c. 26, s. 6, which had only the words "take, receive, pay, or put off," there must have been an *actual passing* or getting rid of the money, and not merely an attempt to do so. The prisoner had carried a large

(g) Reg. v. Whale, 1 Cox C. C. 69; Reg. v. Stone, Ibid. 70. These cases are very probably misreported, as it is quite clear that no such evidence is required, and the universal practice has been to the contrary.

(r) Reg. v. Shrimpton, 2 Den. C. C. 319; Reg. v. Gadbury, 8 C. & P. 676 (34 E. C. L. R.).

(s) Per Lord Campbell, Reg. v. Shrimpton, *supra*. So if a witness were to volunteer any evidence of the prisoner's good character, it clearly would not render the conviction admissible.

(t) This clause is taken from the 2 Will. 4, c. 34, s. 12. As to hard labor, &c., see ante p. 104. And see the Interpretation clause, *ante*, p. 95.

(u) Reg. v. Connell, 1 C. & K. 190 (47 E. C. L. R.).

quantity of counterfeit shillings to the house of a Mrs. Levey, which she agreed to receive from him, and which he agreed to put off to her at the rate of twenty-nine shillings for every guinea. In pursuance of this bargain, the prisoner laid a heap of counterfeit shillings on a table, and Mrs. Levey proceeded to count them out at the rate before mentioned: and had counted out three parcels containing eighty-seven counterfeit shillings, for which she was to pay the prisoner three guineas; but before she had paid him, and while the counterfeit money lay upon the table, the officers entered the room and apprehended them. Mrs. Levey swore that she had bought the three parcels of shillings, and was going to pay the prisoner three guineas for them at the moment they were detected. This was ruled not to be a completion of the offence charged, and the prisoner was acquitted.^(v) [*125
 *But this case would clearly be within the new Act, which has the word "tender" in it.

Upon an indictment under the 2 Will. 4, c. 34, s. 7, for "uttering and putting off" a counterfeit shilling, it appeared that the prisoner went into a shop and asked to purchase some coffee and sugar, and in payment of the same he put on the counter the coin in question, when the shopkeeper took up the coin and told the prisoner it was a bad one. The prisoner then left the shop, leaving the shilling behind him, but without the coffee and sugar, and it was held that the charge of uttering and putting off was proved by the evidence.^(w)

If the names of the persons to whom the money was put off can be ascertained, they ought to be mentioned, and laid severally in the indictment: but if they cannot be ascertained, the same rule will apply which prevails in the case of stealing the property of persons unknown.^(x)

The words of the 15 Geo. 2, c. 28, s. 2, "utter or tender in payment" being in the disjunctive, were held to apply to an uttering of counterfeit money, though not tendered in payment, but passed by the common trick called *ringing the changes*. The prosecutor having bargained with the prisoner, who was selling fruit about the streets, to have five apricots for sixpence, gave him a good shilling to change. The prisoner put the shilling into his mouth, as if to bite it in order to try its goodness; and, returning a shilling to the prosecutor, told him it was a bad one. The prosecutor gave him another good shilling, which he also affected to bite, and then returned another shilling, saying it was not a good one. The prosecutor gave him another good shilling, with which he practised this trick a third time; the shillings returned by him being in every instance bad. The Court held that the words of the statute were sufficient to include this case; and that *uttering* and *tendering in payment* were two distinct and independent acts.^(y)

It was once held that the uttering must either be with intent to defraud the party receiving the money, or with intent that that party should pass it as the agent of the utterer. Upon an indictment on 2 Will. 4, c. 34, s. 7, against husband and wife for uttering a counterfeit half-crown, it appeared that a woman asked the female prisoner to give her something, as her children were without food, and the male prisoner gave her twopence, and told her that his wife would give her something more, on which she gave the woman the bad half-crown in question, telling her to get what she could for children; it was held that, although in the statute there are no words with respect to defrauding, yet in the proof it is necessary to go beyond the mere words of the statute, and to show an intention to defraud some person. There might be cases of a party giving a person a piece of counterfeit money, and at the same time telling that person that it was bad, and

(v) Wooldridge's case, 1 Leach 307; 1 East P. C. c. 4, s. 27, p. 179. I have left this case, as it might be useful if an indictment omitted the word "tender." C. S. G.

(w) Reg. v. Welch, 2 D. C. C. R. 78. See Reg. v. Ion, 2 Den. C. C. 475.

(x) 1 East P. C. c. 4, s. 27, p. 180, citing a case from MS. Tracy, of a woman who was indicted at the Old Bailey, 1702, for putting off ten pieces of counterfeit gilt money like guineas, to divers persons unknown; Holt, C. J., said, that the names of the persons ought to be mentioned and laid severally; yet he tried the prisoner, and she was convicted. Probably the names of the persons to whom the money was put off could not be ascertained.

(y) Frank's case, 2 Leach 64.

*126] yet he would *still be liable to be convicted on an indictment like the present, if a case falling within the mere words of the statute were sufficient.^(z)¹

But where on an indictment for uttering counterfeit coin, it appeared that the prisoner had given the coin to a girl with whom he had had connection, Lord Denman, C. J., and Coltman, J., held that if the prisoner gave the coin to the girl under the circumstances proved, knowing it to be counterfeit, he was guilty of the offence charged; that the preceding decision was not in point, as that was a case of charity; but that there were great doubts as to the correctness of that ruling.^(a) And *Reg. v. Page*^(b) is said to have been overruled, and that "the intent is inferred by law," in like manner as "if a forged instrument is put away in order to get money or credit, that amounts to an uttering."^(c)

An indictment on the 15 Geo. 2, c. 28, charged the prisoner in the first count with having, on the 15th December, uttered to one G. S. a counterfeit half-crown, knowing it to be so; and in the second count with having, on the said 15th December, uttered another counterfeit half-crown to the same person; and the prisoner was convicted on both counts. The question was whether the uttering the counterfeit money twice on the same day *being stated in the two counts*, the Court could pronounce the greater punishment inflicted by the third section of the statute, or must give only the smaller punishment inflicted by the second section; and the judges held that this indictment was not sufficient to subject the prisoner to the larger penalty, as for uttering two pieces of counterfeit coin on the same day, there being no distinct averment of that fact.^(d) But where two utterings are charged in one count of the indictment, on a certain day therein named, the day will be held to be material, and the fact of an uttering twice on the same day to be sufficiently averred. The indictment charged that the prisoner on the 14th of February, uttered base coin to W. C.; and that on the said 14th of February he uttered to J. L. other base coin, and it was held sufficient to warrant the higher punishment; the utterings, on the face of the indictment, appearing to be on the same day. And the judges held, that though, when the day is not material, the fact may be proved on a day different from the day laid, yet where the day is not indifferent, the precise time laid must be proved: and that in this case it must be taken that it was proved that the defendant uttered counterfeit coin at two different times of the same day - ^(e)

*127] *On a conviction of two separate utterings, in two counts, one judgment of two years' imprisonment under sec. 7 of the 2 Will. 4, c. 34, is bad. The first count charged the prisoner with uttering on the 2d of December a counterfeit shilling; the second count charged him with uttering another counterfeit shilling on the same day and at the same place, and he was convicted of both utterings, and sentenced to two years' imprisonment, and, upon a case reserved, the judges were of opinion that the sentence was incorrect, and that there should have been consecutive judgments of one year's imprisonment each.^(f)

(z) *Rex v. Page*, 8 C. & P. 122 (34 E. C. L. R.), Lord Abinger, C. B. As every person is taken to intend the probable consequence of his act, and as the probable consequence of giving a piece of bad money to a beggar is that that beggar will pass it to some one else, and thereby defraud that person; *quære*, whether this case rests upon satisfactory grounds? In any case a party may not be defrauded by taking base coin, as he may pass it again, but still the probability is that he will be defrauded, and that is sufficient. C. S. G.

(a) Anonymous, 1 Cox C. C. 250.

(b) *Supra*.

(c) Per Alderson, B., in *Reg. v. Ion*, 2 Den. C. C. 484.

(d) *Tandy's case*, 2 Leach 833; 1 East P. C. c. 4, s. 29, pp. 182, 183. Eyre, C. J., Buller J., and Heath, J., were absent when this opinion was given, viz., Hil. T. 1799. The judges also thought it advisable to give judgment of imprisonment for six months singly and not on each of the counts. And see *Smith's case*, 2 Leach 856.

(e) *Martin's case*; Derby Lent Ass. 1801, *coram* Graham, B., decided by the judges in June, in the same year: 2 Leach 223; 1 East P. C. *Addend.* xviii., MS. Bayley, J.

(f) *Rex v. Robinson*, R. & M. C. R. C. 413. In *Rex v. Roberts*, Carthew 226, Holt, C. J., said, "Each offence requires a separate and distinct punishment according to the quality of the offence." See this case, *post*, Exhortation.

¹ The staking counterfeit money at a gaming table, as good money, is an attempt to utter or pass the same; and losing it at play is a passing of the same against law: *Smith v. Beeler*, 1 Brevard 482.

For the purpose of proving the act charged in the indictment to have been done *knowingly*, it is the practice to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. This is in conformity with the practice upon indictments for disposing of and putting away forged bank notes, knowing them to be forged; (g) upon one of which the counsel for the prisoners, objecting to such evidence, contended that it would not be allowed upon an indictment for uttering bad money; and stated that the proof in such case was always exclusively confined to the particular uttering charged in the indictment. But Mr. B. Thomson said, that he by no means agreed in the conclusion of the prisoner's counsel, that the prosecutor could not give evidence of another uttering on the same day to prove *the guilty knowledge*. "Such other uttering," he observed, "cannot be punished until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money he uttered was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a common utterer: (h) but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering to show that he uttered the money with a knowledge of its being bad." (i) So, upon an indictment for uttering a counterfeit shilling, the fact of five other counterfeit shillings having been found in the prisoner's possession five days afterwards, has been held admissible in order to show guilty knowledge. (k)

In order to prove guilty knowledge, both previous and subsequent utterings of the same and different kinds of coin are admissible. On an indictment for uttering a counterfeit half-crown on the 12th of December, that uttering was proved, and the uttering of another counterfeit half-crown on the 11th of December, and evidence was admitted of an uttering of a counterfeit shilling on the 4th of January, although it was objected that a subsequent uttering of a different species of counterfeit coin was not admissible to show guilty knowledge at a prior time; and it was held that this evidence was properly received. In order to show guilty knowledge, it would not be sufficient merely to prove some other dishonest act; but here the uttering of the bad silver was so connected with the [*128 offence charged, as to make the evidence of it admissible, although the coin was of a different denomination; and the difference of the denomination goes to the weight of the evidence, but does not affect its admissibility. (l)

An associate, not present nor coöperating at an uttering of bad money, is not liable to be convicted with the actual utterer, merely on the ground that he is an utterer also, and has other bad money about him for the purpose of uttering. And it appears not to be a sufficient ground for convicting a person of the second offence, of having other bad money in possession at the time, that such person was associating with another, not present at the uttering, who had large quantities of bad money about him for circulation; or that such person on the day after the uttering had in possession a small number of pieces of bad money. The prisoners, *Job* and *Sarah Else*, were indicted for uttering a bad shilling, having other bad shillings in their possession at the time. It appeared that the uttering was by a woman alone, on the 30th of January, in the absence of the man; that they both slept together on the 29th and 31st; and that on the 30th the man offered for sale a large quantity of bad shillings, and sixpences; and also that they were both searched on the 31st, when upon the man was found a large quantity of bad shillings, and upon the woman were found six bad shillings. The prisoners were upon this evidence both convicted of the double offence, on the ground that, both being engaged in the same illegal traffic, the act of one was the act of both; but the judges held the woman alone liable to be convicted, and that of the single offence only. (m)

(g) *Rex v. Whiley*, 2 Leach 983; 1 New R. 92; Tattershall's case, cited in *Rex v. Whiley*. And see *Ball's case*, 1 Campb. 325, and other cases, vol. 2, Forgery.

(h) That is, within the repealed Act, 15 Geo. 2, c. 28.

(i) *Rex v. Whiley*, 2 Leach 983.

(k) *Harrison's case*, 2 Lewin 118, Taunton, J., and Alderson, B.

(l) *Reg. v. Foster, Dears. C. C. R.* 456.

(m) *Rex v. Else*, East. T. 1808, MS. Bayley, J., and Russ. & Ry. 142. And see *Rex v.*

So where *Page* and *Jones* were indicted under the 2 Will. 4, c. 34, s. 7, for uttering counterfeit half-crowns, twice on the same day; and it appeared that they were seen at different times in the morning together, and that *Page* went into an inn, leaving *Jones* about twelve yards off in the street, whilst *Page* passed one half-crown in a room, which was out of the sight of *Jones*; *Page* then came out, joined *Jones*, and they went together to another inn, where *Jones* went in, and passed another half-crown, leaving *Page* standing about twelve yards off in the street, and out of sight of where *Jones* passed the half-crown; Mr. J. Coleridge said he thought the true principle was, whether the one prisoner was so near to the other as to help the other to get rid of the money, which he did not think the evidence proved in this case. (n)

*129] But where two prisoners were jointly indicted for uttering a counterfeit shilling, having other counterfeit shillings in their possession, and it appeared that both went to a shop, into which the one entered and uttered a bad shilling, having no more in her possession, and the other stayed outside the shop, having other bad pieces of money, it was held that both might be convicted, the uttering and possession being both joint. (o) So where two women were indicted for two utterings of forged sovereigns on the same day, it was proved that they were together in the morning, at a public house, about nine o'clock, and together again about two o'clock; and several utterings by each were proved, and one of the prisoners uttered a sovereign to one person very near the place, in a market, where the other prisoner at the same time uttered a sovereign to another person; it was held that if they were acting concurrently, and were near enough to be assisting at the time of the uttering, that would be sufficient; but if there was only a general community of purpose in the morning, and each separated to do their respective

Soares and others (uttering a forged note), *Russ. & Ry.* 25; and other cases, *post*, Book IV., xxxii., s. 4.

(n) *Reg. v. Page & Jones*, Hereford Sp. Ass. 1841, MS. C. S. G.; 2 M. C. C. R. 290. The jury convicted both. I suggested in this case that *Rex v. Else*, *supra*, had proceeded on a fallacy. It was considered in the same light as a felony, and the rule as to principal and accessory applied to it, which was erroneous, as it was a misdemeanor, and therefore all persons taking part in it were principals, though absent. The learned judge made no direct allusion to this suggestion, which seems to me to deserve consideration: the rule is that in misdemeanors all persons concerned therein are principals: *ante*, p. 64; 4 Blac. Com. 36; 1 Hale 613; 12 Co. 81, Dalt. c. 161; 2 Inst. 183; Co. Litt. 57; *Fost. Baker v. Rogers*, Cro. Eliz. 788, and whatever would make a person accessory in a felony makes him a principal in crimes where there are no accessories. It has been so held in treason, 12 Co. 81; *Stamf. P. C.* 40; and in *Reg. v. Tracy*, 6 Mod. 32. Holt, C. J., said may be laid either way, viz., charging as principal or laying it special, as it will appear on the evidence. In all these cases of uttering the evidence would certainly have satisfied a jury, if the case had been a felony, that the party absent was an accessory, and therefore it should seem he was a principal in the misdemeanor. If that be so, the indictments charging with the actual uttering were right, because that is charging according to the legal effect of the offence. In 12 Co. 81, it was held that if one, before the act done, procure another to counterfeit the great seal, in the indictment he may be charged with the fact, viz., the counterfeiting. [Since the last edition, it has been held on an indictment charging two prisoners with attempting to set fire to a malthouse, that one of them who was absent at the time the attempt was made might be convicted if he procured the other to make the attempt: *Reg. v. Clayton*, 1 C. & K. 128 (47 E. C. L. R.); and, on an indictment for obtaining money by false pretences, that a party who procured an assistant in the fraud might be convicted, though not present at the time of making the pretence or obtaining the money, for "in misdemeanors all parties are principals, whether present or not:" *Reg. v. Moland*, 2 M. C. C. R. 276.] Unless, therefore the misdemeanor of uttering base coin is to be distinguished from all other misdemeanors, these cases deserve reconsideration, and the more so, because if they are good law the utterer alone can be convicted, while the party in the distance, who generally is the more guilty, will altogether escape. He cannot be convicted as principal, because he is absent, nor as accessory, because in misdemeanors there are no accessories. In *Rex v. Roderick*, 7 C. & P. 795 (32 E. C. L. R.), Mr. B. Parke expressly declared that when an offence was made a misdemeanor by statute, it was made so for all purposes; and surely there can be no good reason for introducing an exception, the effect of which is to give perfect immunity to guilty parties. The only cases referred to in *Rex v. Else* were *Rex v. Soares*, R. & R. C. R. 25, and *Rex v. Davis*, *Ibid.* 113; both cases of felony. U. S. G.

(o) *Rex v. Skerrit*, 2 C. & P. 427 (12 E. C. L. R.), Garrow, B.

five acts in the course of the day, so that one was not present or within a reasonable distance to assist the other, both could not be found guilty. (p)

In consequence of note (n), *Rex v. Else* and *Rex v. Page* were first doubted, and then overruled; and in these cases it is now settled that all who, previously to the uttering of base coin, concert, arrange, or cause its uttering, are equally guilty with the utterer, though absent when the coin is uttered.

The first count charged the prisoners with uttering a counterfeit sixpence to A., and on the same day uttering another to B.; the second count with uttering to C.; and a third count with uttering to D. The prisoners were in a town together all the day in question, and in the evening quitted a public-house together, having first changed their clothes for the purpose of disguise. Each of them uttered three bad sixpences, made in the same mould, and of the same metal, to shopkeepers living within a short space of each other, and the prisoners were found together immediately afterwards with counterfeit money on their persons, but there was no proof that they were together at either of the utterings. There were other facts to show a community of purpose. On these facts, Erskine, J., at first called on the counsel for the prosecution to elect as to which of the prisoners he intended to proceed; but it was contended that if the prisoners jointly provided themselves with the coin for uttering, and shared the proceeds afterwards, they were jointly guilty of each act of uttering; that in misdemeanor there being no accessories, the acts which would make them accessories before the fact in felony made them principals on this charge, and that at all events one of them could be convicted of the two utterings on the same day, and the other of the single uttering, of which he was guilty, on one of the other counts. Erskine, J., then directed the trial to proceed, and in summing up told the jury that if two persons, having jointly prepared counterfeit coin, planned the uttering, and went on a joint expedition, and uttered, in concert and by previous arrangement, the different pieces of coin, then the act of one would be the act of both, though they might not be proved to be actually together at each uttering. It might be different if, having possession of the counterfeit coin, they shared it between them, and each went his own way, and acted independently of the other. If they thought they were acting in concert in the uttering charged, they should convict on the whole indictment. If they thought they were uttering independently of each other, they might convict one of the two utterings on the first count, and the other on the other counts. (q)

So where, on an indictment against *Greenwood* and *Johnson* for a misdemeanor in uttering counterfeit coin, it appeared that the uttering was by Johnson in the absence of Greenwood; but that both were together before the uttering, each offering the counterfeit shillings of the same description with that uttered by Johnson; that they both brought food purchased with the proceeds of such uttering to a common lodging; and that Greenwood was taken on the same evening with a counterfeit shilling of the same mould in his possession, and with eight good sixpences and five four-penny pieces, which left no doubt of their joint engagement in a common purpose of uttering base shillings and sharing in the proceeds; Talford, J., directed the jury, that if they thought Greenwood was engaged on the evening in question with Johnson in the common purpose of uttering counterfeit shillings, having one stock of such coin, for their mutual benefit; and if, in pursuance of such purpose, Johnson uttered the shilling, they ought to find Greenwood guilty, subject to the question of law whether the actual presence of Greenwood, or so near neighborhood as to amount to association in the very act, was necessary to support the charge. The jury found both guilty; but, in deference to the authority of *Rex v. Else* (r) and *Rex v. Page*, (s) the question whether Greenwood was properly convicted was reserved for the opinion of the judges; and they were unanimously of opinion that he was rightly convicted. At common law persons who in felony would have been accessories before the fact, in

(p) *Rex v. Manners*, 7 C. & P. 801 (32 E. C. L. R.), Ludlow, Serjt., after consulting Bolland, B.

(q) *Reg. v. Hulse*, 2 M. & Rob. 360. (r) *Supra*, note (m), p. 128.

(s) *Supra*, note (n), p. 128.

misdemeanor were principals, and therefore the cases of *Rex v. Else* and *Reg. Page* were wrongly decided.^(t)

Where one of two persons utters base coin, and other base coin is found on the other, they are jointly guilty of the aggravated offence under sec. 10 of the 24-25 Vict. c. 99, if they are acting in concert, and the one knows of the possession of the base coin by the other; for by the interpretation clause the having any coin in possession includes "the knowing and wilfully having it in the actual custody or possession of any other person;" and as it is clear that under that clause a man may have possession of coin in a house or other place, though he is far away, the possession of coin by one man may be the possession of another within the clause, though they are at a great distance from each other.^(u)

On an indictment on the 2 Will. 4, c. 34, s. 8 (now repealed), for having possession counterfeit crowns and half-crowns with intent to utter the same, it appeared that there were found in different pockets of the prisoner's dress four counterfeit crowns, all electro-plated, of the same date and same mould, each wrapped in a separate piece of paper; thirteen counterfeit half-crowns, all electro-plated, the same date and the same mould, each wrapped in a separate piece of paper; and fourteen counterfeit shillings, all electro-plated, of the same date and the same mould. The prisoner said that they had been given him while gambling, and that he did not know that they were counterfeit; and it was held that there was sufficient evidence to go to the jury that he knew that the coin was counterfeit, and intended to utter it.^(v)

The word "knowing" in indictments for uttering coin sufficiently applies to the time and place of uttering, and no addition to time or place is necessary. The word "knowing" refers to the prisoner, and not to the person, to whom the coin was uttered, although that person's name immediately precedes the word "knowing." It is sufficient, in an indictment for a felony for uttering base coin after previous conviction, to state that the prisoner was in due form of law tried and convicted by a jury.

It is no objection that an indictment for felony, for uttering base coin after previous conviction, states that the prisoner, together with another person, was tried and convicted; and the record of the former trial shows the conviction of the prisoner and the acquittal of the other person.

Where a prisoner was indicted under the 3 Will. 4, c. 34, s. 7, for uttering counterfeit money after a previous conviction, and the indictment alleged that the prisoner, "together with one T. P., was in due form of law tried and convicted by a jury upon an indictment against them, for that they did unlawfully utter shilling "to A. W., knowing the same to be false," and thereupon it was considered that the prisoner should be imprisoned for two years; and that the prisoner afterwards feloniously did utter a half-crown "to T. H., knowing the same to be false." The copy of the record of the former trial stated the conviction of the prisoner and the acquittal of T. P.; it was objected, 1st. That the indictment was bad for want of an addition of time and place to the allegation of knowledge, which was to be found neither in the recital of the former indictment nor in the substantive charge on the face of the present indictment; but the learned judge thought that the former indictment was good, being in the words of the statute and after verdict; and that "knowing" in the present indictment being a participle in the present tense, must import knowledge at the time of the uttering. 2dly. That the word "knowing" did not refer to the prisoner, but to A. W. and T. H.; but the learned judge thought that "knowing" did refer to the prisoner, as all that was alleged to be done was alleged to be done by him. 3dly. That the indictment did not state any former conviction, because neither the plea nor the verdict of the jury were recited; but the learned judge thought the allegation that he had been in due course of law tried and convicted, together with statement of the judgment, was sufficient. 4thly. That the recital of the former record showed a conviction of the prisoner and T. P., whereas the record produced

(t) *Reg. v. Greenwood*, 2 Den. C. C. 453; overruling also *Reg. v. Hayes*, 1 Cox C. C. 362; s. c., 2 Cox C. C. 68, and *Reg. v. West*, 2 Cox C. C. 237.

(u) See *ante*, p. 95.

(v) *Reg. v. Jarvis*, Dears. C. C. 552.

showed that the prisoner alone had been convicted and T. P. acquitted, and therefore there was a variance; the learned judge overruled this objection also, but, entertaining some doubt upon the point, he reserved the case for the opinion of the judges, who held the conviction right.(w)

Sec. II.—Of Uttering, Tendering, &c., Foreign Counterfeit Coin, &c.

By the 24 & 25 Vict. c. 99, s. 20, "Whosoever shall tender, utter, or put off any such false or counterfeit coin resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country,(w) knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding six months, with or without hard labor.(x)

Sec. 21. "Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court to be *imprisoned for any term not exceeding [*133 two years, with or without hard labor, and with or without solitary confinement; and whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."(y)

Sec. 13. "Whosoever shall, with intent to defraud, tender, utter, or put off as or for any of the Queen's current gold or silver coin, any coin not being such current gold or silver coin, or any medal or piece of metal or mixed metals, resembling in size, figure, and color the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal or mixed metals so tendered, uttered, or put off being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labor, and with or without solitary confinement."

This clause is new. It is intended to meet the cases of uttering foreign coin or medals as and for the current coin of the realm. In order to bring a case within this clause, the coin or medal uttered must be of less value than the coin for which it was uttered, and must have been uttered with intent to defraud.(z)

The prisoner was indicted on the 24 & 25 Vict. c. 99, s. 13, for uttering a medal resembling in size, figure, and color a half sovereign. The medal was made of metal, and was of the same diameter as a half sovereign, and somewhat similar in

(w) Reg. v. Page, Hereford Spr. Ass. 1841, Coleridge, J., MSS. C. S. G., and 2 M. C. C. R. 219. The learned judge only reserved the last point, but he stated the others to the judges, that the prisoner might have the benefit of them, if he had been wrong in overruling them.

(w) See sec. 18, *ante*, p. 97.

(z) This clause is framed from the 37 Geo. 3, c. 126, s. 4, with such alterations in its terms as to make it correspond with the rest of this Act. It is new in Ireland. As to hard labor, &c., see *ante*, p. 104.

(y) This clause is framed from the 37 Geo. 3, c. 126, s. 4. As to hard labor, &c., see *ante*, p. 104. As to the indictment and proceedings, see sec. 37, *ante*, p. 121. Having in custody a greater number than five pieces of counterfeit foreign coin, whether current here or not, makes the party liable to punishment by proceedings before a justice of the peace, under sec. 23 of the statute.

(z) As to hard labor, &c., see *ante*, p. 104. See the interpretation clause, *ante*, p. 95.

color. On the obverse there was the head of the Queen, similar to that on a half sovereign: but the legend was entirely different from that on the half sovereign, being "Victoria, Queen of Great Britain," instead of "Victoria Dei Gratia." The medal was guerdled, but the guerdling was round, and not square. The medal was of less value than a half sovereign. It was objected that "figure" in the indictment meant the impression on the medal, and that such impression must be similar to the impression on the genuine coin for which it was uttered, and that there was no evidence that the medal resembled the half sovereign in size, figure, and color. It was answered that "figure" meant the general shape and outline of the medal, and that there was evidence for the jury; and the jury having convicted, it was held, on a case reserved, that there was some evidence that the medal, in size, figure, and color, resembled a half sovereign. (a)

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*CHAPTER THE FIFTH.

OF BUYING, SELLING, RECEIVING OR PAYING FOR COUNTERFEIT COIN AT A LOWER RATE THAN ITS DENOMINATION IMPORTS.

By the 24 and 25 Vict. c. 99, s. 6, "Whosoever, *without lawful authority* *excuse (the proof whereof shall lie on the party accused)*, shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the Queen's current gold or silver coin at or for a lower rate or value than the same imports *was apparently intended to import*, shall, in England and Ireland, be guilty felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and in any indictment for any such offence as in this section aforesaid shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off, the false or counterfeit coin at or for a lower rate or value than the same imports or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off." (a)

The words "without lawful authority," &c., were introduced in order to protect officers and others who are authorized to buy or procure false coin in order to detect coiners; under the former enactment every one who bought, &c., false coin was within its words.

The words of the former enactment were "the same by its denomination imports, or was coined, or counterfeited for." The words in *italics* have been substituted for them as more appropriately applying to counterfeit coin.

Under the former enactment it was necessary to allege in the indictment, and prove by evidence, the sum for which the coin was bought, &c.; (b) the last part of this clause renders it unnecessary to allege the sum for which the coin was bought, &c., and consequently whatever the evidence on that point may be, there can be no variance between it and the allegation in the indictment, and all that need be proved is that the coin was bought, &c., at some lower rate or value than it imports.

*135] *By the 24 & 25 Vict. c. 99, s. 14, "Whosoever shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off, any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the

(a) Reg. v. Robinson, 12 Law T. 501; 10 Cox C. C. 107.

(a) This clause is taken from the 3 Will. 4, c. 34, s. 6. As to hard labor, &c., see *ante*, p. 104. See the interpretation clause, *ante*, p. 95.

(b) Rex v. Joyce, Carr. Supp. 184; Rex v. Hedges, 3 C. & P. 410 (14 E. C. L. R.).

Queen's current copper coin, at or for a lower rate or value than the same imports ~~was~~ *was apparently intended to import*, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof ~~shall~~ be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."(c)

The mere venting of the money was not considered to come within the 8 & 9 Will. 3, c. 26, s. 6, unless it were done at a lower value than the coin imported; and it should be so stated in the indictment.(d)

If the names of the persons to whom the money was put off can be ascertained, they ought to be laid in the indictment; but if they cannot be ascertained the same rule applies as in stealing the property of persons unknown.(e)

*CHAPTER THE SIXTH.

[*136]

OF SERVING, OR PROCURING OTHERS TO SERVE FOREIGN STATES.

ENTERING into the service of any foreign state without the consent of the King, or contracting with it any other engagement which subjects the party to an influence or control inconsistent with the allegiance due to our own sovereign, is, at common law, a high misdemeanor, and punishable accordingly.(a) Indeed it is considered as so high an offence to prefer the interest of a foreign state to that of our own, that any act is criminal which may but incline a man to do so; as to receive a pension from a foreign prince without the leave of the King.(b)

But with respect to serving, or procuring others to serve, foreign states, provisions have been made by several statutes. The 3 Jac. 1, c. 4, s. 18, which contains provisions against soldiers and other persons going out of the realm to serve foreign states, was repealed by the 9 & 10 Vict. c. 59. Under that Act it was considered, that if a party went out of the realm with intent to serve a foreign state, although there were no service in fact; or if a party did actually so serve, though he did not go over for that purpose, but upon some other occasion, it was within the statute.(c)

The 59 Geo. 3, c. 69, reciting that the enlistment or engagement of his Majesty's subjects to serve in war in foreign service, without his Majesty's license; and the fitting out and equipping, and arming of vessels by his Majesty's subjects, without his Majesty's license, for warlike operations in or against the dominions or territories of any foreign prince, state, &c., or against the ships, goods, or merchandise, of any foreign prince, state, &c., may be prejudicial to and tend to endanger the peace and welfare of this kingdom, repeals the 9 Geo. 2, c. 30, and 29 Geo. 2, c. 17, and also the two Irish statutes, 11 Geo. 2 and 19 Geo. 2; and then enacts, that "if any natural born subject of his Majesty, his heirs and successors, without the leave or license of his Majesty, &c., for that purpose first had and obtained under the sign manual of his Majesty, his heirs or successors, or signified by order in council, or by proclamation of his Majesty, his heirs or successors, shall take or accept, or shall agree to take or accept, any military commission, or shall otherwise enter into the military service as a commissioned or non-commissioned officer, or shall enlist or enter himself to enlist, or shall agree to enlist or to enter himself to

(c) This clause is taken from part of sec. 12 of the 2 Will. 4, c. 34. As to the words in *italics*, see the note to sec. 6, *ante*, p. 134. As to hard labor, &c., see *ante*, p. 104. See the interpretation clause, *ante*, p. 95.

(d) 1 East P. C. c. 4, s. 27, p. 180.

(e) *Ibid.*

(a) 1 East P. C. c. 2, s. 23, p. 81; 4 Blac. Com. 122.

(b) 1 Hawk. P. O. c. 22, s. 3; 4 Blac. Com. 121; 3 Inst. 144.

(c) 3 Inst. 80; 1 East P. C. c. 2, s. 23, p. 82.

serve as a soldier, or to be employed or shall serve in any warlike or military operation, in the service of, or for, or *under, or in aid of, any foreign prince, state, potentate, colony, province, or part of any province, or people, or any person or persons exercising, or assuming to exercise, the powers of government in or over any foreign country, colony, province, or part of any province, people, either as an officer or soldier, or in any other military capacity; or if a natural born subject of his Majesty shall, without such leave or license as aforesaid, accept, or agree to take or accept, any commission, warrant, or appointment, as officer, or shall enlist or enter himself, or shall agree to enlist or enter himself, serve as a sailor or marine, or to be employed or engaged, or shall serve in and board any ship or vessel of war, or in and on board any ship or vessel used or fitted out, or equipped or intended to be used for any warlike purpose, in the service of, or for, or under, or in aid of, any foreign power, prince, state, potentate, colony, province, or part of any province or people, or of any person or persons exercising, or assuming to exercise, the powers of government in or over any foreign country, colony, province, or part of any province, or people; or if any natural born subject of his Majesty shall, without such leave and license as aforesaid, engage, contract, or agree to go, or shall go to any foreign state, country, colony, province, or part of any province, or to any place beyond the seas, with an intent or in order to enlist, or enter himself to serve, or with intent to serve, in any warlike or military operation whatever, whether by land or by sea, in the service of, or for, or under, or in aid of any foreign prince, state, potentate, colony, province, or part of any province or people, or in the service of, or for, or under, or in aid of, any person or persons exercising, or assuming to exercise, the powers of government in or over any foreign country, colony, province, or part of any province, or people, either as an officer or a soldier, or in any other military capacity, or as an officer, or sailor, or marine, in any such ship or vessel as aforesaid, although no enlisting money, or pay, or reward shall have been, or shall be, in any or either of the cases aforesaid, actually paid to or received by him, or by any person to or for his use or benefit; or if any person whatever, within the United Kingdom of Great Britain and Ireland, or in any part of his Majesty's dominions elsewhere, or in any country, colony, settlement, island, or place, belonging to or subject to his Majesty, shall hire, retain, engage, or procure, or shall attempt or endeavor to hire, retain, engage, or procure, any person or persons whatever to enlist, or to enter or engage to enlist, or to serve or to be employed in any such service or employment as aforesaid, as an officer, soldier, sailor, or marine, either in land or sea-service, for, or under, or in aid of, any foreign prince, state, potentate, colony, province, or any part of any province, or people, or for or under, or in aid of, any person or persons exercising, or assuming to exercise, any powers of government as aforesaid; or to go, or to agree to go, or embark, from any part of his Majesty's dominions, for the purpose or with intent to be so enlisted, entered, engaged, or employed, as aforesaid, whether any enlisting money, pay, or reward, shall have been, or shall be, actually given or received or not; in any or either of such cases, every person so offending shall be *138] deemed guilty of a misdemeanor, and upon being convicted thereof, upon any information or indictment, shall be punishable by fine and imprisonment, or either of them, at the discretion of the Court before which such offender shall be convicted."

Sec. 7. "If any person within any part of the United Kingdom, or in any part of his Majesty's dominions beyond the seas, shall, without the leave and license of his Majesty for that purpose first had and obtained as aforesaid, equip, furnish, fit out, or arm, or attempt or endeavor to equip, furnish, fit out, or arm, or procure to be equipped, furnished, fitted out, or armed, or shall knowingly aid, assist, or be concerned in the equipping, furnishing, fitting out, or arming of any ship or vessel, with intent or in order that such ship or vessel shall be employed in the service of any foreign prince, state, or potentate, or of any foreign colony, province, or part of any province or people, or of any person or persons exercising or assuming to exercise any powers of government in or over any foreign state, colony, province, or part of any province or people, as a transport or store-ship, or with intent to cruise or commit hostilities against any prince, state, or potentate, or against the subjects

or citizens of any prince, state, or potentate, or against the persons exercising or assuming to exercise the powers of government in any colony, province, or part of any province, or country, or against the inhabitants of any foreign colony, province, or part of any province or country, with whom his Majesty shall not then be at war; or shall, within the United Kingdom, or any of his Majesty's dominions, or in any settlement, colony, territory, island, or place belonging or subject to his Majesty, issue or deliver any commission for any ship or vessel, to the intent that such ship or vessel shall be employed as aforesaid, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the Court in which such offender shall be convicted."(*d*)

Sec. 8. "If any person in any part of the United Kingdom of Great Britain and Ireland, or in any part of his Majesty's dominions beyond the seas, without the leave and license of his Majesty for that purpose first had and obtained as aforesaid, shall, by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war, increase or augment, or procure to be increased or augmented, or shall be knowingly concerned in increasing or augmenting the warlike force of any ship or vessel of war, or cruiser, or other armed vessel which at the time of her arrival in any part of the United Kingdom, or any of his Majesty's dominions, was a ship of war, cruiser, or armed vessel in the service of any foreign prince, state, or potentate, or of any person or persons exercising or assuming to exercise any powers of government in or over any colony, province, or part of any province or people belonging to the subjects of any such prince, state, or potentate, or to the inhabitants of any colony, province, or part of any province or country under the control of any *person or persons so exercising or assuming to exercise the powers of government, every such person so offending shall be deemed guilty of a misdemeanor, and shall, upon being convicted thereof, upon any information or indictment, be punished by fine and imprisonment, or either of them, at the discretion of the Court before which such offender shall be convicted." [*139]

Where the defendants were indicted under the 59 Geo. 3, c. 69, for engaging and procuring at Liverpool men to enlist as sailors in the Confederate service; and it appeared that the men had been induced by the defendants to sign articles at Liverpool to serve in the Japan on a voyage to China, and they embarked on board her, and she sailed to the British Channel, and anchored off Brest, and the next day a captain of the Confederate navy enlisted the men in that service; Cockburn, C. J., held that the question was, whether the defendants procured the sailors to embark at Liverpool for the purpose of their being employed in the service of the Confederate States. If they procured the sailors to embark on board the Japan and sail to a foreign country, to be there enlisted in the Confederate service, they were guilty, and it was sufficient if that was the intention of the defendants, although the men themselves did not go with that intention. (*dd*)

An indictment on the 59 Geo. 3, c. 69, contained counts for causing, &c., men to enlist in the Confederate service as sailors, &c., and for counselling men here to enlist in that service abroad, and for assisting the equipment of a vessel for that service. An old iron steam gunboat, dismantled of all her guns and warlike equipments, and stripped of her armor-plates, masts, spars, and sails, and with only her engines and boilers in her, was sold by the government to a firm, who bought her with a view to her being engaged in the Confederate service. Leave was obtained from the Admiralty to have the vessel docked and repaired at Sheerness, and the defendant, who was one of the dockyard officials, had rendered every assistance. There were no warlike equipments done, but mere repairs or fittings as a mercantile vessel. The defendant had held himself out as engaging men on board the vessel for a trial trip previously to her going on a voyage to China; and had engaged men, or sent them on board to be engaged, as stokers, firemen, or engineers; but none of the men had any other idea than that the vessel was destined for China.

(*d*) And the ship, with the tackle, &c., is to be forfeited, and may be seized by the officers of excise, &c., sec. 7.

(*dd*) *Reg v. Jones*, 4 F. & F. 25.

The vessel went to Calais, and there the Confederate flag was hoisted, and officers came on board and took the command of her as a Confederate vessel, and the men were invited to enlist in the Confederate service, but most of them declined. The defendant was on board whilst the Confederate flag was flying, in company with the officers, and when he came back to Sheerness he continued to interest himself in sending men over for the service of the vessel, though only in connection with the locomotive power. The jury were directed—1st. That the main question was, whether the defendant was a party to the engagement of the men with a view to enlistment in the Confederate service. 2d. That the acts of the defendant after he must have been aware of the destination of the vessel, though not the subject-matter of the indictment, might be taken into consideration as throwing light upon the intention with which he did the acts in the earlier part of the transaction, which were the subject-matter of the indictment. 3. That the trifling repairs done to the engines, &c., did not amount to an equipment. 4. That if the defendant procured the men to enter into engagements nominally for a trial trip, but with the ulterior purpose on his part of getting them into a position in which they might be induced to enlist in the Confederate service, the defendant was guilty; but if his object in engaging the men was simply that the vessel should go out on a trial trip and come back, he was not guilty. 5. That the term "sailors" in the statute included persons engaged as stokers, firemen, and engineers, for the purpose of navigating the vessel. 6. That there must be a hiring or enlistment in the United Kingdom to bring the case within the statute. 7. That such an offence had been committed in England, or the offence of counselling its commission was not proved. (ee)

The building in pursuance of a contract, with intention to sell and deliver to a belligerent power the hull of a vessel suitable for war, but unarmed and not equipped, furnished, or fitted out with anything which enables her to cruise or commit hostilities, or do any warlike act whatever, is not a violation of the 59 Geo. 3, c. 69. The equipment forbidden by that Act in an equipment of such warlike character as enables a ship on leaving a port of this kingdom to cruise or commit hostilities. Per Pollock, C. B., and Bramwell, B. If the character of equipment is doubtful, it may be explained by evidence of the intent of the parties. Per Channell, B. The Act includes a case where the equipment is such that, although the ship when it leaves a port in this kingdom is not in a condition at once to commit hostilities, is yet capable of being used for war, and the intent is clear that it is to be used for war. Per Channell, B. Any act of equipping, furnishing, or fitting out done to the hull or vessel, of whatever nature or character that act may be, if done with the prohibited intent, is within the statute. Per Pigott, B. On the trial of an information respecting the seizure of a vessel in a port at Liverpool for an alleged violation of the Act for equipping her for the service of a belligerent state, Bramwell, B., was of opinion that a right direction would be, that if the jury were satisfied that the parties concerned were equipping, or arming, or attempting so to do, the ship claimed, with intent that it should be employed in the service of a foreign power to cruise or commit hostilities against others as alleged, they should find for the Crown; but such equipment or attempted equipment must be of a warlike character, so that by means of it she is in a condition more or less effective to cruise or commit hostilities; otherwise find for the claimants. Channell, B., was of opinion that the questions left to the jury should have been—1. Was there intent, on the part of any one having a controlling power over the vessel, that she should be employed in the service of the Confederate States, to cruise or commit hostilities against the United States? 2. If so, was she equipped, fitted out, or furnished in a British port in order to be employed to cruise, &c.? 3. If not equipped, was there any attempt to equip her in a British port in order that she should be so employed? 4. Or did any one knowingly assist, &c., in such equipment in a British port? Pigott, B. The jury should have been directed to see—1, whether the equippers or the purchasers had the prohibited intent; and, 2, whether with such intent they had done any act towards equipping, furnishing,

fitting out the ship, beyond the mere work of building the hull of the vessel, or had attempted to do so. (f)

Any justice of peace residing at or near any port or place within the United Kingdom, where any offence made punishable by this Act as a misdemeanor shall be committed, may issue his warrant for the apprehension of the offender, to bring him before the same or any other justice, who may commit, unless bail is given (e)

It is further enacted, that all such offences as shall be committed within that part of the United Kingdom called England, shall be tried in the Court of King's Bench at Westminster, and the venue laid at Westminster, or at the assizes, or session of oyer and terminer and gaol delivery, or at any quarter or general sessions of the peace for the county or place where the offence was committed; that when committed in Ireland they shall be prosecuted in the Court of King's Bench at Dublin, and the venue there laid, or at any assizes, &c., for the county or place where the offence was committed; and when committed in Scotland that they shall be prosecuted in the Court of Justiciary, or any other court competent to try criminal offences committed within the county, &c., within which the offence was committed. (f)

The statute also provides for the apprehension of offenders, when the offence shall have been committed out of the United Kingdom, and for their trial in any superior Court of his Majesty's dominions competent to try, and having jurisdiction to try, criminal offences, at the place where the offence shall have been committed. (g) And with respect to offences committed out of the United Kingdom, by sec. 9, they may be prosecuted in the Court of King's Bench at Westminster, the venue being laid at Westminster, in the county of Middlesex. (h)

This Act creates an offence against the state, and if any offence be committed against the act, the Court of Queen's Bench will not grant a criminal information for such offence on the application of a private prosecutor, but leave the case to be dealt with like other public offences. (i)

The annual Mutiny Act contains a provision by which any person who, in any part of her Majesty's dominions, directly or indirectly procures any soldier to desert, or attempts to procure or persuade any soldier to desert, is punishable summarily.

It may be observed, though not strictly applicable to the subject of this chapter, that disobedience to the King's letter to a subject commanding him to return from beyond the seas, or to the King's writ of *ne exeat regno*, commanding a subject to stay at home, is a *high misprison and contempt. (k) And it is also a high [*140 offence to refuse to assist the King for the good of the public, either in councils, by advice, if called upon, or in his wars by personal service for the defence of the realm against a rebellion or invasion; (l) under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. 5, c. 8, which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel. (m)

(f) Attorney General v. Sillem, 2 H. & C. 431.

(e) Sec. 4.

(f) Ibid.

(g) Ibid.

(h) By sec. 5, vessels with persons on board engaged in foreign service may be detained in any part of his Majesty's dominions, information being laid upon oath. By sec. 6 a penalty is imposed on masters of vessels, &c., knowingly taking on board persons enlisted contrary to the Act. But by sec. 12 the penalties of the Act are not to extend to any persons entering into the service of any prince, &c., in Asia, with leave from the Governor-General in Council, &c., at Bengal.

(i) Ex parte Crawshaw, 8 Cox C. C. 356.

(k) 4 Blac. Com. 122. And if the subject neglects to return from beyond the seas, when commanded, his lands shall be seized till he does return: 1 Hawk. P. C. c. 22, s. 4.

(l) 1 Hawk. P. C. c. 22, s. 2.

(m) 4 Blac. Com. 122; Lamb. Eir. 315.

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*CHAPTER THE SEVENTH.

OF SEDUCING SOLDIERS AND SAILORS TO DESERT OR MUTINY.

IN consequence of the attempts of evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, to seduce soldiers and sailors from their duty and allegiance to his Majesty, the 37 Geo. 3, c. 70, was passed, enacting "that any person who shall maliciously and advisedly endeavor to seduce any person or persons serving in his Majesty's forces by sea or land, from his or their duty and allegiance to his Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make, or endeavor to make, any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy."^(a) By sec. 3, any person tried, acquitted, or convicted, of any offence against this Act, shall not be liable to be prosecuted again for the same offence or fact, as high treason, or misprison of high treason; and nothing in the Act contained shall prevent the trial of any person who has not been tried for an offence against this Act from being tried for the same as high treason, or misprison of high treason. And by sec. 2, any offence against this Act, whether committed on the high seas or in England, may be prosecuted and tried before any court of oyer and terminer, or gaol delivery, for any county in England, as if the said offence had been therein committed.

The 1 Vict. c. 91, s. 1, after reciting this Act, provides, "that if any person shall," after the 1st of October, 1837, "be convicted of any of the offences herein-before mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the Court to be transported^(b) beyond the seas for the term of the natural life of such person, or for any term not less than fifteen^(c) years, or be imprisoned for any term not exceeding three years.

Sec. 2. "In awarding the punishment of imprisonment for any offence punishable under this Act, it shall be lawful for the Court to direct such punishment to be with or without hard labor in the common gaol or house of correction, and also to *142] direct that *the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labor, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet."

A sailor in a sick hospital, where he had been for thirty days, and who therefore was not entitled to pay, nor liable for what he then did to answer before a court martial, is nevertheless a person serving in his Majesty's forces by sea within this statute, so as to make the seducing him an offence within its provisions.^(d)

An indictment upon this statute need not set out *the means* used for seducing the soldier from his duty and allegiance; and it need not aver that the prisoner *knew* the person endeavored to be seduced *to be a soldier*. It seems also that a double act, namely, that the prisoner endeavored to incite a soldier to commit mutiny, and also to commit traitorous and mutinous practices, may be charged in one count of the indictment.^(e)

The 37 Geo. 3, c. 70, was only temporary; but, after having been continued from time to time by different statutes, was made perpetual (together with an Act upon the same subject passed at the same time in the Parliament of Ireland), by the 57 Geo. 3, c. 7

(a) The Act contains no provisions for the punishment of principals in the second degree and accessories; they are, therefore, punishable, the former in the same manner as principals in the first degree, the latter under the 7 & 8 Geo. 4, c. 28, sec. 8, 9, and 1 Vict. c. 90, s. 5, see *ante*, p. 3.

(b) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(c) Not less than seven years by the 9 & 10 Vict. c. 24, s. 1; and not less than three years' penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 3, 4.

(d) *Rex v. Tierney*, Mich. T. 1804, R. & R. 74.

(e) *Fuller's case*, 2 Leach 790; 1 East P. C. c. 2, s. 33, p. 92; 1 Bos. & Pul. 180.

By the 1 Geo. 1, c. 47, (*f*) persons persuading or procuring soldiers to desert are subjected to a penalty, and under certain circumstances to imprisonment; and the annual Mutiny Act subjects persons so offending to punishment on summary conviction.

The 1 Geo. 1, c. 47, enacts, that if any person (other than enlisted soldiers, against whom it is stated sufficient remedy was already provided by law), shall, in Great Britain, Ireland, Jersey, or Guernsey, persuade or procure any soldier to desert, he shall forfeit £40, to be recovered by any informer; and if he has not property to that amount, or from the heinous circumstances of the crime it shall be thought proper, the Court before whom he is convicted shall imprison him, not exceeding six months. (*g*) And the government of the Navy Act, 24 & 25 Vict. c. 115, s. 13, makes every person who endeavors to seduce from his duty or allegiance any person belonging to the royal navy subject to the Act, and liable to the punishments thereby imposed.

With respect to the consequences to the party deserting, it may be observed, that desertion in time of war was made a capital crime by 18 Hen. 6, c. 19, enforced by 2 & 3 Edw. 6, c. 2, s. 6, repealed as to the felony by 1 M. sess. 1. c. 1, revived by 4 & 5 Ph. & M. c. 3, s. 9, and extended to mariners and gunners by 5 Eliz. c. 5, s. 27. (*h*). But these statutes are now fallen into disuse, as well on account of the manner of the retaining soldiers therein *referred to being [*143 no longer adopted, as because, since the annual Acts for punishing mutiny and desertion, a more compendious and convenient system of military coercion has obtained. (*i*) The annual Mutiny Act, reciting that “no man can be forejudged of life or limb, or subjected *in time of peace* to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm; yet nevertheless, it being requisite for retaining the forces in their duty that an exact discipline be observed, and that soldiers who shall mutiny, or stir up sedition, or desert, be brought to more exemplary and speedy punishment than the usual form of the law will allow,” enacts, that if any officer or soldier shall, during the continuance of the Act, commit any of the offences therein enumerated, amongst which is *desertion*, the offender shall suffer death, or such other punishment as shall be awarded by a court martial.

*CHAPTER THE EIGHTH.

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OF PIRACY.

IN treating shortly of this offence, we may consider—I. Of Piracy at common law, and by statutes. II. Of the places in which the offence may be committed. III. Of the court by which it may be tried.

Sec. I.—Of Piracy at Common Law and by Statutes.

THE offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there. (*a*) It is not a felony which was triable by jury at common law, but it was only punishable by the civil law before the 28 Hen. 8, c. 15; and this statute, though it makes the offence capital, and provides for the trial of it according to the course of the common law, by the King's special commission,

(*f*) *Quere*, whether this Act be not virtually repealed. See 31 Geo. 3, c. 32; 37 Geo. 3, c. 70; 10 Geo. 4, c. 7; and 7 Will. 4, and 1 Vict. c. 91.

(*g*) The punishment of pillory was also added, but that is abolished by the 56 Geo. 3, c. 138, and the 7 Will. 4, and 1 Vict. c. 23.

(*h*) *Quere*, whether some, if not all, of these Acts are not repealed by 2 Geo. 3, c. 20, s. 144.

(*i*) 1 East P. C. c. 2, s. 34, p. 93.

(*a*) 1 Hawk. P. C. c. 37, s. 4; 4 Blac. Com. 72; 2 East P. C. c. 17, s. 3, p. 796.

does not make it a felony; therefore, a pardon of all felonies generally does not extend to it.^(b)¹

(b) 1 Hawk. P. C. c. 37, s. 13; 3 Inst. 112; Co. Litt. 391; Moor 746; 2 East P. C. c. 17 s. 3, p. 796, where it is said that the offence does not extend to corruption of blood, at least where the conviction is before the Admiralty jurisdiction; though the contrary is holden by great authority upon attainder before commissioners, under the statute of Hen 8. A fallacy seems to run through some of our books in saying that piracy was not felony at common law; this arose from such expressions as that it was a crime of which the common law did not take notice or cognizance—*i. e.*, which was not triable by jury, the common law mode of trial. See 2 Hale 18, 370; 1 Hale 355. Lord Coke says it was felony: Co. Lit. 391 *a*; 3 Inst. 112; 13 Rep. 51. In 40 Ass. Pl. 25, p. 245, a case of piracy is mentioned where a Norman captain was attainted of felony and hanged. See this case stated, 3 Inst. 21, and 1 Hale 100.

¹ For the existing Acts of Congress on the subject of piracy see Revised Statutes of the United States, p. 1047. References to decisions under the various acts consolidated in this revision may be important. A robbery committed on the high seas is piracy under the Act of 1790, c. 36, s. 8, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, and the courts of the United States have jurisdiction of such robbery and piracy: *United States v. Palmer*, 3 Wheat. 310, 326. The crime of robbery committed by a person who is not a citizen of the United States, on the high seas, on board a vessel belonging exclusively to foreigners, is not piracy under the Act of 1790, c. 36; and is not punishable under that act in the courts of the United States: *Ibid.* The Act of 1790, c. 36, s. 8, extends to all persons on board all vessels, who throw off their allegiance by cruising piratically, and committing piracy on other vessels: *United States v. Klintock*, 5 Wheat. 144, 149; *United States v. Furlong*, *Ib.*, 52, 184, 192; *United States v. Holmes*, *Ib.* 412, 416. In such case, where by the evidence found on board, the vessel does not appear to be sailing under the authority of any particular nation, the burden of proof of the national character of the vessel is thrown on the prisoner: *Ibid.* Under the same act, if the offence be committed on board of a foreign vessel by a citizen of the United States, or on board a vessel of the United States by a foreigner, or by a citizen or foreigner on board a piratical vessel, the offence is equally cognizable by the courts of the United States; and it makes no difference whether the offence was committed on board of a vessel, or in the sea; as by throwing the deceased overboard and drowning him, or by shooting him when in the sea, though he was not thrown overboard: *Ibid.* A vessel lying in the open roadstead of a foreign country, is upon "the high seas" within the Act of 1790, c. 36, s. 8; *United States v. Furlong*, 5 Wheat. 200. The Act of the 3d of March, 1819, c. 76, s. 35, which provides "that if any person or persons whatsoever, shall upon the high seas, commit the crime of piracy, as defined by the law of nations, &c., every such offender or offenders, shall, upon conviction thereof, &c., be punished with death," is a constitutional definition of the crime of piracy: that crime being defined by writers on the law of nations with reasonable certainty. *United States v. Smith*, 5 Wheat. 153, 160. Under the Act of Congress of March 3, 1819 to protect the commerce of the United States, and to punish piracy, any armed vessel may be seized and brought in, or any vessel the crew whereof may be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure upon any vessel, and such offending vessel may be condemned and sold, the proceeds whereof to be distributed between the United States and the captors at the discretion of the court: *United States v. Brig Malek Adel*, 2 How. C. C. 210. It is no matter whether the vessel be armed for offence or defence, provided she commits the unlawful acts specified. To bring a vessel within the act it is not necessary that there should be either actual plunder or an intent to plunder: if the act be committed from hatred, or abuse of power, or a spirit of mischief, it is sufficient. The word "piratical" in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing. A piratical aggression, search, restraint, or seizure, is as much within the act as a piratical depredation. The innocence or ignorance on the part of the owner of these prohibited acts will not exempt the vessel from condemnation. The condemnation of the cargo is not authorized by the Act of 1819. Neither does the law of nations require the condemnation of the cargo for petty offences, unless the owner thereof coöperates in, and authorizes the unlawful act: *Ibid.*

Robbery or forcible depredation upon the sea, *animo furandi*, is piracy by the law of nations, and by the Act of Congress: *United States v. Furlong*, 5 Wheat. 164, 184. The 8th section of the Act of 1790, c. 36, is not repealed by the Act of the 3d of March, 1819 c. 76, to protect the commerce of the United States, and punish the crime of piracy: *United States v. Furlong*, 5 Wheat. 184, 192. In an indictment for a piratical murder (under the Act of 1790, c. 36), it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to a citizen of the United States, but it is sufficient to charge it, as committed on board such a

The offence of piracy is also provided against by several statutes. The 11 & 12 Will. 3, c. 7. s. 8, enacts, "that if any of his Majesty's natural-born subjects, or denizens of his kingdom, shall commit any piracy or robbery, or any act of hos-

vessel, by a mariner sailing on board such a vessel: Ib. 194. The words "out of the jurisdiction of any particular state," in the Act of 1790, c. 36, s. 8, are construed to mean out of any particular state of this Union: Ib. 200. A commission issued by a person claiming to be the officer of a republic, whose existence *de facto* or *de jure*, is unacknowledged by the United States, will not authorize captures at sea. *Quere.* Whether a person acting with good faith under such a commission is guilty of piracy: United States v. Klintock, 5 Wheat. 144, 149. But however this may be, in general, under the peculiar circumstances of the case, showing that the seizure was made, not *jure belli* but *animo furandi*, the commission will not exempt the offender from the charge of piracy: Ibid. Each count in an indictment for piracy, is a distinct substantive charge; and if the indictment conform to any one of the counts, which in itself will support the verdict, it is sufficient. Thus, where in an indictment for piracy there were two counts, the one charging the offence as committed on the high seas, the other in a haven, basin or bay, a general verdict of guilty may be sustained: United States v. Furlong, 5 Wheat. 184, 201. The clause of the Act of Congress of April 30, 1790, c. 36, s. 8, which provides that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or in which he may be first brought," applies only to offences committed on the high seas, or in some river, haven, basin or bay, not within the jurisdiction of any particular state; and does not apply to the territories of the United States, where regular courts for the trial of offences are provided by Congress: Ex parte Bollman and Swartwout, 4 Cranch 75, 135. The courts of the United States have no jurisdiction under the Act of April 30, 1790, c. 36, of the crime of manslaughter committed by the master upon one of the seamen on board a merchant vessel of the United States, lying in the river Tigris in the empire of China, thirty-five miles above its mouth, and a hundred miles from the shore, and below low-water mark: United States v. Wiltberger, 5 Wheat. 76, 93.

To constitute the offence of piracy within the act of 1790, by piratically and feloniously running away with a vessel, personal force and violence is not necessary: The United States v. Tully et al., 1 Gall. 247. The "piratically and feloniously running away with a vessel" within the act, is the running away with a vessel with the intent of converting the same to the taker's own uses, against the will of the owner. The intent must be *animo furandi*: Ibid. The Circuit Court of the United States has cognizance, under the act of 1790, s. 8, of piracy on board of an American ship, although committed in an open roadstead, adjacent to a foreign territory, and within half a mile of the shore: United States v. Ross, 1 Gall. 524.

The 8th and 9th articles of the rules for the government of the navy, adopted by the Act of April 23, 1800, relate to spoiliations from *prizes*, not acts of *piracy*: U. States v. Jones, 3 Wash. C. C. 209. Robbery committed on the high seas is an offence punishable as piracy by the 8th section of the act of Congress of 30th April, 1790: Ibid. Robbery on the high seas by a *commissioned privateer*, is piracy under the act of 1790, and the law of nations: Ibid. A subordinate officer or private, committing piracy, cannot plead the orders of his superior officer as an excuse or justification: Ibid. A confederacy by American citizens on land, or on board of an American vessel, with sea-robbers or pirates by the law of nations, or the yielding up of a vessel by a citizen to such pirates, is an offence within the meaning of the 8th section of the act of 1790: United States v. Howard, 3 Wash. C. C. 340. Any intercourse with pirates, however inefficient or remote, which had a reference to the offence, or which had a tendency, or was intended in any manner to promote their views, is an offence within the 12th section of the Act of 1790: Ibid. American seamen put on board a vessel of the United States at a foreign port by an American consul, are within the meaning of the Act of April 30, 1790 (1 Story 84), which declares it to be piracy to make a revolt, and a misdemeanor to confine the master, &c. They are bound to all the obligations and duties which exist in the case of armed seamen: United States v. Sharp, 1 Peters' C. C. 118, 121. To convict of this offence, it is not necessary that the defendants should be proved individually to have used any force or threats to compel the captain to confine himself to his cabin, or to resign his command. It is sufficient, if they joined in the general confederacy, and by their presence countenanced the act: Ibid. 118, 126. It seems that to make a revolt under the act, is to throw off all obedience to the master; to take possession of the vessel by the crew; to navigate her themselves, or to transfer the command to some other person on board; and such offence may be committed on board merchant vessels as well in time of peace as in time of war: Ibid. 121, 122. It seems that to bring a case of revolt within the act of Congress, an attack upon the master should be accompanied by some evidence indicating on the part of the assailants, an intention to take possession of the vessel: United States v. Smith, 3 Wash. C. C. 78. Confining the captain while the vessel is in the bay or river of a foreign country, is an offence within the 12th section of this act; and an indictment charging the offence to have been committed on the high seas is good: Ibid. Any con-

tility against others his Majesty's subjects, upon the sea, under color of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offender and offenders shall be deemed, adjudged, and taken to be pirates, felons, and robbers;" and being duly convicted thereof, according to that Act, or the 28 Hen. 8, c. 15, shall suffer such pains of death,^(c) and loss of lands, goods, and chattels, as pirates, &c., upon the seas ought to suffer. And the 18 Geo. 2, c. 30, enacts, "that all persons, being natural-born subjects or denizens of *145] his Majesty, who during any *war shall commit any hostilities upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, against his Majesty's subjects, by virtue or under color of any commission from any of his Majesty's enemies, or shall be any other ways adherent, or giving aid or comfort to his Majesty's enemies upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be tried as pirates, felons, and robbers in the said

(c) Repealed by 1 Vict. c. 88, s. 1. See sec. 2, &c, *post*, p. 146.

fnement of the master of a vessel, whether by depriving him of the use of his limbs, or by shutting him up in the cabin, or by intimidation preventing him from the free use of every part of the vessel, amounts to a confinement within the 12th section of this act: *Ibid.*; *United States v. Sharp*, 1 Peters' C. C. 122. If the captain was restrained from performing his duties by such mutinous conduct of the crew, as might easily intimidate a firm man, this will amount to a constructive confinement within the meaning of the act; and it makes no difference in this respect, that the master did in fact go unmolested to every part of his vessel, whenever he pleased, if he was compelled by a regard to his own safety to go armed, and if, from all the circumstances of the case, it was necessary or prudent for him to do so: *United States v. Bladen*, 1 Peters' C. C. 213, 214. Seizing the person of the master, although the restraint continue but a minute or two, amounts to an actual confinement within the law: *Ibid.*; *United States v. Smith*, 3 Wash. C. C. 525. A master of a vessel may so conduct himself as to justify his officers and men placing a restraint upon him, to prevent his committing acts which may endanger their lives; but an excuse of this kind must be listened to with great caution, and such measures should not continue beyond the existence of the danger which occasioned it: *United States v. Sharp*, 1 Peters' C. C. 127. A battery by the master in pushing defendant from him with a chair, did not justify a confinement: *United States v. Bladen*, 1 Peters' C. C. 213, 214.

An indictment under this act, which charged in the same count, the offence of making a revolt and confining the captain was quashed: *Ibid.* 131. If the crew combine together to refuse to do duty, and actually refuse until the master complies with some improper request on their part, it is an endeavor to make a revolt within the Crimes Act of 1790, ch. 36, s. 12: *United States v. Gardiner*, 5 Mason 402. To constitute the offence, it is necessary that there should be some effort or act to stir up others of the crew to disobedience to the master: *Ibid.* Mere insolent conduct, disobedience of orders, or even violence committed on the person of the master, unattended by other circumstances, will not amount to an endeavor to revolt. Those acts must be coupled with an intent to subvert the authority of the master and to displace him from his command. A mere conspiracy of the crew to make a revolt will not amount to an endeavor to make it, unless it be followed up by some overt act tending to that end; nor is concert an essential ingredient in constituting the offence: *United States v. Kelly*, 4 Wash. C. C. 528. Judge Washington has declined giving *judicially* a definition of a revolt: *United States v. Haskell*, 4 Wash. C. C. 402; *United States v. Kelly*, *Ibid.* 529. *It seems* the making a revolt under the act is where the crew throws off all obedience to the commander, and forcibly take possession of the vessel by assuming and exercising the command and navigation of her, or by transferring their obedience from the lawful commander to one who has usurped the command: *United States v. Haskell*, *et supra*. See *United States v. Haines*, 5 Mason 272; *United States v. Gardiner*, *Ibid.* 402; *United States v. Savage*, *Ibid.* 469. The offence may be committed in any kind of a vessel: *United States v. Kelly*, *supra*.

See *United States v. Peterson*, 1 Woodbury & Minot 305; *United States v. Staley*, *Ibid.* 338.

As to what will constitute a confinement of the master within the purview of the act, see *United States v. Stevens*, 4 Wash. C. C. 547; *United States v. Savage*, 5 Mason 460.

Semble, that the mate is a seaman within the Crimes' Act of 1790, ch. 36, s. 12: *United States v. Savage*, Mason 460; but see *Ely v. Peck*, 7 Conn. 239.

As to the offence of running away with a vessel, see *United States v. Haskell*, 4 Wash. C. C. 402.

Court of Admiralty, on ship-board, or upon the land, in the same manner as persons guilty of piracy, felony, and robbery, are by the said Act^(d) directed to be tried; and such persons being upon such trial convicted thereof, shall suffer such pains of death,^(e) loss of lands, &c., as any other pirates, felons, and robbers ought, by virtue of the 11 & 12 Will. 3, c. 7, or any other Act, to suffer"^(f)

The 11 & 12 Will. 3, c. 7, s. 9, enacts, "that if any commander or master of any ship, or any seaman or mariner, shall, in any place where the admiral hath jurisdiction, betray his trust, and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods or merchandize; or yield them up voluntarily to any pirate; or shall bring any seducing message from any pirate, enemy, or rebel; or consult, combine, or confederate with, or attempt or endeavor to corrupt any commander, master, officer, or mariner, to yield up or run away with any ship, goods, or merchandizes, or turn pirates, or go over to pirates; or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship, and goods committed to his trust,^(g) or shall confine his master, or make or endeavor to make a revolt in the ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber, and being convicted thereof according to the direction of this Act, shall suffer death^(e) and loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to suffer."

By the 8 Geo. 1, c. 24, s. 1, "in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize or carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandizes belonging to such ship or vessel; the person or persons guilty thereof, shall in all respects be deemed and punished as pirates aforesaid."

The 8 Geo. 1, c. 24, s. 1, enacts "that if any commander or master of any ship or vessel, or any other person or persons, shall anywise trade with any pirate by truck, barter, exchange, or in any *other manner, or shall furnish any [*146 pirate, felon, or robber upon the seas, with any ammunition, provision, or stores of any kind; or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply, or correspond with any pirate, felon, or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate, felon, or robber on the seas, knowing him to be guilty of any such piracy, felony, or robbery, every such offender and offenders shall be deemed and adjudged guilty of piracy, felony, and robbery." The Act further provides, that every offender convicted of any piracy, felony, or robbery, by virtue of the Act, shall not be admitted to have the benefit of clergy."^(h)

By the 5 Geo. 4, c. 113, *dealing in slaves* upon the high seas, or in any haven,

(d) 11 & 12 Will. 3, c. 7.

(e) Repealed by 1 Vict. c. 88, s. 1. See sec. 2, &c., *post*, p. 146.

(f) Sec. 2 contains a proviso that any person tried and acquitted, or convicted according to the Act, shall not be liable to be indicted, &c., again in Great Britain or elsewhere, for the same crime or fact as high treason. But by sec. 3 the Act is not to prevent any offender, who shall not be tried according thereto, from being tried for high treason within this realm, according to the stat. 28 Hen. 8, c. 15.

(g) This last provision is similar to one in the 22 & 23 Car. 2, c. 11, s. 9, which is repealed by 8 Geo. 4, c. 31, s. 1, as relates to any mariner laying violent hands on his commander. This statute of Car. 2 contains also some provisions as to yielding without fighting, and as to mariners declining or refusing to fight and defend the ship when commanded by the master.

(h) Sec. 4 (but see now 1 Vict. c. 88, *infra*, as to the punishment), and by sec. 2 every vessel fitted out to trade, &c., with pirates, and also the goods shall be forfeited, half to the Crown and half to the informer. Offenders against this Act are to be tried according to the 28 Hen. 8, c. 15, and 11 & 12 Will. 3, c. 7. In the second edition, the 32 Geo. 3, c. 25, s. 12, was here inserted, but as that Act was only to continue in force during the then war with France, it seems to have expired. See 2 East P. C. c. 17, s. 7, p. 801, n. (a), and Crabb's Index to the Statutes, C. S. G. The 22 Geo. 3, c. 25, prohibits ransoming any ship belonging to any subject of his Majesty, or goods on board the same, which shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects.

&c., where the admiral has jurisdiction, except as by that Act is permitted, is made piracy, felony, and robbery, and the offenders made punishable as pirates, felons, and robbers upon the seas.⁽ⁱ⁾

The 1 Vict. c. 88 (which came into operation on the 1st October, 1837,)^(h) repeals so much of the 28 Hen. 8, c. 15; 11 & 12 Will. 3, c. 7; 4 Geo. 1, c. 11, s. 7; 8 Geo. 1, c. 24, and 18 Geo. 2, c. 30, "as relates to the punishment of the crime of piracy, or of any offence by any of the said Acts declared to be piracy, or of accessories thereto respectively."

Sec. 2 enacts, "That from and after the commencement of this Act whosoever, with intent to commit or at the time of or immediately before or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof shall suffer death as a felon."^(l)

Sec. 3. "From and after the commencement of this Act whosoever shall be convicted of any offence which by any of the Acts hereinbefore referred to amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the Court, to be transported^(m) beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years,⁽ⁿ⁾ or to be imprisoned for any term not exceeding three years."

*Sec. 4. "In the case of every felony punishable under this Act every *147] principal in the second degree and every accessory before the fact shall be punishable with death or otherwise in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."^(o)

Sec. 5. "Where any person shall be convicted of any offence punishable under this Act for which imprisonment may be awarded, it shall be lawful for the Court to sentence the offender to be imprisoned, or imprisoned and kept to hard labor, in the common gaol or house of correction, and also to direct that the offender shall be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labor, not exceeding one month at any one time, and not exceeding three months in any one year, as the Court in its discretion shall seem meet."^(p)

(i) See *post*, *Of dealing in Slaves*.

(k) By sec. 7.

(l) This sentence may be recorded by the 4 Geo. 4, c. 48, s. 1, and where the indictment charges a stabbing, cutting, or wounding, the jury may acquit of the felony, and convict of the stabbing, cutting, or wounding by the 14 & 15 Vict. c. 19, s. 5, *post*.

(m) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(n) Not less than seven years by the 9 & 10 Vict. c. 24, s. 1, and not less than three years' penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, pp. 3, 4.

(o) Sec. 6 provides that this Act shall not alter the provisions of the 5 & 6 Will. 4, c. 98, and 4 Geo. 4, c. 64.

(p) This statute having repealed the punishment of piracy at common law, which was before punishable by the 28 Hen. 8, c. 15, s. 3, with death without benefit of clergy, a difficulty arises as to what is now the punishment for that offence. The 39 Geo. 3, c. 37, s. 1, provides, "That all and every offence and offences, which, after the passing of this Act, shall be committed upon the high seas out of the body of any county of this realm shall be, and they are hereby declared to be offences of the same nature respectively, and to be liable to the same punishments respectively, as if they had been committed upon the shore, and shall be inquired of, heard, tried, and determined, and adjudged in the same manner as treasons, murders, and conspiracies are directed to be by the same Act" (28 Hen. 8, c. 15, *post*, p. 153). It should seem, therefore, that this Act, by making all offences committed on sea of the same nature as if they were committed on shore, has made piracy at common law a felony, which it was not at common law, or by the 28 Hen. 8, c. 15 (see *ante*, p. 144). By the 1 Geo. 4, c. 90, any person found guilty of any capital crime or offence committed upon the sea, which, if committed upon the land would be clergyable, is entitled to the benefit of clergy in like manner as if he had committed such offence upon land. By the 7 & 8 Geo. 4, c. 28, s. 6, clergy was abolished; and by sec. 7 no person convicted of felony was to suffer death unless for some felony excluded from clergy, on or before the first day of that session of Parliament; and by sec. 12, "all offences prosecuted in the High Court of Admiralty shall, upon every first and subsequent con-

Prior to these statutes (except the statute of Hen. 8), several mariners on board a ship lying near the Groyne seized the captain, he not agreeing with them; and, having put him on shore, carried away the ship, and afterwards committed several piracies. This force upon the captain, and the carrying away the ship, which was explained by the use of it afterwards, was adjudged piracy (*q*). But where the master of a vessel loaded goods on board at Rotterdam, *consigned to [148 Malaga, which he caused to be insured, and after he had run the goods on shore in England the ship was burned, when he protested both the ship and cargo as burned, with intent to defraud the owner and insurers; the judges of the common law, who assisted the judges of the Admiralty, directed an acquittal upon an indictment for piracy and stealing the goods; because being only a breach of trust and no felony, it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined. (*r*)

It is an offence within the 11 & 12 Will. 3, c. 7, s. 9, to make a revolt in a ship, or to endeavor to make one, though the object was not to run away with the ship, or to commit any act of piracy, but to force the captain to redress supposed grievances. The prisoners were charged by the first count of the indictment with betraying their trust and turning pirates, and with confederating piratically and feloniously to steal and run away with the ship; by the second with piratically and feloniously attempting to corrupt other persons of the crew so to steal and run away with the ship; by the third, with piratically and feloniously inciting a revolt in the ship, the master being on board; and, by the fourth, with endeavoring to make such revolt. It appeared clearly that there was a revolt in the ship, and that the prisoners participated, refusing to obey orders, and being guilty of many acts of insubordination and violence. The counsel for the prisoners endeavored to show, that the prisoners and their adherents had in view a redress of supposed grievances, and not the intention of assuming the command for the purpose of carrying off the ship; and there was some evidence that the prisoners had an ulterior object than that of redressing ill-usage, of which it appeared they had complained, yet their acquittal upon the two first counts led to the conclusion that the jury did not impute to them any other real intention than that of redressing their supposed grievances. The point submitted to the judges was, that in order to satisfy the intent of the statute, and the words of the indictment, "piratically and feloniously revolted," the object of the revolt must have been to take possession of or to run away with the ship, or to enable the prisoners to commit some act of piracy, and not merely to resist the captain's authority in order to force him to redress alleged grievances. But the judges present were unanimously of opinion, that making or endeavoring to make a revolt, with a view to procure a redress of what the prisoners thought grievances, and without any intent to run away with the ship, or to commit any act of piracy, was an offence within the 11 & 12 Will. 3, c. 7, s. 9, and that the conviction was therefore right. (*s*)

Where one count charged the prisoners with making, and another with endeavoring to make a revolt in a ship, it appeared that great complaints had been made by

viction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon land." See also the Criminal Law Consolidation Acts of 1861, *ante*, p. 2. By the 4 & 5 Will. 4, c. 36 (*post*, p. 158) piracy may now be tried at the Central Criminal Court. By some writers piracy at common law is defined to be the committing those acts of robbery and depredation on sea which, if committed on land, would have amounted to *felony*: 1 Hawk. c. 37, s. 4; 4 Bla. Com. 72; 2 East P. C. c. 17, s. 3, p. 796; Mason's case, *post*, note (*r*). By others it seems to be considered the same offence as *robbery* on land: Archb. Vict. Act 72; 2 Hale 369; 1 Hale 354; 3 Inst. 113, where Lord Coke calls a pirate "a robber upon the sea." On the whole it seems that each act of piracy at common law is now a felony of the same kind, and liable to the same punishment, as if the same act had been done upon land, and the offender is triable either under a commission founded on the 28 Hen. 8, c. 15, or at the Central Criminal Court, or at the assizes, *post*, p. 158. C. S. G.

(*q*) *Rex v. May, Bishop, and others*, Nov. 1796, MS. Tracy, 77; 2 East P. C. c. 17, s. 3, p. 796.

(*r*) *Mason's case*, Old Bailey, 9 Geo. 1, on a special commission: 8 Mod. 74; 2 East P. C. c. 17, s. 3, p. 796, s. c.

(*s*) *Rex v. Hastings and Meharg*, East. T. 1825, Ry. & Mood. 82.

the sailors in the course of the voyage about the provisions and the great heat
 *149] *cooking, &c., being close to it, was unsupportable in the warm latitudes.
 On the 30th of September the prisoner M. refused to go on duty, and remained
 duty till the following day, when he was again desired to work, and again refused,
 using at different times violent and threatening language. The captain in consequence
 ordered the crew to put M. in irons, but instead of obeying him they walked
 away forward. The prisoner S. had the same morning refused to go to his duty,
 and he and one G. went towards the captain, who was endeavoring, with the assistance
 of his officers, to put M. in irons. Violent language was used by both, and
 threats uttered against the captain, to induce him to alter his determination, and
 G. rushed to a boat where spears used in the whale-fishery were kept, with the
 evident intention of seizing one of them, and releasing M. by force. The captain
 shot G. in the act of laying hold of a spear. Lord Abinger, C. B.: "By revolt I
 understand something like rebellion or resistance to lawful authority, and if the
 crew of a ship combine together to resist the captain, especially if the object be to
 deprive him of his authority altogether, it will in my opinion amount to making a
 revolt. I think upon the construction of this Act of Parliament that the resistance
 of one person to the authority of the captain would not be a revolt. Revolt means
 something more than the disobedience of one man. I think it would be straining
 the evidence rather too far to say that the conduct of these men amounted to a
 revolt; and the charge of making a revolt, if my construction of the Act be correct,
 will fall to the ground. The question of whether the ship was properly fitted up
 and found is not material; for it has been decided that, although there be real
 grievances to redress, yet it is not an answer to a charge of attempting to make a
 revolt. If G. and the prisoners were united in some common design to prevent
 the captain from putting M. in irons, which, on the evidence he had a sufficient
 justification in doing, and calling upon others of the crew to assist them in resisting
 the captain's authority, then I think it was an attempt to excite a revolt." (t)

On an indictment upon the 11 & 12 Will. 3, c. 7, s. 9, it appeared that the
 prisoners were two of the mates and the others mariners of a merchant ship, and
 the captain seeing something in the manner of a sailor which displeased him spoke
 sharply to him and ordered him to leave the helm, and called to some one else to
 take his place, and he ordered the sailor to go and grease the masts, which the
 captain thought necessary to be done. The sailor peremptorily refused, and the
 captain on that ordered all hands up: he desired the mates to have the masts
 greased, which the men refused to do, and said that it was the duty of the boys,
 and that whilst there were boys on board they would not. The captain positively
 insisted, and the men as positively refused. He then said, "If that's the case, I'll
 put you on short commons; that beef which is lying there you shan't have," and
 ordered it to be taken below, on which there was a peremptory refusal to let him
 have it. The captain, who saw that this did not meet with the slightest opposition
 from the mates, perceived the disposition to mutiny, and that he must act at once
 *150] or there would be no *authority, went down and armed himself with a cut-
 lass, came again on deck and said, "Give me that beef!" and speaking to
 the steward said, "Take it below, and the first man who interferes, I will exercise
 my authority, and cut him down with the instrument with which I am armed."
 The steward, seeing the captain was not to be trifled with, obeyed; the beef was
 taken down and the captain put away his cutlass, and, after staying on deck some
 time, went down, and had his dinner, and then believing he had done sufficient
 to assert his authority, he sent the beef back, and allowed the crew to have their
 dinners. After the beef was taken away, the men all refused to do anything, and
 went below; however the captain thought that all this had passed away. After
 this the steward requested the captain to come on deck, as the men wanted to speak
 to him. He went on deck, was made prisoner, and confined in his cabin, the vessel
 put about, and brought to Plymouth by the mate and crew, and there the crew
 made a complaint against the captain. Williams, J., told the jury that in con-

(t) Reg. v. M'Gregor, 1 C. & K. 429 (47 E. C. L. R.).

dering the meaning of the terms used in the statute he must tell them that considering together and making a revolt constituted the offence charged, unless they are satisfied that there was some justifiable cause. The great question for their consideration was, whether or not there was any justification for this unquestionable confinement of the captain. Did, therefore, his conduct afford any justification for that step? He was bound to tell them that, according to the authorities, a seaman was not justified in making a revolt in a ship, or in imprisoning his captain, by reason of that captain having been unjust or unreasonable; it was not to be allowed that seamen should take the law into their own hands, because the captain had issued an unjust order, or had conducted himself in a harassing or embarrassing manner. If the rule of law was that whenever the seamen considered the captain's conduct unreasonable and rash, they could take charge of the ship, there would be an end to all maritime discipline. It was necessary, for the due maintenance of discipline that mutiny and revolt, if not justifiable, should be punished as a crime in the merchant service as well as in the royal navy. In his opinion, in point of law, it was justifiable in one view only, namely, if the conduct of the captain had been such as to afford reasonable ground for concluding that, unless the men had imprisoned him, the crew, or some one or more of them, would have been in danger of their lives, or of suffering some grievous bodily harm from his conduct. If they thought that was made out, and that the conduct of the captain was such that the lives of the crew were in danger unless he were imprisoned, then there was a justification. But if they should not come to the conclusion that there was reasonable ground for this belief, then, in point of law, they ought to find the prisoners guilty.^(u)

On an indictment on the 11 & 12 Will. 3, c. 7, s. 9, for making a revolt in a merchant ship, it appeared that the prisoners formed *part of a crew of a [151] steam vessel trading between London and Holland; their register tickets were deposited with the captain, but no agreement in writing had been entered into with them previously to their sailing on the voyage during which the revolt was made, and the Recorder held that the prisoners were not mariners, or seamen; the 1 & 8 Vict. c. 112, s. 2,^(v) made any contract other than the agreement thereby required illegal, and therefore the relation of commander and mariner did not exist.^(w)

Upon an indictment on the 18 Geo. 2, c. 30, a question was made whether adhering to the King's enemies in hostilely cruising in their ships could be tried as piracy under the usual commission granted by virtue of the 28 Hen. 8, c. 15. The 18 Geo. 2, recites that doubts had arisen whether subjects entering into the service of the King's enemies on board privateers and other ships, having commissions from France and Spain, and having by such adherence been guilty of high treason, could be deemed guilty of felony within the intent of the 11 & 12 Will. 3, c. 7, and be triable by the Court of Admiralty appointed by virtue of the said Act; and then enacts that persons who shall commit hostilities upon the sea, &c., against his Majesty's subjects by virtue or under color of any commission from any of his Majesty's enemies, or shall be any otherwise adherent to his Majesty's enemies upon the seas, &c., may be tried as pirates, felons, or robbers, in the said Court of Admiralty in the same manner as persons guilty of piracy, felony, and robbery, are by the said Act directed to be tried; but it does not say that they shall be deemed pirates, &c., as in the 11 & 12 Will. 3, c. 7. The prisoner having been convicted, the question was reserved for consideration of the judges; and it was agreed by eight who were present,^(x) that the prisoner had been well tried under the commission. For that taking the 11 & 12 Will. 3, and 18 Geo. 2 together, and the doubt raised in the latter, and also its enactment that in the

^(u) Reg. v. Rose, 2 Cox C. C. 329. As reported, this direction is open to the objection that it did not inform the jury that the captain might lawfully use any force that was reasonably necessary to retain the command of the vessel and stop the revolt, and that the crew would not be justified in imprisoning him for using such force for that purpose; but, no doubt, the very learned judge did so direct the jury.

^(v) Repealed by the 17 & 18 Vict. c. 120.

^(w) Reg. v. Smith, 3 Cox C. C. 443.

^(x) Lord Loughborough, Lord C. B. Skynner, Gould, J., Willes, J., Ashurst, J., Eyre, B., Perry, B., and Heath, J., who met Nov. 11, 1782.

instances therein mentioned, and also in case of any other adhering to the King's enemies, the parties might be tried as pirates by the Court of Admiralty according to that statute, it was substantially declaring that they should be *deemed pirates*; and that it was a just construction in their favor to allow them to be tried *as such* by a jury.(y)

Accessories to piracy were triable only by the civil law if their offence was committed on the sea, and were not triable at all if their offence was committed on land, until the 11 & 12 Will. 3, c. 7, s. 10, which enacts, "that every person and persons whatsoever, who shall either on the land, or upon the seas, knowingly or wittingly set forth any pirate; or aid and assist, or maintain, procure, command, counsel, or advise, any person or persons whatsoever, to do or commit any piracies or robberies upon the seas; and such person and persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons *whatsoever, so as aforesaid setting forth any pirate, or aiding, assisting, *152] maintaining, procuring, commanding, counselling, or advising, the same either on the land or upon the sea, shall be and are hereby declared, and shall be deemed and adjudged to be *accessory* to such piracy and robbery, done and committed; and further, that after any piracy or robbery is or shall be committed by any pirate or robber whatsoever, every person and persons, who, knowing that such pirate or robber has done or committed such piracy or robbery, shall on the land or upon the seas, receive, entertain, or conceal, any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been by any such pirate or robber piratically and feloniously taken; shall be, and are hereby likewise declared, deemed, and adjudged to be accessory to such piracy and robbery." And then the statute directs, "that all such accessories to such piracies and robberies shall be inquired of, tried, heard, determined, and adjudged, after the common course of the laws of this land, according to the 28 Hen. 8, as the principals of such piracies and robberies may and ought to be, and no otherwise: and being thereupon attainted, shall suffer such pains of death,(z) losses of lands, goods, and chattels, and in like manner, as such principals ought to suffer, according to the 28 Hen. 8, which is thereby declared to continue in full force.

The 8 Geo. 1, c. 24, however, makes an alteration with respect to the accessories described in 11 & 12 Will. 3, and declares them to be principals, and that they shall be tried accordingly. Sec. 3, reciting that "whereas there are some defects in the laws for bringing persons who are accessories to piracy and robbery upon the seas to condign punishment, if the principal who committed such piracy or robbery is not or cannot be apprehended and brought to justice," enacts, "that all persons whatsoever, who by the 11 & 12 Will. 3, are declared to be accessory or accessories to any piracy or robbery therein mentioned, are hereby declared to be principal pirates, felons, and robbers, and shall and may be inquired of, heard, determined, and adjudged, in the same manner as persons guilty of piracy and robbery may, according to that statute; and being thereupon attainted and convicted, shall suffer death(z) and loss of lands, &c., in like manner as pirates and robbers ought by the said act to suffer."

One who knowingly received and abetted a pirate within the body of a county was not triable by the common law, the original offence being cognizable alone by another jurisdiction (b) But see now the 24 & 25 Vict. c. 94, s. 9.(c)

(y) Evans's case, MS. Gould, J.; 1 East P. C. c. 17, s. 5, pp. 798, 799. The 18 Geo. 2, c. 30, s. 3, provides that the Act shall not prevent any offender who shall not be tried according thereto from being tried for high treason within this realm according to the stat 28 Hen. 8, c. 15.

(z) See 1 Vict. c. 88, s. 4, as to the punishment of accessories, *ante*, p. 147.

(b) Admiralty case, 13 Co. 53. And a little before this case the law appears to have been so considered in the case of one Scadding, who was committed by the Court of Admiralty for aiding a pirate to escape out of prison; and, on a return to a *habeas corpus*, the prisoner was remanded, though it appeared that the fact was committed by him within the body of a county. The Court of King's Bench holding, that because Scadding's offence depended on the piracy committed by the principal, of which the temporal judges had no cognizance, and was, as it were, an accessorial offence to the first piracy which was determinable by the admiral, it was sufficient ground for remanding him: Yelv. 134; 2 East P. C. c. 17, s. 14, p. 810.

(c) *Ante*, p. 71.

*Sec. II.—Of the Place in which the Offence may be committed. [*153

THE 28 Hen. 8, c. 15, s. 1, enacts, that all treasons, felonies, robberies, murders, and confederacies, committed in or upon the sea, or in any haven, river, creek, or place, where the admiral has, or pretends to have power, authority, or jurisdiction, shall be inquired, tried, &c., in such shires and places as shall be limited by the King's commission, as if any such offences had been committed upon the land.

In a case at the Admiralty session of a murder committed in a part of Milford Haven, where it was about three miles over, about seven or eight miles from the mouth of the river, or open sea, and about sixteen miles below any bridges over the river, a question was made whether the place where the murder was committed was to be considered as within the limits to which commissions granted under the 28 Hen. 8, c. 15, do by law extend. Upon reference to the judges, they were unanimously of opinion that the trial was properly had. And it is said that during the discussion of the point the construction of this statute by Lord Hale^(d) was much preferred to the doctrine of Lord Coke;^(e) and that most, if not all, of the judges, seemed to think that the common law has a concurrent jurisdiction with the Admiralty in this haven, and in all other havens, creeks, and rivers in this realm^(f). It appeared to them that the 28 Hen. 8 applied to all great waters frequented by ships; that in such waters the admiral, in the time of Hen. 8, pretended jurisdiction; that by havens, &c., havens in England were meant to be included, though they are all within the body of some county; and that the mischief from the witnesses being seafaring men was likely to apply to all places frequented by ships.^(g)

If a robbery be committed in creeks, harbors, ports, &c., in foreign countries, the Court of Admiralty indisputably has jurisdiction of it, and such offence is, consequently, piracy.^(h)

It is clear that upon the open sea-shore the common law and the Admiralty have alternate jurisdiction between high and low-water *mark;⁽ⁱ⁾ but it is some- [*154 times a matter of difficulty to fix the line of demarcation between the county and the high seas in harbors, or below the bridges in great rivers. The question is often more a matter of fact than of law, and determinable by local evidence; but some general rules upon the point are collected by Mr. East. He says, that "in general it is said that such parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties where persons can see from one side to the other. Lord Hale, in his treatise *De jure maris*, says that the arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. Hawkins, however, considers the line more accurately confined, by other authorities, to such parts of the sea where a man, standing on the one side of the land, may see what

(d) 2 Hale 16, 17.

(e) 3 Inst. 111; 4 Inst. 134.

(f) Bruce's case, 2 Leach 1093; Russ. & Ry. 243. This was a case of murder. The stat. 15 Rich. 2, c. 3, gives the admiral jurisdiction to inquire of the death of a man, and of a mayhem done in great ships hovering in the main stream of great rivers, beneath the bridges of the same rivers nigh to the sea, and to none other places in the same rivers; which jurisdiction is only concurrent with, and not in exclusion of, the common law: 1 East P. C. 368. It is most probable that pointz in the 15 Rich. 2, c. 3, means points and not bridges. In "A description of the River Thames" (Longman, 1752), it is said that the Lord Mayor of London used to summon a jury four times a year "to make inquisition after all offences committed on the Thames and Medway up the river as far as Staines Bridge, and down the river as far as the points of it next the sea," and that "the jurisdiction of the City of London in the river of Thames from Staines Bridge westward unto the points of the river next to the sea eastward, appeareth to belong to the City." All this appears to be taken from old charters. In 1347, it appears that persons setting kiddels ultra Grenland (Yantlett) versus mare were fined: P. 94, 95, 96. In later times Yendall or Yentlet seems from old charters to be the limit: P. 139. All this seems to show that pointz means points, not bridges.

(g) MS. Bayley, J.

(h) Rex v. Jemot, Old Bailey, 28th Feb. 1812; MS. Jerv. Arch. 366, edit. 15.

(i) 3 Inst. 113; 2 Hale 17; and see 2 Hawk. c. 9, s. 14, as to the jurisdiction of the coroner in offences on the sea-shore: *Anonymous*, 1 Lewin 242.

is done on the other; and the reason assigned by Lord Coke in the Admiralty case^(k) in support of the county coroner's jurisdiction, where a man is killed in such places, *because that the county may well know it*, seems rather to support the more limited construction. But at least, where there is any doubt, the jurisdiction of the common law ought to be preferred."^(l)

Where a murder was committed in Roundstone Bay, and it appeared that the place in question was within the county of Galway, and that the headlands bounding the bay were so situated that a man could see from the one to the other, and that the place in question would fall within a straight line drawn from the one headland to the other, and that in that part of the bay there were fifteen fathoms water, and that a ship of 120 tons could sail there; but there was no evidence of its having been frequented by shipping, or of any Admiralty process having ever been executed within it; it was held by the judges in Ireland, that the murderer was rightly tried under an Admiralty commission.^(m)

But where, upon an indictment for maliciously wounding in the county of Glamorgan, it appeared that the prisoners were Americans, and they and the person wounded were part of the crew of the American ship *Gleaner*, which sailed from the docks of Cardiff to an anchorage in Penarth Roads, and the offence was committed shortly before she arrived at that anchorage, when the ship was three-quarters of a mile from land, in a place never left dry by the tide; but she was within a quarter of a mile of the land which is left dry by the tide. The shore of the county of Glamorgan extends many miles up and down the Bristol Channel from the place where the offence was committed. The spot in question was in the Bristol Channel, between the Glamorganshire and Somersetshire coasts, and was about ten miles from the opposite coast of Somersetshire. Two islands, called the Flat and Steep Holmes, are outside the anchorage-ground, and farther from the shore than it is, but not lower down the Channel. being abreast of the anchorage-ground. When the offence was committed the ship was inside, and about two miles from the Flat Holmes, and four or five miles from the Steep Holmes, and was within the

*155] Lavernock Point in Penarth Roads, but outside of Penarth Head. Penarth Head and Lavernock Point form a bay. It is three miles from Lavernock Point. At Penarth Head persons can see from one to the other, and could see what a vessel was doing from one to the other, but could not see the people from one to the other. From where the ship was persons could see people at Lavernock, and see what they were doing if they took particular notice of them, and they could see the coast of Somersetshire in a clear day. The mouth of the Severn is at King's Road, higher up the Channel. The Holmes are part of the parish of St. Mary's, Cardiff, and taxes had been collected from the occupiers of Flat Holmes for St. Mary's parish. By an order of the Commissioners of Her Majesty's Treasury, the port of Cardiff had been fixed so as to include the spot in question. It was objected that the prisoners could not be tried in the county of Glamorgan, as there was no proof that the offence was committed in that county; but it was held that the offence was committed in that county. Cockburn, C. J. : "The question is, whether the part of the sea on which the vessel was at the time when the offence was committed forms part of the body of the county of Glamorgan; and we are of opinion that it does. The sea in question is part of the Bristol Channel, both shores of which form part of England and Wales, of the county of Somerset on one side, and the county of Glamorgan on the other. We are of opinion that, looking at the local situation of this sea, it must be taken to belong to the counties respectively by the shores of which it is bounded; and the fact of the Holmes, between which and the shore of the county of Glamorgan the place in question is situated, having always been treated as part of the parish of Cardiff and as part of the county of Glamorgan, is a strong illustration of the principle on which we proceed, namely, that the whole of this inland sea between the counties of Somerset and Glamorgan is to be considered as within the counties, by the shores of which its several parts are respectively bounded. We are, therefore,

(k) 13 Co. 52.

(l) 2 East P. C. c. 17, s. 10, p. 803, 804.

(m) Reg. v. Mannion, 2 Cox C. C. 158.

of opinion that the place in question is within the body of the county of Glamorgan."⁽ⁿ⁾

The question, whether the fact was committed on the sea or within the body of the county, is of main importance; for if it turn out that the goods were taken anywhere within the body of a county, the commissioners under the statute of Hen. 8 can have no jurisdiction to inquire of it; and if it should appear that the goods were taken at sea and afterwards brought on shore, the offender cannot be indicted as for a larceny in that county into which they were carried, because the original felony was not a taking of which the common law takes cognizance.^(o) And the 39 Geo. 3, c. 37,^(p) relates only to offences committed on the high seas, and out of the body of any county.^(q)

*Where a prisoner was indicted for stealing three chests of tea out of the Aurora, of London, on the high seas, and it was proved that the larceny [156 was committed while the vessel lay off Wampa, in the river, twenty or thirty miles from the sea, but there was no evidence as to the tide flowing, or otherwise, at the place where the vessel lay, it was held from the circumstance that the tea was stolen on board the vessel, which had crossed the ocean, that there was sufficient evidence that the larceny was committed on the high seas.^(r)

It was decided that where A., standing on the shore of a harbor, fired a loaded musket at a revenue cutter, which had struck upon a sandbank in the sea, about one hundred yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy; for the offence was committed where the death happened, and not at the place from whence the cause of death proceeded.^(s) And if a man be struck upon the high sea, and die upon the shore after the reflux of the water, the admiral, by virtue of his commission, has no cognizance of the offence.^(t) And as it was doubtful whether it could be tried at common law, it is provided by statute that the offender may be tried in the county where the death, stroke, poisoning, or hurt happened.^(u)

The 28 Hen. 8, c. 15, s. 2, introduces "manslaughters" and uses the words "havens," &c., without qualification in the first section, where the admiral has a jurisdiction. One of the mischiefs recited in the first section is, that the witnesses being commonly mariners and shipmen, depart without long tarrying or protraction of time. The statute is almost in terms with 27 Hen. 8, c. 4, except that it adds "treasons" to the offences.

It seems that the 27 Hen. 8 does not authorize the trial of felonies created by subsequent statutes, for which provision was therefore made by the 39 Geo. 3, c. 37.^(v) The prisoner was indicted for maliciously shooting, and the offence was within a few weeks after the passing of the 39 Geo 3, and before notice of it could have reached the place where the offence was committed; and, upon a case reserved, none of the judges supposed that the party could have been tried if the 39 Geo. 3 had not passed; and as he could not have known of that Act, they thought it right that he should have a pardon.^(w) And it was decided that a party was not triable under both or either of these statutes for maliciously shooting, within 43

(n) *Reg. v. Cunningham*, Bell C. C. 72. As the offence in this case was committed on a foreign vessel, it could not have been tried as an Admiralty offence. But where an offence is committed in a British ship, and there is a doubt whether the place be within the Admiralty jurisdiction, it would be well to have one count laying the offence "upon the high seas" and another as if the offence were committed within a county.

(o) 2 East P. C. c. 17, s. 12, a. 805; 3 Inst. 113; *Rex v. Prowes*, 1 M. C. C. R. 349; *Reg. v. Madge*, 9 C. & P. 29 (38 E. C. L. R.).

(p) *Id.*, p. 147, note (p).

(q) But as this act and the 24 & 25 Vict. c. 96, s. 115, made a larceny on the sea of the same nature as if it had been committed on land and triable by jury, it should seem that the ground of the former decisions fails, and therefore they ought to be considered as no longer binding.

(r) *Rex v. Allen*, R. & M. C. C. R. 494; s. c. 7 C. & P. 664.

(s) 1 Hawk. P. C. c. 37, s. 17; *Coombe's case*, 1 Leach 388; 1 East P. C. c. 5, s. 131, p. 367.

(t) 2 Hale 17, 20; 1 East P. C. c. 5, s. 131, pp. 365, 366.

(u) 24 & 25 Vict. c. 100, s. 10, *post*, *Murder*.

(v) *Id.*, p. 147, note (p); *Rex v. Snape*, 2 East P. C. 807.

(w) *Rex v. Bailey*, Hil. T. 1800, MS. *Bayley, J.*, and R. & R. 1.

Geo. c. 58 (now repealed); but this decision proceeded upon the terms of the 43 Geo. 3, which confined its operation to *England and Ireland*.(x)

The 26 & 27 Vict. c. 125 repeals the 27 Hen. 8, c. 4.

*157] *Sec. III.—Of the Court by which the Offence may be tried.

THE offence of piracy was formerly cognizable only by the Admiralty Courts, which proceeded without a jury, in a method much conformed to the civil law. But it being inconsistent with the liberties of the nation that any man's life should be taken away, unless by the judgment of his peers, or the common law of the land, the 28 Hen. 8, c. 15, established a new jurisdiction. That statute enacted, that this offence should be tried by commissioners nominated by the Lord Chancellor, the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury as at common law, and that the course of proceeding should be according to the law of the land. Amongst the commissioners there were always some of the common law judges;(y) and by the Admiralty Court, thus constituted, the offence of piracy, and other marine offences, may now be tried. But the 28 Hen. 8 merely altered the mode of trial in the Admiralty Court; and its jurisdiction still continues to rest on the same foundations as it did before that Act. It is regulated by the civil law, *et per consuetudines marinas* grounded on the law of nations, which may possibly give to that Court a jurisdiction that our common law has not.(z)

The 32 Geo. 2, c. 25, s. 20, for the more speedy bringing of offenders to justice, &c., enacts, that a session of oyer and terminer and gaol delivery for the trial of offences committed upon the high seas, within the jurisdiction of the Admiralty of England, shall be holden twice at least in every year; viz., in March and October, at the Old Bailey (except when the sessions of oyer and terminer and gaol delivery for London and Middlesex shall be there holden), or in such other places in England as the Lord High Admiral, &c., shall, in writing under his hand, directed to the judge of the Court of Admiralty, appoint. And the 7 Geo. 4, c. 38, was passed, to enable the commissioners for trying offences committed upon the sea, and justices of the peace to take examination touching such offences, and to commit to safe custody persons charged therewith.(a)

The 11 & 12 Will. 3, c. 7, s. 1, made provision for the trial of piracies, felonies, &c., committed upon the sea, or in any haven, &c., and the 46 Geo. 3, c. 54, enacts, that all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place, where the admiral or admirals have power, authority, or jurisdiction, may be inquired of, tried, &c., according to the common course of the laws of this realm used for offences committed upon the land within this realm, and not otherwise, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the King's *commission or commissions, under the Great Seal of Great Britain, to be directed to any such four or more discreet persons as the Lord Chancellor of Great Britain, Lord Keeper, or Commissioner for the custody of the Great Seal of Great Britain for the time being, shall from time to time think fit to appoint; and that the said commissioners so to be appointed, or any three of them, shall have such and the like powers and authorities for the trial of all such murders, &c., within any such island, &c., as any commissioners appointed according to the directions of the 28 Hen. 8, by any law or laws then in force would have for the trial of the said offences within this realm. And it further enacts, that all persons convicted of any of the said offences so to be tried, &c., shall be liable to the same pains, &c., as, by any laws then in force, persons convicted of the same would be liable to, in case the same were tried, &c., within this realm, by virtue of any commission according to the direction of the 28 Hen. 8.(x)

(x) *Rex v. Amarro*, R. & R. 286. The act is now repealed.

(y) Generally *two*. 4 Blac. Com. 269.

(z) By Mansfield, C. J., *Rex v. Depardo*, 1 Taunt. 29.

(a) See note (d), p. 159.

(x) See the 12 & 13 Vict. c. 96, *post*, p. 164.

By 7 & 8 Geo. 4, c. 28, s. 12, "All offences prosecuted in the High Court of Admiralty of England shall upon every first and subsequent conviction be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon the land."

Each of the Consolidation Acts of 1861 makes the offences committed on the sea against it of the same nature as if they had been committed on land in England or Ireland, and triable where the offender is apprehended or in custody.^(a)

The Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 22, enacts, that "it shall and may be lawful for the justices and judges of oyer and terminer, and gaol delivery to be named in, and appointed by the commissions to be issued under the authority of this Act, or any two or more of them, to inquire of, hear, and determine any offence or offences committed, or alleged to have been committed on the high seas, and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to, or detained therein for any offence or offences alleged to have been done and committed upon the high seas aforesaid, within the jurisdiction of the Admiralty of England; and all indictments found, and trials, and other proceedings had or taken by and before the said justices and judges of oyer and terminer and gaol delivery shall be valid and effectual to all intents and purposes whatsoever."

An accessory before the fact to a felony committed on the high seas within the jurisdiction of the Admiralty, might be indicted and tried at the Central Criminal Court by virtue of the preceding section and the 7 Geo. 4, c. 64, s. 9 (now repealed), although the principal had not been "committed to, or detained in," the gaol of Newgate for his offence.^(b)

The 7 & 8 Vict. c. 2, s. 1, reciting the 28 Hen. 8, c. 15, and that it is expedient that provision be made for the trial of persons charged with offences committed within the jurisdiction of the Admiralty, enacts "that Her Majesty's justices of assize or others Her Majesty's commissioners by whom any Court shall be holden *under any of Her Majesty's commissions of oyer and terminer or general gaol delivery shall have severally and jointly all the powers which by any [*159 Act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the Admiralty of England, and that it shall be lawful for the first-mentioned justices and commissioners, or any one or more of them, to inquire of, hear, and determine all offences alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty of England, and to deliver the gaol in every county and franchise within the limits of their several commissions of any person committed to or imprisoned therein for any offence alleged to have been committed upon the high seas and other places within the jurisdiction of the Admiralty of England; and all indictments found, and trials and other proceedings had, by and before the said justices and commissioners shall be valid."

Sec. 2, "In all indictments preferred before the said justices and commissioners under this Act the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts which in other indictments would be averred to have taken place in the county where the trial is had shall in indictments prepared^(c) and tried under this Act be averred to have taken place 'on the high seas.'"^(d)

Where a larceny was alleged under this Act to have been committed "on the

^(a) *Ante*, p. 2.

^(b) *Reg. v. Wallace*, 2 M. C. C. R. 200; C. & M. 200 (41 E. C. L. R.).

^(c) *Quere*, preferred.

^(d) Sec. 3 provided for the commitment of persons charged with offences committed within the jurisdiction of the Admiralty under the 7 Geo. 4, c. 38, but so much of that act as related to the examination and commitment of such persons, was repealed by the 11 & 12 Vict. c. 42, s. 34, and 12 & 13 Vict. c. 69, s. 31, which was repealed by the 14 & 15 Vict. c. 93, s. 43, and the examination and commitment of such persons are now regulated by the 11 & 12 Vict. c. 42, and 14 & 15 Vict. c. 93. It seems, therefore, that sec. 3 of the 7 & 8 Vict. c. 2, is virtually repealed. Sec. 4 of the 7 & 8 Vict. c. 2, provides that the act shall not affect the jurisdiction of the Central Criminal Court, or commissions under the 28 Hen. 8, c. 15.

high seas," it was held that the indictment was sufficient, without adding "within the jurisdiction of the Admiralty."^(e)

An indictment tried at the assizes under this statute for murder committed on the high seas, need not conclude *contra formam statuti*.^(f)

By the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 267, "All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is or within three months previously has been employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same Courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England."

To a count for murder since this statute, which alleged the murder to have been committed "upon the high seas," it was objected that it ought to have averred ~~that~~ the prisoners were on *board a British ship, or that they were British sub-
*160] jects; and to counts alleging that the prisoner was master of a British ship afloat in the river Elbe, and that he there committed the murder, it was objected that these counts did not allege the murder to have been committed "on the high seas." But Wightman, J., thought the provision in the 7 & 8 Vict. c. 2, as to the high seas, only directory, and overruled the objections, and, as they were on the record, refused to reserve them.^(g)

By the 18 & 19 Vict. c. 91, s. 21, "if any person, being a British subject, charged with having committed any crime or offence on board any British ship on the high seas or in any foreign port or harbor, or if any person, not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any court of justice in Her Majesty's dominions which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits."

A ship, public or private, on the high seas, is considered a part of the territory to which the ship belongs, and a foreigner committing an offence in it is amenable to the laws of such territory. Upon an indictment for wounding G. Smith, with intent to do him some grievous bodily harm, it was proved that the prisoner, a foreigner, being a sailor and one of the crew of the British ship Ontario, maliciously and unlawfully wounded the prosecutor, also a foreigner and a sailor, and one of the crew of the same ship, whilst on the high seas, and in the said ship, on a voyage from London to the coast of East Africa. The prisoner was tried and convicted at the Assizes at Exeter; and a case was reserved upon the question whether the prisoner, a foreigner, was properly convicted of the offence committed on the high seas.^(h) In another case,⁽ⁱ⁾ upon an indictment for murder, tried at the Central Criminal Court, it appeared that the prisoner was a foreigner, and had committed a larceny in England, and then went with part of the stolen property to Hamburg. The owner of the property gave information to the London police, and the deceased, who was a detective officer of that force, and an English subject went, and, with the assistance of the police of Hamburg, arrested the prisoner there, and brought him against his will on board an English steamer trading between Hamburg and London, in order that he might be tried for the larceny. Hamburg is on the river Elbe, sixty miles from the sea; but the tide flows higher up than the place where the steamer was when the prisoner was taken on board. The steamer left Hamburg on the 21st of November, the prisoner being in irons, and on the 22d, whilst on the high seas, he shot the officer, who died of the wound. If the killing had been by an Englishman, in an English county, it would have been murder. The deceased had no warrant; and a case was reserved upon the question whether

(e) Reg. v. Jones, 1 Den. C. C. 101.

(f) Reg. v. Serva, 2 C. & K. 53 (61 E. C. L. R.).

(g) Reg. v. Menham, 1 F. & F. 369.

(i) Reg. v. Sattler, Ibid.

(h) Reg. v. Lopez, D. & B., 525.

re was any jurisdiction to try the prisoner at the Central Criminal Court? It
 s contended in both cases that there was no jurisdiction to try the prisoner
 nder sec. 21 of the 18 & 19 Vict. c. 91. *Lopez* was not "found" within [*161
 ; jurisdiction of the Court at Exeter, but was brought into the jurisdiction in
 study and against his will, having been "found" in the ship.(k) This clause
 s intended to apply to cases where an offender, having escaped, was discovered
 erwards within another jurisdiction. In *Sattler's* case, the original caption at
 mburgh was unlawful, and he was illegally taken on board the steamer. There
 no extradition treaty between Hamburgh and this country, and the arrest at
 mburgh was without any warrant or authority; and therefore it cannot be said
 t he was "found" within the jurisdiction of the Central Criminal Court.
 ously, in neither case had the prisoner committed any offence for which he was
 enable to the English law. In none of the statutes, except the 18 & 19 Vict.
 91, s. 21, are foreigners mentioned, and they are not to be included in them by
 plication. It must be admitted that *Lopez* went on board the vessel voluntarily;
 t *Sattler*, as a foreigner, owed no allegiance to our laws; and as he did not enter
 to our jurisdiction voluntarily, no allegiance was created thereby. No allegiance
 n be created by bringing a foreigner forcibly and illegally from his own land.
 or the Crown it was contended:—First, that the word "found" meant that a
 an might be tried at any place where he is at the time of the trial. Secondly,
 at it is a general principle that a ship, public or private, on the high seas is, for
 ie purpose of jurisdiction over crimes therein committed, a part of the territory
 f the country to which the ship belongs, and a person coming voluntarily or in-
 oluntarily on board an English ship is as much amenable to the criminal law of
 England as if he came voluntarily or involuntarily into an English county. Lord
 Campbell, C. J.: "We are all of the opinion that in both these cases the convic-
 tion must be sustained. In the case of *Lopez*, we have no doubt that the offence
 committed by the prisoner was, under the circumstances, an offence against the
 aws of England. The prisoner, a foreigner, was in an English ship; he was
 nder the protection of English laws, and he therefore owed obedience to the
 English laws, and was guilty of an offence against those laws when he maliciously
 ounded another foreigner, one of the crew of the same ship, on the high seas. It
 s unnecessary to enter into a discussion of the authorities cited to prove that
 proposition—they are quite overwhelming; and I am glad to find that in this re-
 spect the law of America and France is the same as our own. Then the only
 ther question is, whether there was jurisdiction under the commission of oyer and
 eterminer to try the prisoner at Exeter for that offence; and upon that point we
 entertain as little doubt. The Court at Exeter would not have had jurisdiction
 before the 18 & 19 Vict. c. 91, s. 21; but that statute is quite conclusive on the
 subject, and seems to have been passed for the purpose of removing any doubt that
 might arise. It provides that offences committed by foreigners in British vessels
 on the high seas may be tried by any Court within the jurisdiction of which the
 offender is found, if the offence is one which would have been cognizable by such
 Court, supposing it to have been committed *within the limits of its ordi- [*162
 nary jurisdiction. Here the offence, if committed within the county of
 Devon, would certainly have been triable at Exeter; and as the prisoner was found
 within that jurisdiction, it is the same as if the offence had been committed within
 the limits of that jurisdiction, and we therefore think there was clearly jurisdiction
 in the Court at Exeter to try him there, and that he was legally convicted. With
 regard to the case of *Sattler*, we think it equally clear that, although the prisoner
 was a foreigner, the offence of which he was convicted was an offence against the
 laws of England. [Lord Campbell here stated the facts.] Then, here a crime is
 committed by the prisoner on board an English ship on the high seas, which
 would have been murder if the killing had been by an Englishman in an English
 county; and we are of opinion that, under these circumstances, whether the
 capture at Hamburgh and the subsequent detention were lawful or unlawful, the

(k) The case did not state how *Lopez* came into custody; but this was the assertion in
 the argument.

prisoner was guilty of murder and an offence against the laws of England; for he was in an English ship—part of the territory of England—entitled to the protection of the English law, and he owed obedience to that law; and he committed the crime of murder—that is to say, he shot the detective officer, not for the purpose of obtaining his liberation, but for revenge, and of malice prepense. Then comes the question, whether the Central Criminal Court had jurisdiction to try the prisoner for this offence; and it appears to us that the late Act was framed for the purpose of obviating, and does obviate, all doubt upon such a subject. A man is 'found' wherever he is actually present, and the prisoner was 'found' within the jurisdiction of the Central Criminal Court, and we are all of opinion that the Court had jurisdiction to try him. It was contended that the prisoner was not 'found' within the jurisdiction, because he was brought within it against his will; but, upon the construction of the statute, we are all of a different opinion." (1)

The prisoner was convicted of manslaughter committed on board the *Gustav Adolph* on the high seas, at a point about five days' sail from Pernambuco, and about 200 miles from the nearest land; the ship was built at Kiel, in the duchy of Holstein, and sailed thence to London, and thence on the voyage in which the offence was committed. All the officers and crew were foreigners; the prisoner was the second mate, and the deceased the master. The ship was sailing under the English flag when the offence was committed. The crew were told before sailing that Mr. Rehder was sole owner. He was not born an Englishman. A certified copy of the register of the *Gustav Adolph* under the 17 & 18 Vict. c. 104 was put in, and admitted as *prima facie* evidence that the ship was a British ship. Certain letters were put in, which, it was urged, showed a partnership between Rehder and Ehlers, and it was urged that under the 17 & 18 Vict. c. 104, ss. 138, and 103, the owner of a beneficial interest in a British ship must be qualified in the same way as the owner of a legal interest; that, even admitting that the registration of the ship in the name of Rehder was *prima facie* evidence that he was owner, it could be no evidence of Ehler's qualification, and therefore the letter

(1) *Reg. v. Lopez* and *Reg. v. Sattler*, *supra*. These cases were argued separately, but only one judgment delivered. All that these cases really decide is that the prisoners were properly tried under the 18 & 19 Vict. c. 91, s. 21, and it was quite unnecessary to decide whether they could have been tried under any other act, and it is to be regretted that Lord Campbell should have said that they could not, as that dictum is clearly erroneous; and as the 18 & 19 Vict. c. 91, and 17 & 18 Vict. c. 104, apply only to merchant vessels, it is right to correct that error. In the argument in *Reg. v. Lopez*, C. J. Cockburn said, "There is a strong opinion that but for the difficulty as to laying the venue, a person committing an offence on the high seas in an English ship would have been amenable to punishment at the common law." And that opinion is clearly right. The distinction is this: wherever a murder or other felony against the law of nature or nations was committed in England or on the narrow seas, it was triable by jury in the Court of King's Bench and courts of oyer and terminer and gaol delivery. But wherever a murder or such other felony was committed on the high seas it could not be tried by a jury (because a jury by the common law could only take cognizance of felonies committed within the local jurisdiction from which they were summoned), but such murders and other felonies were always triable by the court of admiralty, which proceeded according to the course of the civil law. To this proceeding, there was the vital objection that it did not try by a jury, and either the accused must plainly confess his offence, or there must be two witnesses who saw the offence committed; and this led to the passing of the 28 Hen. 8, c. 15, as is plain from the preamble and 3 Inst. 112. Now, that act in terms makes "all treasons, felonies, robberies, murders, and confederacies" committed upon the sea, or in any haven, river, creek or place where the admiral has jurisdiction, triable by commissions issued under that act, and as that act did not create or alter any offence, but left the offences as they were before it passed, 3 Inst. 112, it is clear that all the offences mentioned in it were offences triable by the court of admiralty, and were by that act made triable by a jury under the commissions issued under it. Then the 7 & 8 Vict. c. 2, s. 1, gave courts of oyer or terminer or general gaol delivery all the powers which were given by any act to commissioners in any commission of oyer and terminer for trying offences committed within the jurisdiction of the Admiralty. So that it is clear that the courts of oyer and terminer and gaol delivery have now the same jurisdiction as commissioners under the 28 Hen. 8, c. 15, or as the Court of Admiralty before that act passed. In other words, such murders and other felonies are now triable by the courts of oyer and terminer and gaol delivery.

proving Ehler's interest in the ship rebutted the *prima facie* evidence that she was a British ship. And, on a case reserved, it was held that there was *prima facie* evidence that she was a British ship; as there was evidence of a certificate of registry in London, wherein Rehder was described as the owner at that time resident in London, and the ship was sailing under the British flag; but that the *prima facie* proof was rebutted by the proof that Rehder was alien born; and that there was no presumption that letters of denization or naturalization had been granted to him, by reason that he, being alien born, would have become liable to penalties under the Act for registering the ship as belonging to a British owner. (U)

*The prisoner, the master of an English ship, entered into a contract with the Chilian Government, whereby he agreed to convey to the port of Liverpool [*163 five persons who had been ordered by that Government to be transported. These persons were brought by force on board the ship, guarded by soldiers of that State, and conveyed by the prisoner, under the contract, and against their will, to Liverpool. At the time the prisoner received these persons on board, the ship was lying in the territorial waters of Chili. The prisoner having been convicted on these facts upon an indictment for false imprisonment and assault tried at Liverpool, it was held that the conviction could not be sustained for what was done within the Chilian waters. It must be assumed that in Chili the act of the Government towards its subjects was lawful; and, although an English ship, in some respects, carries with her the laws of her country in the territorial waters of a foreign State, yet, in other respects, she is subject to the laws of that State, as to acts done to the subjects thereof. The Government could justify all that it did within its own territory, and it followed that the prisoner could justify all that he did there as agent for the Government, and under its authority. (m) But the conviction was sustained for that which was done out of the Chilian territory. It is clear that an English ship on the high sea, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil. Such being the law, if the act of the prisoner amounted to false imprisonment he was liable to be convicted. Now, as the contract of the prisoner was to receive the five persons on board the ship and to take them, without their consent, over the sea to England, although he was justified in first receiving them in Chili, yet that justification ceased when he passed the line of Chilian jurisdiction, and after that it was a wrong which was intentionally planned and executed in pursuance of the contract, amounting in law to false imprisonment. It may be that transportation to England is lawful by the law of Chili, and that a Chilian ship might so lawfully transport Chilian subjects; but for an English ship the laws of Chili, out of that State, are powerless, and the lawfulness of the acts must be tried by English law. (n)

By the last clause of sec. 1 of the 7 & 8 Vict. c. 2, the Court may "order the payment of the costs and expenses of the prosecution of Admiralty offences in the manner prescribed by the 7 Geo. 4, c. 64, in the case of felonies tried in the Court of Admiralty;" and by the last clause in the 17 & 18 Vict. c. 104, s. 267, the costs of the prosecution of any such offence as is therein mentioned may [*164 be directed to be paid in the same manner as costs of prosecutions for offences committed within the jurisdiction of the Admiralty of England.

The 12 and 13 Vict. c. 96, provides that the prosecution and trial in the colonies of any treason, piracy, felony, robbery, murder, conspiracy or other offence of what nature or kind soever, committed upon the sea or in any haven, river, creek or place where the admiral has jurisdiction, shall be in the same manner as if such offence had been committed upon any waters within the limits of such colony; (o) and that the punishment of any such offence shall be the same as if it had been committed in England; (p) and that in cases of murder and manslaughter, where

(U) Reg. v. Bjornsen, 12 Law T. 473; 10 Cox C. C. 74.

(m) Dobree v. Napier, 2 Bingh. N. C. 781 (29 E. C. L. R.).

(n) Reg. v. Lesley, Bell C. C. 220.

(o) Sec. 1.

(p) Sec. 2.

the death is in any colony, and the cause of the death elsewhere, the offence may be dealt with, tried and punished as if it had been wholly committed in the colony; and that where the death is within the jurisdiction of the Admiralty wherever the cause of death may have been, the offence shall be held for the purpose of the Act to have been wholly committed upon the sea.(g)

*165]

*CHAPTER THE NINTH.

OF NEGLECTING QUARANTINE, OF SPREADING CONTAGIOUS DISORDERS, AND OF INJURY TO THE PUBLIC HEALTH.

Sec. I.—Of neglecting Quarantine.

THE performance of *quarantine*, or forty days' probation, when ships arrive from countries infected with contagious disorders, having been considered as of the highest importance, with reference to the public health of the nation, has been enforced from time to time by various legislative enactments. These were formerly of considerable severity; but the 6 Geo. 4, c. 78, repeals all former Acts upon this subject, and enforces the performance of quarantine principally by pecuniary penalties. Some offences, however, subject the offender to imprisonment, and some are of the degree of felony. It may be here observed, that in a case which arose upon 26 Geo. 2, c. 6, which enacted, that all persons going on board ships coming from infected places should obey such orders as the King in Council should make, but did not award any particular punishment, nor contain a clause as to the jurisdiction of the justices of the peace, it was holden that disobedience of such an order of council was an indictable offence, and punishable as a misdemeanor at common law.(a)

By the 6 Geo. 4, c. 78, s. 17, "if any commander, master, or other person having charge of any vessel liable to perform quarantine, and on board of which the plague, or other infectious disease or distemper, shall not then have appeared, shall himself quit, or shall knowingly permit or suffer any seaman or passenger coming in such vessel to quit such vessel, by going on shore, or by going on board any other vessel or boat, before such quarantine shall be fully performed, unless by such license as shall be granted by virtue of any order in council, to be made concerning quarantine as aforesaid, or in case any commander or other person having charge of such vessel shall not, within a convenient time after due notice given for that purpose, cause such vessel, and the lading thereof, to be conveyed into the place and places appointed for such vessel and lading to perform quarantine; then and in every such case every such commander, master, or other person as aforesaid for every such offence shall forfeit and pay the sum of four hundred pounds; and if any such person coming in any such vessel liable to quarantine (or any pilot or other person going on board the same, either before or after the arrival of such vessel at any port or place in the United Kingdom, or the islands aforesaid), shall *166] either before or after such arrival, quit such vessel, unless by such license as aforesaid, by going on shore in any port or place in the United Kingdom or the islands aforesaid, or by going on board any other vessel or boat, with intent to go on shore as aforesaid, before such vessel so liable to quarantine as aforesaid shall be regularly discharged from the performance thereof, it shall not be lawful for any person whatsoever, by any kind of necessary force, to compel such pilot or other person so quitting such vessel so liable to quarantine, to return on board the same; and every such pilot or other person so quitting such vessel so liable to quarantine shall for every such offence suffer imprisonment for

(g) Sec. 3. Sec. 4 provides that the act shall not affect the jurisdiction of the Courts of New South Wales and Van Diemen's land. The 18 & 19 Vict. c. 91, s. 21, provides that nothing contained in that section shall affect the 12 & 13 Vict. c. 96.

(a) *Rex v. Harris*, 4 T. R. 202, 2 Leach 549.

the space of six months, and shall forfeit and pay the sum of three hundred pounds."

Sec. 21. "If any officer of his Majesty's customs, or any other officer or person whatsoever, to whom it doth or shall appertain to execute any order or orders made or to be made concerning quarantine, or the prevention of infection, as notified as aforesaid, or to see the same put in execution, shall knowingly and wilfully embezzle any goods or articles performing quarantine, or be guilty of any other breach or neglect of his duty in respect to the vessels, persons, goods, or articles performing quarantine, every such officer or person so offending shall forfeit such office or employment as he may be possessed of, and shall become from thence incapable to hold or enjoy the same, or to take a new grant thereof; and every such officer and person shall forfeit and pay the sum of two hundred pounds; and if any such officer or person shall desert from his duty when employed as aforesaid, or shall knowingly and willingly permit any person, vessel, goods, or merchandize, to depart or to be conveyed out of the said lazaret vessel or other place as aforesaid, unless by permission under an order of his Majesty, by and with the advice of his council, or under an order of two or more of the lords or others of his privy council; or if any person hereby authorized and directed to give a certificate of a vessel having duly performed quarantine or airing, shall knowingly give a false certificate thereof, every such person so offending shall be guilty of felony;^(b) and if any such officer or person shall knowingly or wilfully damage any goods performing quarantine under his direction, he shall be liable to pay one hundred pounds damages, and full costs of suit, to the owner of the same."

The publication in the London Gazette of any order in council, or of any order by two or more of the lords or others of the privy council, made in pursuance of the Act, or his Majesty's royal proclamation made in pursuance of the same, is to be deemed and taken to be sufficient notice to all persons concerned, of all matters therein respectively contained.

The statute also enacts, that in any prosecution, suit, or other proceedings against any person, for any offence against this Act, or any which may hereafter be passed concerning quarantine, or for any breach or disobedience of any order made by his Majesty by the advice of his privy council, concerning quarantine, and the prevention of infection, notified or published as aforesaid, or of any order or orders made by two or more of the privy council, the answers of the commander, [*167 master, or other person, having charge of any vessel, to any questions or interrogatories put to him by virtue and in pursuance of the Act, or of any Act which may hereafter be passed concerning quarantine, or of any such order or orders as aforesaid, shall be received as evidence so far as the same relate to the place from which such vessel came, or to the place or places at which she touched in the course of her voyage: and also that where any vessel shall have been directed to perform quarantine by the superintendent of quarantine, or his assistant, or where there is no superintendent or assistant, by the principal officer of the customs at any port or place, or other officer of the customs authorized to act in that behalf; the having been so directed to perform quarantine shall be given and received as evidence that such vessel was liable to quarantine, unless satisfactory proof be produced by the defendant to show that the vessel did not come from, or touch at, any such place or places as is or are stated in the said answers, or that such vessel, although directed to perform quarantine, was not liable to the performance thereof. And it further enacts, that where any vessel shall in fact have been put under quarantine by the superintendent, &c., and shall actually be performing the same, such vessel shall, in any prosecution, &c., for any offence against this act, or any other act hereafter passed concerning quarantine, or against any orders of council as aforesaid, be deemed liable to quarantine, without proving in what manner or from what circumstances such vessel became liable to the performance thereof.

(b) This act specifies no punishment for principals; they are, therefore, punishable under the 7 & 8 Geo. 4, c. 28, ss. 8, 9; 1 Vict. c. 90, s. 5, and 20 & 21 Vict. c. 3, s. 2, *ante*, pp. 2, 4; and as to accessories, see *ante*, p. 67, *et seq.*

Sec. II.—Of Spreading Contagious Disorders, and of Injury to the Public Health

WITH the same regard to the public health, upon which the statutes relating to quarantine have proceeded, the Legislature appears to have acted in former times in making persons guilty of felony who, being infected with the plague, went abroad and into company, with infectious sores upon them, after being commanded by the magistrates to stay at home.^(c) The statute which contained this enactment, after being continued for some time, is now expired: but Lord Hale puts the question whether if a person infected with the plague should go abroad *with intent* to infect another, and another be thereby infected and die, it would not be murder by the common law.^(d) And he seems to consider it as clear, that though where no such intent appears it cannot be murder, yet, if by the conversation of such a person another should be infected, it would be a great misdemeanor.^(d)

In a case relating the small-pox, it was held that the exposing in the public highway, with a full knowledge of the fact, a person infected with a contagious disorder is a common nuisance, *and as such the subject of an indictment *168] The defendant was indicted for carrying her child, while infected with the small-pox, along a public highway, in which persons were passing, and near to the habitations of the King's subjects: and having suffered judgment to go by default it was moved, in arrest of judgment, that it was consistent with the indictment that the child might have caught the disease, and that it was not shown that the act was unlawful, as the mother might have carried it through the street, in order to procure medical advice; and that the indictment ought to have alleged, that there was some sore upon the child at the time when it was so carried. It was also urged that the only offences against the public health of which Hawkins speaks are spreading the plague and neglecting quarantine;^(e) and that it appeared that Lord Hardwicke thought the building of a house for the reception of patients inoculated with the small-pox was not a public nuisance, and mentioned that upon an indictment of that kind there had been an acquittal.^(f) But Lord Ellenborough, C. J., said, that if there had been any such necessity as supposed for the conduct of the defendant, it might have been given in evidence as matter of defence: but there was no such evidence; and as the indictment alleged that the act was done *unlawfully* and *injuriously*, it precluded the presumption that there was any such necessity. Le Blanc, J., in passing sentence observed, that although the Court had not found upon its records any prosecution for this specific offence, yet there could be no doubt in point of law, that if any one unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects, and indictable as such. That the Court did not pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner, and the patient was kept from the society of others, so as not to endanger a communication of the disease. But no person, having a disorder of this description upon him, ought to be publicly exposed, to the endangering the health and lives of the rest of the subjects.^(g)

In a subsequent case, where the indictment was against an apothecary for unlawfully and injuriously inoculating children with the small-pox, and while they were sick of it, *unlawfully* and *injuriously* causing them to be carried along the public street, it was moved in arrest of judgment, that this was not any offence; that the case differed materially from that of *Rex v. Vantandillo*, as it appeared that the defendant was by profession a person qualified to inoculate with this disease, if it were lawful for any person to inoculate with it. That as to its being alleged that the defendant caused the children to be carried along the street, it was no more

(c) 2 (vulgo 1.) Jac. 1, c. 31, s. 7; 1 Hale 432, 695; 3 Inst. 90.

(d) 1 Hale 432.

(e) 1 Hawk. P. C. c. 52, 53.

(f) Anon., 3 Atk. 750. In 2 Chitt. Crim. Law, 656, there is an indictment against an apothecary for keeping a common inoculating house near the church in a town; and the Cro. Circ. A. 365, is referred to.

(g) *Rex v. Vantandillo*, 4 M. & S. 73.

than this, that he directed the patients to attend him for advice instead of visiting them, or that he prescribed what he might deem essential for their recovery, air, and exercise. And *it was observed that in *Rex v. Sutton*,^(h) which was [*169 an indictment for keeping an inoculating-house, and therefore much more likely to spread infection than what had been done here, the Court said that the defendant might demur. But Lord Ellenborough, C. J., said that the indictment laid the act to be done *unlawfully* and *injuriously*; and that in order to support this statement it must be shown, that what was done was, in the manner of doing it, incautious, and likely to affect the health of others. That the words *unlawfully* and *injuriously* precluded all legal cause of excuse. And Le Blanc, J., in passing sentence observed that in all times it was unlawful and an indictable offence to expose persons affected with contagious disorders, and therefore liable to communicate them to the public, in a place of public resort.⁽ⁱ⁾

By the 3 & 4 Vict. c. 29, s. 8, which was passed to extend the practice of vaccination, "any person who shall from and after the passing of this Act (23 July, 1840) produce or attempt to produce in any person, by inoculation with variolous matter, or by wilful exposure to variolous matter, or to any matter, article or thing, impregnated with variolous matter, or wilfully by any other means whatsoever produce the disease of small-pox in any person in England, Wales, or Ireland, shall be liable to be proceeded against and convicted summarily before any two or more justices of the peace in petty sessions assembled, and for every such offence shall, upon conviction, be imprisoned in the common gaol or house of correction for any term not exceeding one month." And by the 16 & 17 Vict. c. 100, vaccination was made compulsory, and penalties recoverable before two justices imposed on persons neglecting to comply with its provisions.^(k)

The public health may be injured by selling unwholesome food; and it is an indictable offence to mix unwholesome ingredients in anything made and supplied for the food of man. And if a master knows that his servant puts into bread what the law has prohibited, and the servant, from the quantity he puts in, makes the bread unwholesome, the master is answerable criminally, for he should have taken care that more than is wholesome was not inserted. The indictment was against the contract baker for a military asylum, for delivering for the use of the children belonging to the asylum divers loaves containing noxious materials, which he knew. The evidence was that they contained crude lumps of alum, and that alum was an unwholesome ingredient, and that the defendant's foreman made the loaves; but the jury found that the defendant knew he used alum. Upon a motion for a new trial the Court thought that if the master suffered the use of a prohibited article, it was his duty to take care that it was not used to a noxious extent, and that he was answerable if it was. A rule for arresting the judgment was then moved for, on the ground that the indictment did not specify what the noxious ingredients were, or state that the loaves were delivered to be eaten by the children; but the Court held the former not necessary, because the ingredients were in* the defendant's knowledge; and the allegation that the loaves were delivered [*170 for the use and supply of the children, must mean that they were delivered for their eating; and the rule was refused.^(l)

Victuallers, butchers, and other common dealers in victuals, are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances that they are, so that if an order be sent to them to be executed they are presumed to undertake to supply a good and merchantable article; but they are also liable to punishment for selling corrupt victuals, by virtue

(h) 4 Burr. 2116.

(i) *Rex v. Burnett*, 4 M. & S. 272.

(k) The 14 & 15 Vict. c. 68, and 21 & 22 Vict. c. 64, contain other provisions on this subject as to Ireland, and the 4 & 5 Vict. c. 32, and 24 & 25 Vict. c. 59, as to England.

(l) *Rex v. Dixon*, 3 M. & S. 11. And see 1 & 2 Geo. 4, c. 50, as to penalties upon bakers for using alum, &c., in making bread. See *Att.-Gen. v. Siddon*, 1 Tyrw. 41, as to the liability of a master for the acts of his servant: *Att.-Gen. v. Riddell*, 2 Tyrw. 523, as to the liability of a husband for the acts of his wife: *Lyons v. Martin*, 8 A. & E. 512 (35 E. C. L. R.)

of an ancient statute,(*m*) certainly if they do so *knowingly*, and probably if they do not.”(*n*)

If a person publicly exposes or causes to be exposed for sale in a market meat unfit for human food as and for meat that is fit for human food, knowing it not to be so, he is indictable at common law.(*o*) But a person is not indictable at common law for sending meat unfit for human food to a salesman in a market, unless he intend it to be sold for human food.(*p*)

It is an indictable offence at common law to bring a horse infected with the glanders into a public place to the danger of infecting the people there: and an indictment, which alleges that the defendant knew that a horse was infected with a contagious and infectious disease called the glanders, and that he brought it into a public place among divers subjects of the Queen to the great danger of infecting the said subjects with the said disease, is sufficient, after verdict, without alleging that the defendant knew that the disease was communicable to man.(*q*)

Where an indictment alleged that the defendant mixed a large quantity of cantharides with rum, and gave the mixture to a woman with intent that she should drink it, and with intent thereby to injure her health, and that the woman, not knowing the cantharides to have been mixed with the rum, drank the mixture, whereby she became ill for a long space of time, and the facts corresponded with the statements in the indictment, Williams, J., after consulting Cresswell, J., held that the offence charged was not a misdemeanor at common law.(*r*)

Of late years many excellent provisions have been made for promoting the public health, for the better prevention of diseases, and for preventing the adulteration of food, by the 11 & 12 Vict. c. 63, 18 & 19 Vict. cc. 116 & 121, 171*] 22 & 23 Vict. c. 84, 23 & 24 *Vict. c. 77, and other Acts, but their provisions do not fall within the scope of this work.

It is also an indictable offence to convey the refuse of gas into a great public river, and thereby to render the waters corrupt, insalubrious, and unfit for the use of man, and the directors of a gas company are responsible for the acts done by their superintendent and engineer under a general authority to manage the works, though they are personally ignorant of the plan adopted, and though such plan be a departure from the original and understood method which the directors had no reason to suppose was discontinued: for if persons for their own advantage employ servants to conduct works, they are answerable for what is done by those servants.(*s*)

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*CHAPTER THE TENTH.

OF OFFENCES AGAINST THE REVENUE LAWS RELATING TO THE CUSTOMS OR EXCISE.

AMONGST the offences against the revenue laws, that of *smuggling* is one of the principal. It consists in bringing on shore, or in carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited: an offence productive of various mischiefs

(*m*) 51 H. 3, st. 6, repealed by the 7 & 8 Vict. c. 24, which also repeals an act for “the punishment of a butcher selling unwholesome flesh:” Ruffhead’s St. p. 187, vol. 1, either of H. 3, E. 1, or E. 2.

(*n*) Per Parke, B., delivering the judgment of the Court in Burnby v. Bollett, 16 M. & W. 644, and see 4 Inst. 261.

(*o*) Reg. v. Stevenson, 3 F. & F. 106; Reg. v. Jarvis, 3 F. & F. 108.

(*p*) Reg. v. Crawley, 3 F. & F. 109. See 11 & 12 Vict. c. 107, s. 3; and 18 & 19 Vict. c. 121, s. 26, as to these offences when punishable summarily.

(*q*) Reg. v. Henson, Dears. C. C. 24.

(*r*) Reg. v. Hanson, 2 C. & K. 912; 4 Cox C. C. 238. See the 24 & 25 Vict. c. 100, ss. 23, 24, which clearly provide for such cases as the preceding, and Rex v. Walkden, 1 Cox C. C. 282.

(*s*) Rex v. Medley, 6 C. & P. 292 (25 E. C. L. R.), Lord Denman, C. J.

to society.(a) In order to prevent the commission of offences of this kind, many statutes were passed from time to time, which, in addition to the proceedings at common law for assaulting and obstructing revenue officers when acting in the execution of their duties,(b) gave to those officers extraordinary powers and protections, and punished persons endeavoring to resist or evade the laws relating to the customs and excise. The 16 & 17 Vict. c. 107, which consolidates the laws relating to the customs, makes various enactments relating to the forfeiture of vessels engaged in illegal traffic, and of uncustomed goods, which do not come within the scope of this treatise. But some of the enactments relating to the right to proceed to extremities, when necessary, for the purpose of seizing vessels liable to seizure, and the right to search for and seize goods liable to forfeiture, may properly be here mentioned. And the offence of making signals to smuggling vessels at sea, and the several offences declared to be felonies by this statute, require to be particularly noticed.

By the 16 & 17 Vict. c. 107, s. 218, "If any ship or boat liable to seizure or examination under this or any Act for the prevention of smuggling shall not bring-to when required so to do, on being chased by any vessel or boat in Her Majesty's navy having the proper pendant and ensign of Her Majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person having the charge or command of such vessel or boat in Her Majesty's navy, or employed as aforesaid (first causing a gun to be fired as a signal), to fire at or into such ship or boat, and such captain, master, or other person acting in his aid or by his direction, shall be and is hereby *indemnified and discharged from any indictment, penalty, action, or other proceeding for so [*173 doing."(c)

Sec. 219. "Any officer or officers of the army, navy, or marines, duly employed for the prevention of smuggling, and on full pay, or any officer or officers of customs, producing his or their warrant or deputation (if required), may go on board any ship which shall be within the limits of any port of the United Kingdom, and rummage and search the cabin and all other parts of such ship for prohibited or uncustomed goods, and remain on board such ship so long as she shall continue within the limits of such port."

Sec. 220. "Any officer of customs or excise, or other person acting in his or their aid, or duly employed for the prevention of smuggling, may, upon reasonable suspicion, stop and examine any cart, wagon, or other means of conveyance, for the purpose of ascertaining whether any smuggled goods are contained therein; and if no such goods shall be found, the officer or other person so stopping and examining such cart, wagon, or other conveyance, having had probable cause to suspect that such cart, wagon, or other conveyance had smuggled goods contained therein, shall not, on account of such stoppage and search, be liable to any prosecution or action at law on account thereof; and all persons driving or conducting such cart, wagon, or other conveyance, refusing to stop or allow any such examination when required in the Queen's name, shall forfeit the sum of one hundred pounds."

Sec. 221. "Any officer of customs, or person acting under the direction of the commissioners of customs, having a writ of assistance issued from the Court of Exchequer, may, in the daytime, enter into and search(d) any house, shop, cellar, warehouse, room, or other place, and in case of resistance break open doors, chests,

(a) 1 Hawk. P. C. c. 48, s. 1; 4 Blac. Com. 155; Bac. Abr. Smuggling.

(b) See many precedents for misdemeanors at common law, in assaulting and obstructing officers of excise and customs, acting in the due execution of their offices: 4 Wentw. 385, *et seq.*; 2 Chitt. Crim. Law, 127, *et seq.* And see Brady's case, 1 Bos. & Pul. 188, where it was admitted that the offence charged in the indictment was an offence indictable at common law.

(c) By sec. 357, "ship shall mean ship or vessel of any description unless used to distinguish a ship from a sloop or some other description of vessel."

(d) The power to search was introduced in consequence of *Rex v. Watts*, 1 B. & Ad. 166 (20 E. C. L. R.), where it was doubted whether that power existed under the 6 Geo. 4, c. 108, s. 40, and where it was also doubted whether the ordinary writ of assistance was not too general.

trunks, and other packages, and seize and bring away any uncustomed or prohibited goods, and put and secure the same in the Queen's warehouse, and may take with him any constable, headborough, police or other public officer, duly sworn as such, who may act as well without the limits of the parish or other place for which he shall be so sworn as within such limits; and all writs of assistance so issued shall continue in force during the reign for which they were granted, and for six months afterwards."

Sec. 223. "All ships and boats, and all goods whatsoever, liable to forfeiture, and all persons liable to be detained for any offence under this or any other Act relating to the customs, shall and may be seized or detained in any place, either upon land or water, by any officer or officers of Her Majesty's army, navy, or marines, duly employed for the prevention of smuggling, and on full pay, or by any officer or officers of customs or excise, or by any person having authority from the commissioners of customs or inland revenue to seize, or duly employed for the prevention of smuggling; and all ships, boats, and goods so seized shall, as soon as *174] conveniently may be, be delivered into the care of the proper officer *ap- pointed to receive the same; and the forfeiture of any ship or boat shall be deemed to include her tackle, apparel, and furniture, and the forfeiture of any goods shall be deemed to include the package in which the same are found, and all the contents thereof."

In a case under the 6 Geo. 4, c. 108, s. 34, which was similar to sec. 223 of the present Act, a count alleged that certain spirituous liquors were about to be imported, in respect of which certain duties would be payable, and that R. H. was a person employed in the service of the customs of our Lord the King, and that it was the duty of R. H., as such person so employed in the service of the customs as aforesaid, to arrest and detain all such goods and merchandizes as should within his knowledge be imported, which, upon such importation thereof, would become forfeited; and that the defendant unlawfully solicited R. H. to forbear to arrest and detain the said goods; it was objected, in arrest of judgment, that as the law did not cast upon all persons in the service of the customs the duty of making seizures, and the count did not show that H. was a person coming within any of the three classes described in sec. 34 of 6 Geo. 4, c. 108, the count was bad: and the Court held that the allegation that it was H.'s duty to seize goods, which upon importation were forfeited, was an allegation of matter of law. That being so, the facts from which that duty arose ought to have been stated in the count. If, indeed, it could be said to be the duty of every person employed in the service of the customs to seize such goods, then the allegation would have been sufficient. But it clearly was not the duty of every such person, and therefore the indictment was bad.(e)

Sec. 238. "If any person liable to be detained under this or any other Act relating to the customs shall not be detained at the time of committing the offence for which he is so liable, or shall after detention make his escape, such person shall and may at any time afterwards be detained, and taken before any justice, to be dealt with as if detained at the time of committing such offence."

Sec. 244. "No person shall, after sunset and before sunrise between the twenty-first day of September and the first day of April, or after the hour of eight in the evening and before the hour of six in the morning at any other time of the year, make, aid, or assist in making any signal in or on board or from any ship or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving notice to any person on board any smuggling ship or boat, whether any person so on board of such ship or boat be or not within distance to notice any such signal; and if any person, contrary to this Act, shall make or cause to be made, or aid or assist in making, any such signal, such person so offending shall be guilty of a misdemeanor; and any person may stop, arrest, and detain the person so offending, and convey him before any justice, who, if he see cause, shall commit the offender to the next county gaol, there to remain until delivered by due course of law; and it

(e) *Rex v. Everett*, 8 B. & C. 114 (15 E. C. L. R.); 2 M. & R. 35 (17 E. C. L. R.).

shall not be necessary to prove on any indictment or information in such case that any ship or boat was *actually on the coast; and the offender, being duly convicted, shall, by order of the Court before whom he shall be convicted, [*175 either forfeit the penalty of one hundred pounds, or, at the discretion of such Court, be committed to the common gaol or house of correction, there to be kept to hard labor for any term not exceeding one year."(*f*)

Where an indictment upon the 6 Geo. 4, c. 108, s. 52, which was similar to sec. 244 of the present Act, stated that the defendants between sunset on the 8th and sunrise on the 9th of March, that is to say, on the morning of the said 9th of March about three o'clock, did make certain lights, &c.; it was proved that the lights were made on the morning of the 9th, and it was objected that the indictment did not state the offence to have been committed between the 21st of September and the 1st of April, and that the allegation that the offence was committed on the 9th of March was not sufficient, because the prosecutor was not bound to the day laid; but might prove the offence to have taken place on any other day; that the time was of the essence of the offence, and therefore it ought to have formed a distinct and substantive averment in the words of the Act; but it was held that the day having been proved as laid, the objection could only properly be made in arrest of judgment, and even then it was no valid objection; for judicial notice must be taken that the day averred in the indictment is, in fact, within the period mentioned in the statute, and therefore the indictment was good.(*g*)

Sec. 245. "If any person be charged with or indicted for having made or caused to be made, or for aiding or assisting in making, any such signal as aforesaid, the burden of proof that such signal so charged as having been made with intent and for the purpose of giving such notice as aforesaid was not made with such intent and for such purpose shall be upon the defendant against whom such charge is made or such indictment is found."

Sec. 246. "Any person whatsoever may prevent any signal being made as aforesaid, and may go upon any lands for that purpose, without being liable to any indictment, suit, or action for the same."

Sec. 247. "All persons assembled, to the number of three or more, for the purpose of unshipping, carrying, conveying, or concealing any spirits or tobacco, or any tea or silk (such tea or silk being of the value of ten pounds or more), liable to forfeiture under this or any other Act relating to the customs or excise, and every person who shall by any means procure or hire, or shall depute or authorize any other person to procure or hire, any person or persons to assemble for the purpose of being concerned in the landing or unshipping, or carrying, conveying, or concealing *any goods which are prohibited to be imported, or the duties [*176 for which have not been paid or secured, and every person who shall obstruct any officer or officers of the army, navy, or marines, being duly employed for the prevention of smuggling, or any officer or officers of the customs or excise, or any person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, in the execution of his or their duty, or in the due seizing of any goods liable to forfeiture by this Act or any Act relating to the customs, or who shall rescue, attempt, or endeavor to rescue, or cause to be rescued, any goods which have been duly seized, or who shall before or at or after any seizure stave, break, or otherwise destroy, or attempt or endeavor to break, stave, or otherwise destroy, any goods, to prevent the seizure thereof or the securing of the same,

(*f*) Two persons were separately convicted of unshipping goods against the 3 & 4 Will. 4, c. 53, s. 44, by which "every person" concerned in the unshipping of goods, the duties of which have not been paid, shall forfeit either the treble value thereof, or be liable to a penalty of £100, and it was held that each was liable to the penalties imposed by the clause: *Reg. v. Dean*, 12 M. & W. 39; and per Alderson B., "We must look at the statute to see whether it was intended that every person offending should be punished, or merely that every offence should be punished. The question is whether an offence that is committed by several persons is to be visited by one penalty, or each person is to be visited by a penalty."

(*g*) *Rex v. Brown*, Moo. & M. 163 (22 E. C. L. R.) Littledale, J., after consulting Gaselee, J., see Martin's case, *ante*, p. 126.

shall, upon being duly convicted of any of the said offences before any justice of the peace, be adjudged by such justice for the first offence to be imprisoned in any house of correction, and there kept to hard labor, for any term not less than six nor more than nine months, and for the second offence for any term not less than nine nor more than twelve months, or for the third or any subsequent offence for twelve months."

Sec. 248. "If any persons, to the number of three or more, armed with firearm or other offensive weapons, shall, within the United Kingdom, or within the limits of any port, harbor, or creek thereof, be assembled in order to be aiding and assisting in the illegal landing, running, or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid, after seizure from the officer of the customs or other officer authorized to seize the same, or from any person or persons employed by or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any offence made felony by this or any Act relating to the customs, or in the preventing the apprehension of any person who shall have been guilty of such offence or in case any persons, to the number of three or more, so armed as aforesaid, shall within the United Kingdom, or within the limits of any port, harbor, or creek thereof, be so aiding or assisting, every person so offending, and every person aiding, abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the Court before which he shall be convicted, to be transported^(h) beyond the seas for the term of his natural life or for any term not less than fifteen⁽ⁱ⁾ years, or to be imprisoned for any term not exceeding three years."⁽ⁱⁱ⁾

Sec. 249. "If any person shall maliciously shoot at any vessel or boat belonging to Her Majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or shall maliciously shoot at maim, or wound any officer of the army, navy, or marines, being duly employed for *177] the prevention of smuggling, and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty, every person so offending, and every person aiding, abetting, or assisting therein, shall, upon conviction, be adjudged guilty of felony, and shall be liable, at the discretion of the Court before which he shall be convicted, to be transported^(k) beyond the seas for the term of his natural life, or for any term not less than fifteen^(l) years, or to be imprisoned for any term not exceeding three years."

Sec. 250. "If any person, in company with more than four others, be found with any goods liable to forfeiture under this or any other Act relating to the customs or excise, or in company with one other person, within five miles of the sea coast or of any tidal river, and carrying offensive arms or weapons, or disguised in any way, every such person shall be adjudged guilty of felony, and shall, on conviction of such offence, be transported^(k) as a felon for the term of seven years."^(m)

Sec. 251. "If any person shall, by force or violence, assault, resist, or obstruct any officer of the army, navy or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person duly employed for the prevention of smuggling, in the due execution of his or their duty, or any person acting in his or their aid, every person so offending being thereof convicted, shall be transported^(k) for seven years,^(m) or sentenced to be imprisoned in any house of correction or common gaol, and kept to hard labor, for

(h) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(i) Not less than seven by the 9 & 10 Vict. c. 24, s. 1; and not less than three years' penal servitude by the 20 and 21 Vict. c. 3, s. 2, *ante*, pp. 3, 4.

(ii) As to accessories, see *ante*, p. 67, *et seq.*

(k) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4. As to accessories, see *ante*, p. 67, *et seq.*

(l) Not less than seven by the 9 & 10 Vict. c. 24, s. 1; and not less than three years' penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, pp. 3, 4.

(m) And not less than three years by the same *ante*, p. 4.

any term not exceeding three years, at the discretion of the Court before whom such offender shall be tried and convicted as aforesaid."

Sec. 275. "Where any offence shall be committed in any place upon the water not being within any county of the United Kingdom, or where the officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall for the purposes of this Act be deemed and taken to be an offence committed on the high seas; and for the purpose of giving jurisdiction under this Act every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose, or in any place on land where the offender or person complained against may be or be brought."

Sec. 301. "No indictment shall be preferred for any offence against this or any other Act or Acts relating to the customs or excise, nor shall any suit be commenced for the recovery of any penalty or forfeiture for any such offence, except in the cases of persons detained and carried before one or more justices in pursuance of such Act or Acts as aforesaid, unless such indictment shall be preferred under the direction of the commissioners of customs or inland revenue, or unless such suit shall be commenced in the name of Her Majesty's Attorney-General for *England or Ireland, or in the name of the Lord Advocate of Scotland, or in the name of some officer of customs or excise, under the direction of the [178 said commissioners respectively."

Sec. 303. "All suits, indictments, or informations brought or exhibited for any offence against this or any other Act relating to the customs in any Court, or before any justice or justices, shall be brought or exhibited within three years next after the date of the offence committed."

Sec. 304. "Any indictment, prosecution, or information which may be instituted or brought under the direction of the commissioners of customs relating to the customs shall and may be inquired of, examined, tried, and determined in any county of England when the offence is committed in England, and in any county of Scotland when the offence is committed in Scotland, and in any county in Ireland when the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county where the said indictment or information shall be tried."

Sec. 305. "If in any prosecution under the direction of the commissioners of customs in respect of any goods seized for nonpayment of duties, or any other cause of forfeiture, or for the recovering any penalty or penalties under this or any Act relating to the customs, any dispute shall arise whether the duties of customs or excise have been paid in respect of such goods, or the same have been lawfully imported or lawfully unshipped, or concerning the place from whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution."

Sec. 306. "The averment that the commissioners of customs or inland revenue have directed or elected that any information or proceedings under this or any Act relating to the customs or excise shall be instituted, or that any ship or boat is foreign or belonging wholly or in part to Her Majesty's subjects, or that any person detained or found on board any ship or boat liable to seizure is or is not a subject of Her Majesty, or that any goods thrown overboard, staved or destroyed were so thrown overboard, staved or destroyed to prevent seizure, or that any goods thrown overboard, staved or destroyed when chased by any ship or boat in Her Majesty's service, or in the service of the revenue, were so thrown overboard, staved, or destroyed to avoid seizure, or that any person is an officer of customs or excise, or that any person was employed for the prevention of smuggling, or that the offence was committed within the limits of any port, or where the offence is committed in any port of the United Kingdom, the naming of such port in any information or proceedings, shall be deemed to be sufficient, without proof of such fact or facts, unless the defendant in such case shall prove to the contrary."

Sec. 307. "If upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, his own evidence

thereof or other evidence of his having acted as such shall be deemed sufficient, and such person shall not be required to produce his commission or deputation *179] unless sufficient proof shall be given to the contrary; *and every such officer and any person acting in his aid or assistance shall be deemed a competent witness upon the trial of any suit or information on account of any seizure or penalty as aforesaid, notwithstanding such officer or other person may be entitled to the whole or any part of such seizure or penalty, or to any reward upon the conviction of the party charged in such suit or information."

Sec. 308. "Upon the trial of any issue, or upon any judicial hearing or investigation touching any seizure, penalty, or forfeiture, or other proceeding under any law or laws relating to the customs or excise, or incident thereto, where it may be necessary to give proof of any order issued by the commissioners of the Treasury, or by the commissioners of customs or inland revenue respectively, the order, or any letter or instructions referring thereto, which shall have been officially received by any officer of customs or excise for his government, and under which he shall have acted as such officer, shall be admitted and taken as sufficient evidence and proof of such order."

Upon a clause in the 52 Geo. 3, c. 143, s. 11 (now repealed), which was similar to sec. 249 of the present Act, it was determined that where a custom-house vessel had chased a smuggler and fired into her without hoisting the pendant and ensign then required by the 56 Geo. 3, c. 104, s. 8, the returning such fire was not malicious. The indictment was for shooting at a vessel in the service of the customs on the high seas, within one hundred leagues of the coast of Great Britain; and also for maliciously shooting at an officer of the customs, &c. It appeared that the vessel chased a smuggler within the limits; the smuggler did not bring to upon being chased and a signal-gun being fired; whereupon the custom-house vessel fired at the smuggler, and the smuggler returned the fire, and they had a regular engagement, in which one of the custom-house officers was severely wounded. In order to prove the right of firing at the smuggler, the 56 Geo. 3, c. 104, s. 8, was referred to, which, in the case of ships employed to prevent smuggling by the Treasury, Admiralty, Customs, or Excise, gave the power, if the vessel had a pendant and ensign hoisted of such description as his Majesty by any order in council, or by royal proclamation under the great seal, should direct; but there had been no proclamation, nor was any order in council proved; though, after the trial, an order in council was discovered which required certain particulars in the pendant and ensign which this ship's pendant and ensign had not. Upon a case reserved eleven judges (Best, J., being absent) were clear that, as the custom-house vessel had not complied with what was required to make her shooting legal, the smuggler's firing was not in law malicious.(n)

Upon a clause in the 19 Geo. 2, c. 34 (now repealed), similar to sec. 248 of the present Act, which relates to offences committed by persons, to the number of three or more, armed with firearms, or other offensive weapons, it was decided that in order to bring offenders within its penalties, it was necessary that they should be armed with weapons which might properly be called *offensive*.(o) *180] It seems that a person catching up a *hatchet* accidentally, during the hurry and heat of an affray, was not armed with an offensive weapon within the meaning of that Act;(p) and in one case it was held, that *large sticks* about three feet long, with large knobs at the end, with several prongs, the natural growth of the stick, arising out of them, were not offensive weapons; and that, from the preamble of the statute, the weapons must be such as the law calls dangerous.(q) But in a subsequent case, the Court said, that although it was difficult to say what should or should not be called an offensive weapon, it would be going a great deal too far to say that nothing but guns, pistols, daggers, and instruments of war, should be so considered; and that bludgeons properly so called, clubs, and anything that was not in common use for any other purpose but a weapon, were clearly offensive.

(n) *Rex v. Reynolds*, Mich. T. 1821, MS. Bayley, J., R. & R. 465.

(o) *Hutchinson's case*, 1 Leach 342.

(p) *Rose's case*, 1 Leach 342, note (a).

(q) *Ince's case*, 1 Leach 342, note (a).

weapons within the meaning of the Legislature.^(r) In a case upon a former statute (9 Geo. 2, c. 35, s. 10), where the same words, "armed with firearms, or other offensive arms or weapons," occurred, it was held that a person armed only with a *common whip* was not an offender within the meaning of the Act; though he aided and assisted other persons who were armed with firearms and weapons which were clearly offensive.^(s) But with respect to the latter part of this judgment, a different doctrine appears to have been held by Lord Mansfield upon the 19 Geo. 2, c. 34, who is reported to have said, that where a person was assembled together with others who were armed, and was active, it was not necessary that such individual should be armed.^(t)

Where a number of persons were assembled for the purpose of landing smuggled goods, and they were, as is usual on such occasions, divided into two different parties, one called the company, who had bats in their hands for the purpose of carrying the tubs of spirits (which bats were hop-poles about seven feet in length), and the other called the protecting party, who were armed with muskets; and the prisoner was one of the company, and carried a bat, but he did not strike any one with it, but some of the men with bats struck some of the preventive men; as the bats might be used for offensive purposes, it was left to the jury to say whether the bats were offensive weapons or not.^(u)

Upon the 7 Geo. 2, c. 21 (now repealed), by which any person who should, with an offensive weapon or instrument, assault with intent to rob, was made guilty of felony, it was decided that the words "offensive weapon or instrument," would apply to a stick, though not of extraordinary size, and though it might in general have been used as a walking-stick. An indictment was for assaulting with an offensive weapon, viz., a stick, with intent to rob; and it appeared that the stick was like a common walking-stick, about a yard long, and not very thick, but that the prisoner, when he came up to the prosecutor, struck him violently on the head with it, so as to cut his head and make it bleed; and two of the prisoner's comrades afterwards came up and beat the prosecutor on the head with similar sticks. Holroyd, J., told the jury, that as the prisoner had used the stick as a weapon of offence, he thought it ought to be considered as an offensive weapon; and the jury having convicted the prisoner, the judges agreed with Holroyd, J.; and held the conviction right.^(v) And in a similar case on the 9 Geo. 4, c. 69, s. 9 (the Night Poaching Act), it was held to be a question for the jury whether the prisoner had taken out a stick, large enough to be called a bludgeon, which he, being lame, was in the habit of using as a crutch, with intent to use it as an offensive weapon, or merely for the purpose to which he usually applied it.^(w) From a case upon the same repealed statute (7 Geo. 2, c. 21,) where the indictment was for assaulting with a certain offensive weapon called a wooden staff, and the evidence proved a violent blow with a great stone, as it was holden that the conviction of the prisoner was proper, it appears to follow that both a wooden staff and a great stone was considered as offensive weapons within the meaning of that statute.^(x)

The term, *weapon*, would seem to include any instrument of metal or wood, or any club, stone, or other thing which is had for the purpose of effecting an injury

^(r) *Cosan's case*. In this case it was contended, upon the authority of *Ince's case*, that very large club sticks, such as people ride with, to defend themselves, are not offensive weapons: 1 Leach 342, 343, note (a).

^(s) *Fletcher's case*, 1 Leach 23.

^(t) *Franklin's case*, 1 Leach 255; s. c., Cald. 244. And this appears to be the correct doctrine; see *Rex v. Smith*, R. & R. 368, *post*, 649.

^(u) *Rex v. Noakes*, 5 C. & P. 326 (24 E. C. L. R.), Littledale, J., Alderson, B., Bolland, B.

^(v) *Rex v. Johnson*, Mich. T. 1822, R. & R. 492.

^(w) *Rex v. Palmer*, 1 M. & Rob. 70, Taunton, J. See *post*, p. 651.

^(x) *Sherwin's case*, Oakham, 1785: 1 East P. C. c. 8, s. 13, p. 421. The ground upon which the judges held in this case, that the evidence was sufficient to maintain the charge in the indictment, was that the weapon laid in the indictment, and the weapon proved, produce the same sort of mischief, viz., by blows and bruises; and that the description would have been sufficient in an indictment for murder.

on the person, according to the doctrine of the Roman law, *Teli appellatione ferrum, et fustis, et lapis, et denique omne quod nocendi causâ habetur, significatur.*(y)

As to the *assembling*, it was determined upon the repealed statute (19 Geo. 2, c. 34), that it must be *deliberate*, and for the purpose of committing the offence described in the statute. So that where a set of drunken men came from an ale house, and hastily set themselves to carry away some Geneva which had been seized by the excise officers, it was thought very questionable whether the object which the Legislature had in view could be extended to such a case; and the Court said that the words of the statute manifestly alluded to the circumstance of great multitudes of persons coming down upon the beach of the sea for the purpose of escorting uncustomed goods to the places designed for their reception.(z)

Upon a clause of the repealed statute (9 Geo. 2, c. 35, s. 26), by which it was enacted, that an assault committed upon any of the officers of the customs or an excise should be tried in any county in England, in such manner and form as in *182] the offence had been therein committed, it was decided that the provision *extended only to revenue officers, *qua* officers: and a defendant having been found guilty, on an indictment, of a *common assault* on the prosecutor, who was an excise officer, the Court of King's Bench arrested the judgment, though the prosecutor was described to be an excise officer, the offence being laid in Surrey, and the venue in Middlesex.(zz)

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*CHAPTER THE ELEVENTH.

OF HINDERING THE EXPORTATION OF CORN, OR PREVENTING ITS CIRCULATION
WITHIN THE KINGDOM.

THE 11 Geo. 2, c. 22, s. 1, reciting that persons had assembled in great numbers committed great violences, and done many injuries, with intent to hinder the exportation of corn, whereby many of his Majesty's subjects had been deterred from buying corn or grain, and following their lawful business therein, to their great loss and damage, as well as to the great damage and prejudice of the farmers and landholders of this kingdom, and of the nation in general, enacts, "that if an person or persons [shall wilfully and maliciously beat, wound, or use any other violence to or upon any person or persons, with intent to deter or hinder him or them from buying of corn or grain in any market, or other place within this kingdom;](a) or shall unlawfully stop or seize upon any wagon, cart, or other carriage, or horse loaded with wheat, flour, meal, malt, or other grain, in or on the way to or from any city, market-town, or sea-port, of this kingdom; and wilfully and maliciously break, cut, separate, or destroy, the same or any part thereof, or the harness of the horses drawing the same; or shall unlawfully take off, drive away, kill, or wound any of such horses; [or unlawfully beat or wound the driver or drivers of such wagon, cart, or other carriage, or horse, so loaded, in order to stop the same;](a) or shall by cutting of the sacks, or otherwise, scatter or throw abroad such wheat, flour, meal, malt, or other grain; or shall take or carry away spoil or damage, the same, or any part thereof;" such offenders, being convicted before two justices of the peace of the country, &c., in which the offence is committed, or before the justices of the peace in open sessions (who are thereby authori

(y) Heinec. Antiq. Tit. 1, s. 9.

(z) Hutchinson's case, 1 Leach 343. The Court offered the Attorney-General a special verdict upon this case: but he declined to take it, and the prisoners were acquitted. This construction of the statute as to the assembling being *deliberate*, and for the purpose of committing the offence, is stated to have been adopted by Willes, J., and Hotham, B. in Spice's case, Old Bailey, December, 1785, and by Heath, J., in Gray's case, Old Bailey July in the same year; 1 Leach 343, note (a).

(zz) Rex v. Cartwright, 4 T. R. 490.

(a) Repealed, see note (d), *post*, p. 184.

ized and empowered summarily and finally to hear and determine the same), shall be sent to the common gaol, or to the house of correction, there to be kept to hard labor for any time not exceeding three months, nor less than one month; and shall by the same justices be also ordered to be once publicly whipped by the master or keeper of the gaol or house of correction in such city, market-town, or sea-port, in or near to which such offence shall be committed, at the market-cross or market-place there, between the hours of eleven and two o'clock.

By sec. 2 ["if any person or persons so convicted, shall commit any of the offences aforesaid, a second time;](a) or if any person or persons shall wilfully and maliciously pull, throw down, or otherwise destroy, any storehouse or granary, or other place where corn shall be then kept in order to be exported; or shall unlawfully enter any such storehouse, granary, or other place, and take and [*184 carry away any corn, flour, meal, or grain therefrom; or shall throw abroad, or spoil the same, or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and shall wilfully and maliciously take and carry away, cast or throw out therefrom, or otherwise spoil or damage, any meal, flour, wheat, or grain, therein intended for exportation;" every such offender being convicted, shall be adjudged guilty of felony, and transported(b) for seven(c) years; and if such offender shall return before the expiration of the seven years, he or she shall suffer death as a felon without benefit of clergy.(d)

The 36 Geo. 3, c. 9, s. 1, reciting that persons had assembled themselves in great numbers, and committed great violences, with intent to hinder the passage of corn and grain from place to place, whereby the necessary circulation of corn and grain within the kingdom might be prevented; enacts, that if any person or persons shall [wilfully and maliciously beat, wound, or use any other violence to or upon any person or persons with intent to deter or hinder him or them from buying of corn or grain in any market, or other place within this kingdom;](e) or shall unlawfully stop or seize any wheat, flour, malt, or other grain, in or on the way to or from any city, market-town, or place in this kingdom; or shall wilfully and maliciously break, cut, or destroy any wagon, cart, or other carriage, wherein any such wheat, flour, meal, malt, or other grain, shall be loaded, or the harness of any horse or horses drawing or carrying the same; or shall unlawfully take off from any such carriage, or drive away, kill, or wound, any such horse or horses; [or unlawfully beat or wound the driver or drivers of any such wagon, cart, or such other carriage or horse so loaded, with intent to stop such wheat, flour, meal, malt, or other grain;](e) or shall, by cutting of the sacks or otherwise, scatter or throw abroad any such wheat, flour, meal, malt, or other grain; or shall take or carry away, destroy, spoil, or damage, the same or any part thereof; such offenders being convicted before two justices of the peace of the county, &c., wherein the offence is committed, or before the justices of the peace in open sessions (who are thereby authorized and empowered summarily and finally to hear and determine the same), shall be sent to the common gaol, or house of correction, to be kept to hard labor for any time not exceeding three months, nor less than one month.

By sec. 2 ["if any such person or persons so convicted shall commit any of the offences aforesaid, a second time;](e) or if any person or persons with intent to prevent or hinder any corn, meal, flour, malt, or grain from being lawfully carried or removed from any place whatsoever, shall wilfully and maliciously pull, throw

(a) Repealed, see note (d), *post*, p. 184.

(b) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(c) And not less than three years by the same Act, *ante*, p. 4. Principals in the second degree are punishable like principals in the first degree; and as to accessories, see *ante*, p. 67, *et seq*.

(d) Sec. 3 provides that attainder shall not work corruption of blood, loss of dower, or disinherittance; and by sec. 4 no person, who shall be punished for any offence by virtue of this Act, shall be punished for the same offence by any other law or statute. Secs. 5, 6, 7, and 8, relating to actions by persons against the hundred for damages done to their properties are repealed by the 7 & 8 Geo. 4, c. 27; and so much of this statute as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence felony, is repealed by the 9 Geo. 4, c. 31.

(e) Repealed, see note (i), *post*.

*185] down, or otherwise destroy, any storehouse or granary, or other *place, which corn, meal, flour, malt, or grain, shall be then kept; or shall unlawfully enter any such storehouse, granary, or other place, and take and carry away any corn, flour, meal, malt, or grain, therefrom; or shall throw abroad or spoil the same or any part thereof; or shall unlawfully enter on board any ship, barge, boat, or vessel, and wilfully and maliciously take and carry away, cast, or throw out therefrom, or otherwise spoil or damage, any corn, flour, meal, malt, or grain therein;" every person so offending, and being convicted, shall be adjudged guilty of felony, and be transported(*f*) for seven(*g*) years; and if such offender shall return into this kingdom before the expiration of the seven years, he or she shall suffer death as a felon without benefit of clergy.(*h*) The section further provides that attainder shall not work corruption of blood, loss of dower, or disinheriting of heirs. And by the sixth section it is provided that nothing contained in this Act shall abridge or take away any provision already made by the law of the realm for the suppression or punishment of any offence whatsoever, mentioned or described in this Act; and it is provided also, that no person who shall be punished by virtue of this Act shall be punished for the same offence by virtue of any other law or statute whatsoever.(*i*)

By the 24 & 25 Vict. c. 100, s. 39, "Whosoever shall beat, or use any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling, or otherwise disposing of, or to compel him to buy, sell, or otherwise dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall beat or use any such violence or threat to any person having the care or charge of any wheat or other grain, flour, meal, malt, or potatoes whilst on the way to or from any city, market-town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labor in the common gaol or house of correction for any term not exceeding three months: provide that no person who shall be punished for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever."

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*CHAPTER THE TWELFTH.

OF ADMINISTERING OR TAKING UNLAWFUL OATHS.

THE 37 Geo. 3, c. 123, s. 1, recites, that wicked and evil disposed persons have attempted to seduce his Majesty's forces and subjects from their duty and allegiance, and to incite them to acts of mutiny and sedition; and had endeavored to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they had attempted to seduce the pretended obligation of oaths unlawfully administered. From this preamble it appears as if the statute were mainly directed against combinations for purposes of mutiny and sedition: but in the enacting part, after dealing with offences of that description, it goes on in much more extensive terms, and embraces other more general objects. It enacts "that any person or persons who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at, or present at, and consenting to, the administering or taking of any oath or engagement, purporting or intending to bind the person taking the same to engage in any mutinous

(*f*) See note (*b*), *supra*.

(*g*) See note (*c*), *supra*.

(*h*) *Quære*, whether the punishment for returning from transportation under this Act was altered by the 4 & 5 Will. 4, c. 67, *post*, p. 612.

(*i*) Secs. 3, 4, and 5, relating to proceedings against the hundred for damages done to the properties of persons, by offenders against this Act, are repealed by the 7 & 8 Geo. 4, c. 27. So much of this statute as relates to any person who shall beat, wound, or use any other violence to any person or driver, and so much thereof as makes any second offence a felony, is repealed by the 9 Geo. 4, c. 31.

sedition purpose; or to disturb the public peace; or to be of any association, society, or confederacy, formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal oath or engagement which may have been administered or tendered to or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement;" shall on conviction be adjudged guilty of felony, and be transported^(a) for any term not exceeding seven^(b) years; "and every person who shall *take* any such oath or engagement, not being compelled thereto, shall, on conviction, be adjudged guilty of felony, and may be transported^(a) for any term not exceeding seven^(b) years."

In one case a question was made, whether the unlawful administering of an oath by an associated body of men to a person, purporting to bind him not to reveal or discover an unlawful combination or conspiracy of persons, nor any illegal act done by them,^(c) was within this statute; the object of the association being a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. It was contended, that the words of the statute, however large in themselves, must be confined to the objects stated in the preamble; and could not have been intended to reach a case where it was plain that the fact arose entirely out of a private dispute between persons engaged in the same trade, and was confined in its object to that alone; and that the general words therefore must be construed with relation to the antecedent offences, which are confined in their objects to mutiny and sedition. But the Court, though they did not upon the particular circumstances feel themselves called upon to give an express decision, appear to have entertained no doubt but that the case was within the statute.^(d)

So where sixteen persons, with their faces blackened, met at a house at night, having guns with them, and intending to go out for the purpose of night poaching, and were all sworn not to betray their companions, and it was objected that this oath was not within the statute, as it was not for a mutinous or seditious object, and that the statute only prohibited those oaths of secrecy which related to some illegal act, and that the word "illegal" imported a criminal act and not a mere civil trespass, whereas it was a mere civil trespass which was contemplated at the time when the oath was administered, it was held that the oath was within the statute; and as to the assembly itself, and its object, it was impossible that a meeting to go out with faces thus disguised, at night, and under such circumstances, could be other than an unlawful assembly: in which case, the oath to keep it secret was an oath prohibited by the statute.^(e) So where an oath was administered to the members of a trades' union, binding them not to make buttons for less than the lodge prices, and not to divulge the secrets of the lodge, it was held that this was an oath within the statute, for to administer an oath or engagement not to reveal the secrets of any association is within the 37 Geo. 3, c. 137, as explained by subsequent statutes, not because it has reference to any matter respecting wages, but on the ground that every association of that kind, bound together by an oath, not to disclose the proceedings of that society, is for that reason an unlawful combination within the statutes.^(f)

So where an oath not to reveal what they saw or heard was administered by

(a) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(b) And not less than three by the same Act, *ante*, p. 4.

(c) The oath was, "You shall be true to every journeyman shearman, and not to hurt any of them, and you shall not divulge any of their secrets; so help you God."

(d) *Rex v. Marks*, 3 East 157. Lawrence, J., said, "It is true that the preamble and the first part of the enacting clause are confined in their objects to cases of mutiny and sedition; but it is nothing unusual in Acts of Parliament for the enacting part to go beyond the preamble; the remedy often extends beyond the particular act or mischief which first suggested the necessity of the law."

(e) *Rex v. Brodribb*, 6 C. & P. 571 (25 E. C. L. R.), Holroyd, J.

(f) *Rex v. Ball*, 6 C. & P. 563 (25 E. C. L. R.), Williams, J.

members of an association, which was formed for the purpose of raising wages by a general strike on the part of its members, and for other purposes in furtherance of that design, it was held that it was within the 37 Geo. 3, c. 123.(g)

The 52 Geo. 3, c. 104, s. 1, which was passed to render the foregoing Act more effectual in respect to oaths of a particular nature, enacts, "that every person ~~who~~ *188] shall in any manner or *form whatsoever administer, or cause to be administered, or be aiding or assisting at the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death," shall, on conviction, be adjudged guilty of felony, and suffer death as a felon without benefit of clergy;(h) and every person who shall take any such oath or engagement, not being compelled thereto," shall, on conviction, be adjudged guilty of felony, and be transported(hh) for life, or for such term of years as the court shall adjudge.

But persons taking the oaths mentioned in either of these Acts by compulsion must make a full disclosure of the fact, and the circumstances attending it, with a limited time, in order to be justified or excused. The 37 Geo. 3, c. 123, s. 2, enacts, "that compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall, within *four days* after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she shall know touching the same, and the person or persons by whom, and in whose presence, and when and where, such oath or engagement was administered or taken, by information on oath before one of his Majesty's justices of the peace, or one of his Majesty's principal secretaries of state, or his Majesty's privy council: or in case the person taking such oath or engagement shall be in actual service in his Majesty's forces by sea or land, the officer." The 52 Geo. 3, c. 104, s. 2, contains a similar enactment as to the oaths or engagements within that Act, except that the words "*fourteen days*" are substituted for "*four days*."

By the 37 Geo. 3, c. 123, s. 5, any engagement or obligation whatsoever in the nature of an oath, and by the 52 Geo. 3, c. 104, s. 6, any engagement or obligation whatsoever in the nature of an oath purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of those Acts in whatever form or manner the same shall be administered or taken: and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

If the oath administered was intended to make the party believe himself under an engagement, it is equally within the Act, whether the book made use of be a testament or not.(i) So the precise form of the oath is immaterial; it is an oath *189] within the meaning of the Acts, if it was understood by the party tendering and by the party taking it, as having the force and obligation of an oath(k).

With respect to persons aiding and assisting at the administering or taking of these unlawful oaths, the 37 Geo. 3, c. 123, s. 3, enacts, that persons aiding and assisting at, or present or consenting to, the administering or taking of any oath

(g) *Rex v. Loveless*, 1 M. & Rob. 349; s. c., 6 C. & P. 596, Williams, J. See *Rex v. Dixon*, 6 C. & P. 601 (25 E. C. L. C.), Bosanquet, J.

(h) But this punishment was abolished by the 1 Vict. c. 91, s. 1, by which, and sec. 2 (*ante*, p. 141), and the 20 & 21 Vict. c. 3, s. 2, the punishment now is [penal servitude] for life, or for any term not less than [three] (*ante*, p. 4) years, or imprisonment, without hard labor, in the common gaol or house of correction for any term not exceeding three years, and solitary confinement for any portion or portions of such imprisonment or of such imprisonment with hard labor, not exceeding one month at a time, or three months in the course of one year.

(hh) Penal servitude as stated in the preceding note.

(i) *Rex v. Brodribb*, 6 C. & P. 571 (25 E. C. L. R.), Holroyd, J., where an account book called *The Young Man's Best Companion*, was used.

(k) *Rex v. Loveless*, M. & Rob. 349, Williams, J.

engagement before mentioned in that Act; and persons causing any such oath to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and tried as such; though the person or persons who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted. A similar statement is contained in the 52 Geo. 3, c. 104, s. 4, with respect to persons aiding and assisting at the administering of any oath or engagement mentioned in that Act, and persons causing any such oath or engagement to be administered, though not present at the administering thereof: such persons are to be deemed principal offenders, and, on conviction, to be adjudged guilty of felony, and to suffer death without benefit of clergy,^(l) although the person or persons who actually administered the oath or engagement, if any such there shall be, shall not have been tried or convicted.

Both the statutes provide that it shall not be necessary to set forth in the indictment "the words of the oath or engagement;" and that "it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof."^(m) Upon an indictment on the 37 Geo. 3, the fourth count charged, that the defendants administered to J. H. an oath "intended to bind him not to inform or give evidence against any member of a certain society formed to disturb the public peace for any act or expression of his or theirs, done or made collectively or individually, in or out of that or other similar societies, in pursuance of the spirit of that obligation;" and the eighth count stated the oath to be "intended to bind the said J. H. not to give evidence against any associate in certain associations and societies of persons formed for seditious purposes:" and the other counts stated the objects of the oath administered, and the objects of the society, differently and more generally adapted to several prohibitory parts of the statute. Upon the objection taken at the trial to the generality of the statements in the indictment, Lord Avonley was of opinion that the Act intended that it should be sufficient to allege and prove what the object of the oath and engagement was, without stating any words at all; and that the offence being described in the words of the Act, was well described: but that supposing the objection made to the generality of the counts was good, which he did not admit, yet that in the fourth and eighth a material part of the oath or engagement was set forth according to the clause of the Act. The point was submitted to the judges, who, without expressing any opinion against the other counts, all agreed that at any rate the fourth and eighth counts were good.⁽ⁿ⁾

If the indictment state the oath to have been not to inform or give evidence against any person belonging to a confederacy or persons associated together to do "a certain illegal act," it is sufficient without going on to state what the illegal act was. For the offence is not the illegal act, but the administration of the oath, which preceded it, and all that the rules of pleading require is that the offence—that is the oath itself—should be sufficiently set out.^(o) Where an indictment charged that the prisoner administered "a certain oath" to J. any, and fifteen others, naming them, and it was proved that the sixteen were sworn in the same manner, on the same book, two or three at a time, at the same meeting, it was held that this was sufficient, for it was the same act of administering. Or it might be taken to be a complete transaction with respect to each person sworn; and the charge would be substantiated by evidence of the prisoner having sworn any one of the party, in the same way as a man may be convicted of larceny on proof of stealing one out of several articles named in an indictment.^(p)

Where the witness, swearing to the words spoken by way of oath by the prisoner when he administered it, said that he held a paper in his hand at the time when he administered the oath, from which paper it was supposed that he read the

^(l) Abolished by the 1 Vict. c. 91, s. 1, see note (h), *ante*, p. 188; for the present punishment. As to accessories after the fact, see *ante*, p. 69.

^(m) 37 Geo. 3, c. 123, s. 4; 52 Geo. 3, c. 104, s. 5.

⁽ⁿ⁾ *Rex v. Moors*, 6 East 419, note (b).

^(o) *Rex v. Brodrigg*, 6 C. & P. 571 (25 E. C. L. R.), *Holroyd, J.* (p) *Ibid.*

words; it was held, that parol evidence of what he in fact said was sufficient, without giving him notice to produce such paper.^(g) And where the oath on the face of it did not purport to be for a seditious purpose, though it was objected that no parol evidence could be given to show that the "*brotherhood*" mentioned it in was of a seditious nature, it was held that declarations made at the time by the party administering such oath were admissible to prove the real object of it ^(r).

Both the 37 Geo. 3 and 52 Geo. 3, provide that offences committed on the high seas, or out of the realm, or in England, shall be tried before any court of oyer and terminer and gaol delivery for any county in England in such manner and form as if such offence had been therein committed; and that offences committed in Scotland shall be tried either before the Justiciary Court at Edinburgh, or in any of the circuit courts in that part of the United Kingdom.^(s)

It is also provided by both these statutes that any person who shall be tried and acquitted or convicted of any offence against the Acts, shall not be liable to be prosecuted again for the same offence or facts as high treason, or misprision of high treason. And further, that nothing in the Acts contained shall be construed to extend to prevent any person guilty of any offence against the Acts, and who shall not be tried for the same as an offence against the Acts, from being tried for the same, as high treason, or misprision of high treason, in such manner as if the Acts had not been made.^(t)

*By the 57 Geo. 3, c. 19, s. 25, it is enacted that all societies or clubs^[191] the members whereof shall be required or admitted to take any oath or engagement, which shall be an unlawful engagement within the 37 Geo. 3, c. 123, or the 52 Geo. 3, c. 104, or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to any test or declaration not required or authorized by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise, either on becoming, or in order to become, or in consequence of being a member or members of any such society or club; shall be deemed and taken to be *unlawful combinations and confederacies* within the meaning of the 39 Geo. 3, c. 79^(u) and may be prosecuted, proceeded against, and punished according to the provisions of the said Act.^(v)

The mutual promises and engagements of societies are lawful, unless they are clearly prohibited by law; and it lies on the party who alleges that such promises and engagements are illegal to prove that they are so. Where, therefore, appeared from the rules of a lodge of Odd Fellows that the members entered in an engagement to abide by the rules, and one of the rules was to keep the secrets of the society; but all secrets had been abolished; and the rules had not been enrolled: Erle, J., held that there was nothing to show that the engagement was illegal; the subjects of this realm might enter into any engagement they please unless prohibited by law, and the party objecting to the legality of an engagement must show that it is illegal.^(w)

With respect to the administering or taking unlawful oaths in Ireland, the 37 Geo. 3, c. 102, enacts, "that any person or person who shall administer, or cause to be administered, tender, or cause to be tendered, or be present aiding and assisting at the administering or tendering, or who shall by threats, promises, persuasions, or other undue means, cause, procure, or induce to be taken by any person or persons in Ireland, upon a book or otherwise, any oath or engagement importing to bind the person or persons taking the same to be of any association, brotherhood

(g) *Rex v. Moors and Others*, 6 East 421.

(r) *Id. Ibid.*

(s) 37 Geo. 3, c. 123, s. 6; 52 Geo. 3, c. 104, s. 7.

(t) 37 Geo. 3, c. 123, s. 7; 52 Geo. 3, c. 104, s. 8.

(u) See this Act, *post*, 391.

(v) This statute is not to extend to Freemasons' lodges, nor to any declaration approved by two justices, nor to *Quakers'* meetings, nor to meetings or societies for charitable purposes, sec. 26. By sec. 39, the Act is not to extend to Ireland.

(w) *Reg. v. Rouse*, 4 Cox C. C. 7.

committee, society, or confederacy whatsoever, in reality formed, or to be formed, for seditious purposes, or to disturb the public peace, or to injure the persons or property of any person or persons whatsoever, or to compel any person or persons whatsoever to do, or omit, or refuse to do, any act or acts whatsoever, under whatever name, description, or pretence such association, brotherhood, committee, society, or confederacy shall assume, or pretend to be formed or constituted, or any oath or engagement importing to bind the person taking the same to obey the orders, or rules, or commands, of any *committee or other body of men not lawfully constituted, or of any captain, leader, or commander (not appointed by or under the authority of his Majesty, his heir and successors), or to assemble at the desire and command of any such captain, leader, commander, or committee, or of any person or persons not having lawful authority, or not to inform or give evidence against any brother, associate, confederate, or other person, or not to reveal or discover his or her having taken any illegal oath, or not to reveal or discover any illegal act done or to be done, or not to discover any illegal oath or engagement which may be administered or tendered to him or her, or the import thereof, whether such oath shall be afterwards so administered or tendered or not, or whether he or she shall take such oath, or enter into such engagement or not, being by due course of law convicted thereof, shall be adjudged guilty of felony, and be transported(x) for life; and every person who shall take, in Ireland, any such oath or engagement, importing so to bind him or her as aforesaid, and being by due course of law thereof convicted, shall be adjudged guilty of felony, and be transported(x) for seven years.”(y)

This statute further enacts, that a person compelled by inevitable necessity to commit any of these offences, shall be excused and justified upon proof of such necessity, if within ten days (not being prevented by actual force or sickness, by then within seven days after such actual force or sickness shall cease to disable him), he disclose to a justice of peace, by information on oath, the whole of what he knows touching his compulsion.(z) Persons aiding at the administering or tendering the oath or engagement, and persons causing the oath or engagement to be administered or tendered, though not present, are to be deemed principal offenders, and tried as such, though the person who actually administered such oath or engagement shall not have been tried or convicted.(a) And the statute also provides, that it shall be sufficient to set forth in the indictment the purport or object of such oath or engagement.(b)

By the 4 Geo. 4, c. 87, s. 1, every society, &c., in Ireland, the members whereof shall, according to the rules, &c., be required or admitted, or permitted to take any oath or engagement, which shall be an unlawful oath or engagement, within the statute 50 Geo. 3, c. 102, or to take any oath not required or authorized by law, are declared to be unlawful combinations and confederacies.

The provisions of the 4 Geo. 4, c. 87, were extended by the 2 & 3 Vict. c. 74, to certain other societies therein described, and these Acts are continued by the 25 & 26 Vict. c. 32, for five years from the 7th of July, 1862, and until the end of the then next session of Parliament.

The 5 & 6 Will. 4, c. 62, in many cases substituted a declaration in lieu of an oath; and by sec. 13, reciting that “a practice has prevailed of administering and receiving oaths and affidavits *voluntarily taken and made in matters not the subject of any judicial inquiry, nor in anywise pending or at issue before the justice of the peace or other person by whom such oaths or affidavits have been administered or received,” and that ‘doubts have arisen whether or not such proceeding is illegal; for the more effectual suppression of such practice and removing such doubts,’ enacts that, after the 1st of October, 1835, ‘it shall not be lawful for any justice of the peace or other person to administer, or cause or allow

(z) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(y) And not less than three years by the same Act, *ante*, p. 4.

(z) Sec. 2. And the section provides also, that no person shall be excluded from the defence of inevitable necessity, who shall be tried for an offence within ten days from the commission of it, or of seven days from the time when the force or sickness shall cease.

(a) Sec. 3.

(b) Sec. 4.

to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being. Provided always that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the Houses of Parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively.

It has been doubted whether an indictment can be sustained for administering an oath contrary to this clause, and, supposing it can, such an indictment is bad unless it set out so much at least of the oath as may enable the Court to see that the oath is one which is prohibited by the clause. An indictment alleged in several counts that the defendant administered a voluntary oath touching certain matters whereof he had not jurisdiction by any statute, and some counts negatived the oaths, &c., in the proviso; and the Court of Queen's Bench held that the indictment was bad; for the having or not having jurisdiction is a matter of law depending upon the facts, upon which the Court is to form an opinion. They thought, therefore, to be a distinct allegation of the subject matter of the oath, showing affirmatively that it was out of the jurisdiction. But the Court expressed no opinion whether the indictment would lie; Lord Denman, C. J., however, seems to have thought that it would be necessary to show that the disobedience was wilful and in the nature of a contempt, in order to convict a person disobeying the clause. (a)

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*CHAPTER THE THIRTEENTH.

OF MISPRISION OF FELONY, AND OF COMPOUNDING OFFENCES.

By misprision of felony, is generally understood the *concealment of felony*, or *procuring* such concealment, whether it be felony by the common law, or by statute. (a) Thus, silently to observe the commission of a felony without using any endeavor to apprehend the offender, is a misprision; (b) for a man is bound to discover the crime of another to a magistrate with all possible expedition; (c) as the law does not allow any private person to forego a prosecution on any account. (d) But there must be knowledge merely without any assent; for if a man assent to a felony, he will be either principal or accessory. (e) The punishment of this offence in an officer is imposed by the statute of Westminster, 3 Edw. 1, c. 9, which enacts, that "if the sheriff, coroner, or any other bailiff within a franchise, or without, for reward, or for prayer, or for fear, or for any manner of affinity, conceal, consent or procure to conceal, the felonies done in their liberties; or otherwise will not attach nor arrest such felons there (as they may), or otherwise will not do their office, for favor borne to such misdoers, and be attainted thereof, they shall have one year's imprisonment, and after make a grievous fine at the King's pleasure, if they have wherewith; and if they have not whereof, they shall have imprisonment of three years." The punishment, in the case of a common person, is imprisonment for a less discretionary time; and in both cases fine and ransom at the King's pleasure.

(a) Reg. v. Nott, 4 Q. B. 768 (45 E. C. L. R.). The majority of the Court thought that it was not necessary to set out the whole oath; but the 37 Geo. 3, c. 123, and 52 Geo. c. 104, contain express provisions to that effect (*ante*, p. 189), and, therefore, it would certainly be prudent to set out the whole oath, if practicable, in some counts.

(a) 1 Hawk. P. C. c. 59, s. 2; 3 Inst. 139.

(b) 1 Hale 374, 375; 1 Hawk. P. C. c. 59, s. 2, note (1).

(c) 3 Inst. 140.

(d) Reg. v. Daly, 9 C. & P. 342 (38 E. C. L. R.), Gurney, B.

(e) 4 Blac. Com. 121. But see 1 Hale 616, cited *ante*, p. 57.

asure.(f) By the 3 Hen. 7, c. 1, the justices of every shire may take an inquest to inquire of the concealments of other inquests, of such matters and inquests as are to be inquired and presented before justices of the peace, whereof complaint shall be made by bill; and if such concealment be found of any inquest within a year after the concealment, every person of the inquest is to be amerced for the concealment by discretion of the justices.

Of a similar nature to this offence of misprision of felony, is the offence of *compounding of felony*, mentioned in the books by the more ancient appellation of *est-bote*, which is where the party robbed not only knows the felon, but also takes his goods again, *or other amends, upon agreement not to prosecute.(g) It is said to have been anciently punishable as felony; but is now punished [*195] only with fine and imprisonment, unless it be accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact.(h) But the barely taking again one's own goods which have been stolen, is no offence at all unless some favor be shown to the thief.(i)

Compounding a mere charge of felony is illegal; as where a person, having charged a man before a magistrate with embezzlement, agrees not to prosecute the charge in consideration of a bill of exchange being accepted by another person (k)¹

Where an indictment for compounding felony alleged that the defendant deserted from prosecuting, and it appeared that he did prosecute to conviction, the defendant was held entitled to be acquitted.(l)

It is made felony by the 24 & 25 Vict. c. 96, s. 101,(m) to take any reward for helping a person to any property stolen or obtained by false pretences; and to advertise a reward for the return of things stolen, incurs a forfeiture of fifty pounds by sec. 102 of the same Act.

An agreement to put an end to a prosecution for a *misdemeanor* has been considered to be illegal, as impeding the course of public justice;(n) but it is sometimes done after conviction, with the sanction of the Court, in cases where the offence principally and more immediately affects an individual; the defendant being permitted to *speak with the prosecutor* before any judgment is pronounced, and a trivial punishment being inflicted if the prosecutor declares himself satisfied.(o) And where, in a case of an indictment for ill-treating a parish apprentice, a security for the fair expenses of the prosecution had been given by the defendant after conviction, upon an understanding that the Court would abate the period of his imprisonment, the security was held to be good, upon the ground that it was given with the sanction of the Court, and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him.(p)

So where a defendant was prosecuted by parish officers, and convicted for disobeying an order of maintenance, and sentence was deferred by the Court with a

(f) 4 Blac. Com. 121, where it is said, "which pleasure of the King must be observed, not for all, not to signify any extrajudicial will of the sovereign, but such as is declared by his representatives, the judges in his courts of justice; *voluntas Regis in curiâ, non in mercato.*"

(g) 1 Hawk. P. C. c. 59, s. 5; 4 Blac. Com. 133.

(h) 1 Hawk. P. C. c. 59, s. 6; 2 Hale 400.

(i) 1 Hawk. P. C. c. 59, s. 7.

(k) *Fivaz v. Nicholls*, 2 C. B. 501 (52 E. C. L. R.).

(l) *Rex v. Stone*, 4 C. & P. 379 (19 E. C. L. R.), *Bosanquet, J.* *Quære*, whether, if the indictment had omitted this averment it would have been good. The offence seems to be letting the thief go without prosecution.

(m) See vol. ii. p. 574.

(n) *Collins v. Blantern*, 2 Wils. 341; *Edgecombe v. Rodd*, 5 East 294.

(o) 4 Blac. Com. 363, 364.

(p) *Beeley v. Wingfield*, 11 East 46. See the observations on this case in 6 Q. B. 320 (51 E. C. L. R.); and see also *Baker v. Townshend*, 7 Taunt. 422. But in general any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offence, without leave of the Court, is invalid: 1 Chit Crim. Law 4.

¹ See the case of *Comm. v. Pease*, 16 Mass. Rep. p. 91, where it is settled, that accepting a note signed by the party guilty of larceny, as a consideration for not prosecuting, is sufficient to constitute a compounding of a felony.

view to an arrangement, and in the meantime he was committed to prison, and the officers demanded a sum considerably exceeding the amount of maintenance due, but part of which was to cover costs; the defendant paid part, and gave a note for *196] the remainder, and was then brought into Court, fined 1s. and discharged; it did not appear whether the particulars of the arrangement were made known to the Court; but the defendant made no complaint when brought up; it was held that the compromise was legal. (q)

It has been laid down, that "the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might recover damages in an action." (r) But it seems that this proposition should be limited to the "cases where the private rights of the injured party are made the subject of agreement, and where by the previous conviction of the defendant the rights of the public are also preserved inviolate." (s) For "when verdict of guilty is taken, and the Court suspend judgment, and allow the questions between the parties to be referred, the matter is very different, for then it only to enable the Court the better to see what sentence ought to be given." (t) "But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." (u) A contract therefore to withdraw a prosecution for perjury, and to give no evidence against the accused founded on an illegal consideration and void (v)

So where an action was brought on an agreement, by which the defendants, consideration that the plaintiff, being the prosecutor of an indictment against certain persons for an assault and riot, would not proceed further on such indictment, promised the plaintiff to pay him a certain sum of money, and in pursuance of that agreement the plaintiff did not proceed further with the indictment, and formed the Court, before which the indictment was pending, of the premises, and by leave of the Court, forebore to give evidence upon the indictment, and thereupon there was an acquittal; it was held that the agreement was illegal; for the offence was not confined to the personal injury, but was accompanied with a riot, which was a matter of public concern, and therefore not legally the subject of compromise. (w)

In one case an indictment for a nuisance by making an embankment in the Thames, whereby the navigation was obstructed, was referred; (x) but the question of the legality of the reference was not raised. And where an indictment had been prepared by the plaintiff for erecting walls or cribs across the Wye, which were a nuisance to the navigation, and the defendant gave the plaintiff a bond to remove the nuisances before a certain time, in order to save expense and prevent the indictment being preferred, the bond was held good. (y) But where an indictment had been preferred against the defendant for nonrepair of a highway, which it was alleged he ought to have repaired *ratione tenuræ*, and the prosecutor and defendant before the trial agreed to leave the question of liability of repair the highway to reference, and the arbitrator was to make an award on the evidence adduced before him, and a verdict was to be entered according to the result of the award, and the arbitrator awarded that the defendant was guilty of the non-repair alleged in the indictment; it was held that the reference was illegal as the question as to the liability to repair was of public concern. (z)

In one case an indictment for conspiracy was referred, (a) but the question

(q) *Kirk v. Strickwood*, 4 B. & Ad. 421 (24 E. C. L. R.).

(r) *Keir v. Leeman*, 6 Q. B. 308 (51 E. C. L. R.).

(s) *Keir v. Leeman*, 9 Q. B. 371 (58 E. C. L. R.), in error, affirming the judgment of the Queen's Bench.

(t) *Reg. v. Hardey*, 14 Q. B. 529 (68 E. C. L. R.).

(u) *Keir v. Leeman*, 6 Q. B. 308 (51 E. C. L. R.).

(v) *Per Curiam*, *Ibid*, citing *Collins v. Blantern*, 2 Wils. 341.

(w) *Keir v. Leeman*, *supra*.

(x) *Reg. v. Dobson*, 6 Q. B. 637 (51 E. C. L. R.).

(y) *Fallowes v. Taylor*, 7 T. R. 475. There was no plea alleging that the conspiracy was unlawful. See the observations in this case, 9 Q. B. 293 (58 E. C. L. R.).

(z) *Reg. v. Blakemore*, 14 Q. B. 544 (68 E. C. L. R.).

(a) *Rex v. Bardell*, 5 A. & E. 619 (31 E. C. L. R.).

the lawfulness of the reference was not raised; the Court of Queen's Bench has since, however, declined to lay down as law, that such an indictment can be reversed. (b)

Where, however, indictments, for perjury and conspiracy were removed into the Queen's Bench, and on the indictment for perjury coming on for trial, it was agreed, under the strong advice of counsel, that no evidence should be tendered, a verdict of not guilty taken on both indictments, and that all matters in difference between the prosecutor and defendant should be referred to a barrister; it was held that it would have been illegal to refer the indictment for perjury, and, as it would seem, the indictment for conspiracy; but that the indictments were not referred, and the verdicts of acquittal must at all events stand; and there was nothing illegal in referring all matters in difference and at the same time consenting to verdicts of acquittal, unless there was a corrupt agreement to stifle the prosecution, which in the present case did not appear to be the fact. (c)

In the well considered judgment of the Court of Exchequer Chamber, in *Keir v. Leeman*, (d) it is said, "it is very remarkable what very little authority is to be found, rather consisting of dicta than decisions, for the principle that any compromise of a misdemeanor, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on the point. We have no doubt that in all offences which involve damages to an injured party, for which he may maintain an action, (e) it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his *private* damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so; but we are not disposed to extend this any further."

It is clear that the consent of the Court cannot make an agreement to abandon a prosecution valid, if it would otherwise be unlawful. (f)

The compounding of *informations on penal statutes* is a misdemeanor against public justice, by contributing to make the laws odious to the people. (g) Therefore, in order to discourage malicious informers, and to provide that offences, when once discovered, shall be duly prosecuted, it was enacted by the 18 Eliz. c. 5, s. 4, that if any person, "by color or pretence of process, or without process upon color or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward," without [198] the order or consent of some Court, he shall stand two hours in the pillory, (h) be forever disabled to sue on any popular or penal statute, and shall forfeit ten pounds. This severe statute extends even to penal actions, where the whole penalty is given to the prosecutor. (i) But it does not apply to penalties which are only recoverable by information before justices; and an indictment for making a composition in such a case was holden bad, in arrest of judgment. (k)

In a case where it was held that threatening, by letter or otherwise, to put in motion a prosecution by a public officer to recover penalties for selling *Fryer's Balsam* without a stamp, (l) for the purpose of obtaining money to stay the prosecution (not being such a threat as a firm and prudent man might not be expected to resist), was not in itself an indictable offence at common law, though it was alleged that money was obtained, it seems to have been considered that such an

(b) *Reg. v. Hardey*, *supra*.

(c) *Ibid*.

(d) 62 B. 308 (51 E. C. L. R.).

(e) This excludes all cases of felony; for an action cannot be maintained in them until the felon has been prosecuted: *Stone v. Marsh*, 6 B. & C. 551 (13 E. C. L. R.); and, *quære* the case of property obtained by false pretences; see sec. 101 of the Larceny Act.

(f) *Keir v. Leeman*, *supra*.

(g) 4 Blac. Com. 136.

(h) This part of the punishment is abolished by the 56 Geo. 3, c. 138. But sec. 2 empowers the Court to pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory, as to the Court shall seem proper: and see the 7 Will. 4, and 1 Vict. c. 23. The 18 Eliz. was made perpetual by the 27 Eliz. c. 10.

(i) 4 Blac. Com. 136. note (3).

(k) *Rex v. Crisp*, 1 B. & Ald. 282.

(l) By the 42 Geo. 3, c. 56, it was prohibited to be vended without a stamped label.

offence would be indictable under the foregoing section of this statute of Elizabeth (*m*) But no indictment for any *attempt* to commit such a statutable misdemeanor can be sustained as a misdemeanor at common law, without at least bringing the offence intended within, and laying it to be against, the statute. Though the party so threatened had been alleged to be guilty of the offence imputed, with the statute imposing the duty and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute (which gives the penalty as auxilia to the revenue, and in furtherance of public justice for the sake of example), might also, upon general principles, have been deemed a sufficient ground on which to have sustained the indictment at common law. (*n*)

A party is liable to the punishment prescribed by the 18 Eliz. c. 5, for taking the penalty imposed by a penal statute, though there is no action or proceeding for the penalty. The prisoner applied to one Round, and demanded five pounds, as a penalty which Round had incurred under the General Turnpike Act, by suffering his wagon to be drawn on a turnpike road by more than four horses. Round had incurred such a penalty, and the prisoner obtained the money by way of composition to prevent any legal proceedings; no process had been sued out, and no information had been laid before a magistrate. The prisoner having been convicted, judgment was respite, upon a doubt whether the offence was within the statute, so as to subject the prisoner to the specific punishment therein prescribed, inasmuch as no action or proceeding was depending in which the order or consent of a Court in Westminster Hall for a composition could have been obtained. [1805] *the judges were all of opinion that the conviction was right, and that the statute applies to all cases of taking a penalty incurred, or pretended to be incurred, without leave of a Court at Westminster, or without judgment or conviction. (*o*)

A person may be convicted under the 18 Eliz. c. 5, s. 4, for taking money upon color or pretence of a party having committed an offence, though in fact no offence liable to a penalty has been committed by the person from whom the money was taken. One Peverill, who kept a retail beer-shop, but had no license to sell spirit having given a woman a glass of gin as a new-year's gift, the prisoner threatened to prosecute him for selling gin without a license, and afterwards obtained money from Peverill, as a reward for forbearing to prosecute him for the supposed offence of selling gin without a license. No information was actually preferred, nor any process sued out. It was objected that, as no offence had been actually committed by Peverill, and as no process had been issued, or information laid against him, the case was not within the statute. The jury having found the prisoner guilty, upon a case reserved, the judges thought that the words, "upon color or pretence of any matter of offence," extended to a case where no penalty had been incurred, and that the conviction was right. (*p*)

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*CHAPTER THE FOURTEENTH.

OF OFFENCES BY PERSONS IN OFFICE.

WHERE an officer neglects a duty incumbent on him, either by common law or by statute, he is indictable for his offence: and this, whether he be an officer at common law, or appointed by Act of Parliament: (*a*) and a person holding a public office under the King's letters patent, or derivatively from such authority

(*m*) *Rex v. Southerton*, 6 East 126. But *quære*, and see *Rex v. Crisp*, 1 B. & Ald. 212, 287.

(*n*) *Id. Ibid.*

(*o*) *Rex v. Gotley*, East. T. 1805, Russ. & Ry. 84.

(*p*) *Reg. v. Best*, 2 Moo. C. C. R. 124; s. c., 9 C. & P. 368 (38 E. C. L. R.).

(*a*) *Reg. v. Wyatt*, 1 Salk. 380; *Anon.*, 6 Mod. 96.

has been considered amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it.^(b) And it is laid down generally, that any public officer is indictable for misbehavior in his office.^(c)¹ There is also the further punishment of the forfeiture of the office for the misdemeanor of doing anything directly contrary to its design.^(d) And in the case of a coroner, the 25 Geo. 2, c. 29, s. 6, makes particular provision, and enacts, that when convicted of extortion, or wilful neglect of duty, or misdemeanor in office, he may be removed from office by the judgment of the Court in which he is convicted, unless such office be annual, or annexed to some other office. And by the 23 & 24 Vict. c. 116, s. 6, the Lord Chancellor may remove a county coroner for inability or misbehavior in his office. Where a duty is thrown upon a body of several persons, and they neglect it, each is individually liable to prosecution for the neglect.^(e)

It is proposed to treat shortly, in the present chapter, of oppression, negligence, fraud and extortion, by persons in office; and of the refusal of persons to execute the duties of their offices when properly appointed; leaving the subjects of buying and selling offices, and of bribery, for subsequent chapters.

The *oppression* and tyrannical partiality of judges, justices and other magistrates in the administration, and under color of their offices, may be punished by impeachment in Parliament, or by information or indictment, according to the rank of the offenders, and the circumstances of the offence.^(f) Thus, if a justice of the peace abuses the authority reposed in him by law, in order to gratify his malice, or promote his private interests or ambition, he may be punished by indictment or information. But the Court of King's Bench have expressly declared, that though a justice of peace should act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill-intention whatsoever, the Court will never punish him by the extraordinary course of an information, but will leave the party complaining to the *ordinary method * [201 of prosecution by action or indictment.^(g) And whenever justices have been challenged, either by way of indictment, or application for a criminal information, the question has always been, not whether the act done might, upon full and mature investigation, be found strictly right, but from what motive it had proceeded; whether from a dishonest, oppressive, or corrupt motive, under which description fear and favor may generally be included, or from mistake or error. In the former case, alone, they have become the objects of punishment.^(h) But where two sets of magistrates, having a concurrent jurisdiction, one set of them appointed a meeting to grant ale licenses, and, after such appointment, the other set of magistrates appointed a meeting for the same purpose on a subsequent day, and having met, granted a license which had been refused by the first set; it was held that the proceedings of the magistrates appointing the second meeting were illegal, and the subject of an indictment. Lord Kenyon, C. J., said that it was proper the question should be settled whether it were *legal* for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any

(b) *Rex v. Bembridge*, M. 24 Geo. 3; 1 Salk. 380, note (a).

(c) *Anon.*, 6 Mod. 96.

(d) 1 Hawk. P. C. c. 66, s. 1.

(e) *Rex v. Holland*, 5 T. R. 607.

(f) 4 Blac. Com. 141. A judge is not indictable for an error in judgment; but this rule extends only to judges in courts of record, and not to ministerial officers: *Rex v. Loggen* and another, 1 Str. 74.

(g) *Rex v. Palmer*, 2 Burr. 1162; 1 Blac. Com. 354, note (17), where it is said that in no case will the Court grant an information unless an application for it be made within the second Term after the offence committed, and notice of the application be previously given to the justice, and unless the party injured will undertake to bring no action.

(h) Per Lord Tenterden, C. J., *Rex v. Borron*, 3 B. & Ald. 434 (5 E. C. L. R.); *Ex parte Fentiman*, 2 Ad. & E. 127 (29 E. C. L. R.); 1 Blac. Com. 354, note (17).

¹ To render a neglect of duty by a public officer *wilful* within the statute making such neglect a misdemeanor, it is only necessary that it should appear to be *intentional*, and it is no defence that the officer believed he was not bound to do the act and was not guilty of bad faith in refusing: *The People v. Brooks*, 1 Denio 471.

part of their jurisdiction; and that it was of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. And Ashhurst, J., said that it was a breach of the law to attempt to wrest the jurisdiction out of the hands of the magistrates who first gave notice of the meeting; for what the law says shall not be done, it becomes illegal to do, and is therefore the subject-matter of an indictment, without the addition of any corrupt motives.⁽ⁱ⁾ So, if a magistrate were wilfully, and in defiance of the known law, to refuse bail in a case where the defendant was entitled to be bailed, he would be liable to a criminal information or indictment.^(k)

The conduct of justices of the peace in granting or refusing licenses to sell ale has been frequently the subject of investigation; and it seems to be clear that though upon this matter the justices have a discretionary jurisdiction given them by the law, and though discretion means the exercising the best of their judgment upon the occasion that calls for it, yet if this discretion be wilfully abused, it is criminal, and under the control of the Court of King's Bench.^(l) That Court will, therefore, grant an information against justices who refuse, from corrupt and improper motives, to grant such licenses;^(m) and an information will be granted against them as well for granting a license improperly as for refusing to do so in the same manner.⁽ⁿ⁾

To prevent abuses by the extensive power which the law is obliged to repose in gaolers, the 14 Edw. 3, c. 10, enacts, that if any gaoler, by too great duress of imprisonment, makes any prisoner that he hath in ward become an *approver* or an *appellor* against his will; that is, to accuse and turn evidence against some other person; it shall be felony in the gaoler. For it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a gaoler to whom the prisoner is committed for safe custody.^(o) And a gaoler may be discharged and fined for voluntarily suffering his prisoners to escape, or for barbarously misusing them.^(p) So, a gaoler is indictable for refusing to receive a prisoner under the commitment of a magistrate.^(q)

An *overseer* of the poor is also indictable for misfeasance in the execution of his office: as if he relieve the poor where there is no necessity for it;^(r) or if he misuse the poor, as by keeping and lodging several poor persons in a filthy and unwholesome room, with the windows not in a sufficient state of repair to protect them against the severity of the weather;^(s) or by exacting labor from them when they are unable to work.^(t) And if overseers conspire to prevail upon a man to marry a poor woman big with child, for the purpose of throwing the expense of maintaining her and the issue from themselves upon another parish or township, they may be indicted.^(u) And for most breaches of their duty overseers may be punished by indictment or information:^(v) but with respect to the proceeding by

(i) *Rex v. Sainsbury*, 4 T. R. 451.

(k) *Reg. v. Badger*, 4 Q. B. 468 (45 E. C. L. R.); and see *Reg. v. Dodgson*, 9 A. & E. 704 (36 E. C. L. R.), where a criminal information was applied for against a magistrate who had convicted notwithstanding a claim of right was set up.

(l) *Rex v. Young*, 1 Burr. 556, 560, *et seq.*

(m) *Rex v. Williams*, 3 Burr. 1317. The licenses in this case had been refused, because the persons applying for them would not give their votes for members of Parliament the justices would have them. And see *Rex v. Hann*, Id. 1716, 1786.

(n) *Rex v. Holland*, 1 T. R. 692. And see 1 Burn's Just. tit. *Alehouses*.

(o) 4 Blac. Com. 128; 3 Inst. 91.

(p) 1 Hawk. P. C. c. 66, s. 2.

(q) *Rex v. Cope*, 6 A. & E. 226 (33 E. C. L. R.); 1 N. & P. 515 (36 E. C. L. R.); 7 C. & 720 (32 E. C. L. R.). See the form of indictment there, which was for a refusal to receive in Newgate, and it was held that under the 4 Geo. 4, c. 64, the Court of Aldermen had not power to exclude from the gaol prisoners committed by the Middlesex magistrates and who might have been committed to that gaol before that Act passed.

(r) *Tawney's case*, 16 Vin. Abr. 415; 1 Bott. 358, pl. 371.

(s) *Rex v. Wetheril*, Cald. 432.

(t) *Rex v. Winship*, Cald. 76.

(u) *Rex v. Compton*, Cald. 246; *Rex v. Tarrant*, 4 Burr. 2106; and *Rex v. Herbert*, East P. C. c. 11, s. 11, p. 461.

(v) *Rex v. Commings*, 1 Bott. 357, pl. 370; *Rex v. Robinson*, 2 Burr. 799; *Rex v. Jones*.

information, as it is an extraordinary remedy, the Court of King's Bench will not allow it to be applied to the punishment of ordinary offences, and has long come to a resolution not to grant informations against overseers for procuring a pauper's marriage with a view to burden another parish. (w)

An indictment against overseers on the 5 & 6 Will. 4, c. 76, s. 47, for not presenting to the auditor of a union, upon request, on a day appointed by him, is, unless it appear that there was some rule, order, or regulation of the poor-law commissioners that the overseers should account upon such request; and where no such order, &c., is alleged, the indictment cannot be sustained after verdict, [*203] solely because it appears, by inference, or by the inducement, that the defendants have not in fact accounted for one whole quarter. (x) Upon such an indictment it is sufficient, at least after verdict, to allege the order to have been made by "the poor-law commissioners for England and Wales," without naming any commissioner, and to state that a copy of the order, under seal, &c., was duly sent to the overseers, without alleging actual service on them. (y)

An overseer of the poor is not indictable if (without fraud or menace) he remove a pauper under an order of removal after it has been confirmed on appeal by the sessions, subject to the opinion of the Queen's Bench, and before its final determination by that Court. (z)

It has been already stated, that an officer neglecting the duties of his office is guilty of an indictable offence. (a) In some cases also the offence will amount to a forfeiture of his office, if it be a beneficial one; (b) for, by the implied condition of the grant of an office shall execute it diligently and faithfully, it appears to be clear that he will be liable to a forfeiture of it, not only for doing a thing directly contrary to its design, but also for neglecting to attend to his duty at all proper and convenient times and places, whereby any damage shall accrue to those by or for whom he was made an officer. (c) A coroner neglecting the duties of his office is indictable: (d) and by the 3 Edw. 1, c. 9, the sheriff, coroner, or any other bailiff concealing felonies, or not arresting felons, or otherwise neglecting their duty, are to be imprisoned for a year, and fined at the King's pleasure. (e) A sheriff is indictable for refusing or neglecting to execute a criminal according to his sentence; but he is not bound to execute a criminal if he be not in his custody, and in such case, if it is intended by the Court which passed the sentence that the sheriff should do execution, there should be a special mandate to that party having the prisoner in custody to deliver him to the sheriff, and another to the sheriff to receive the prisoner and execute him. (f) And an indictment lies at common law against all subordinate officers for neglect, as well as misconduct, in the discharge of their official duties. A constable is therefore indictable

10tt. 360. pl. 377, 2 Nolan 474. From these authorities it appears that such proceedings may be had in some cases where a particular punishment is created by statute, and a specific method of recovering the penalty is pointed out. But as to this, see *ante*, p. 86. (w) *Rex v. Slaughter*, Cald. 246, note (a). And perhaps this offence would not be punishable at all if the woman settled in the defendant's parish previous to the marriage with child by the man to whom the defendants procure her to be married: 2 Nolan 7.

(x) *Reg. v. Crossley*, 10 A. & E. 132 (37 E. C. L. R.); 2 P. & D. 319.

(y) Per Lord Denman, C. J., and Patteson, J. Whether disobedience of an order of the commissioners within sec. 98 be indictable till the third offence, was not discussed in this case, but it should seem it is not. C. S. G.

(z) *Reg. v. Cooper*, 3 Sess. C. 346.

(a) *Ante*, p. 200.

(b) 4 Blac. Com. 140.

(c) 1 Hawk. P. C. c. 66, s. 1. And see further as to forfeiture of offices, Com. Dig. Sheriff (K. 2) (K. 3), and the Earl of Shrewsbury's case, 9 Co. 50.

(d) See precedents of indictments against coroners for refusing to take inquisitions, or for not returning inquisitions according to evidence; 2 Chit. Crim. Law, 255, Cro. Circ. comp. (10th edit.) 173.

(e) *Ante*, p. 194. And by 3 Hen. 7, c. 1, if any coroner be remiss, and make not inquiry upon the view of the dead body, and certify not, as ordained in the statute, he shall, for every default, forfeit to the King a hundred shillings.

(f) *Rex v. Antrobus*, 6 C. & P. 784 (25 E. C. L. R.); 2 A. & E. 788 (29 E. C. L. R.); 4 M. & M. 565 (30 E. C. L. R.).

for neglecting the duties required of him by common law or by statute; (*g*) and when a statute requires him to do what without requiring had been his duty, it is not imposing a new duty, and he is indictable at common law for *th *204] neglect. (*h*) And an overseer of the poor is indictable for the wilful neglect of his duty. Thus overseers have been held to be indictable for not providing for the poor; (*i*) for refusing to account within four days after the appointment of new overseers, under the 43 Eliz. c. 2; (*k*) for not making a rate to reimburse constables under the 14 Car. 2, c. 14; (*l*) and for not receiving a pauper sent to them by order of two justices; (*m*) or disobeying any other order of justices, where the justices have competent jurisdiction. (*n*)

It was the opinion of a majority of the learned judges present at the discussion that an indictment would not lie against an overseer for not relieving a pauper unless there were an order for his relief, except in a case of immediate emergency where there was not time to get an order. (*o*) But there may be cases in which the neglect to provide a pauper with necessaries will render an overseer liable to be indicted. Thus where an indictment stated that the defendant, an overseer, had under his care a poor person belonging to his township, but neglected and refused to provide for her necessary meat, &c., whereby she was reduced to a state of extreme weakness, and afterwards, through want of such reasonable and necessary meat, &c., died, the defendant was convicted, and sentenced to a year's imprisonment. (*p*) And where an overseer was indicted for neglecting to supply medical assistance when required, to a pauper laboring under dangerous illness, the learned judge before whom the indictment was tried held that an offence was sufficiently charged and proved, though such pauper was not in the parish workhouse nor had previously to his illness received or stood in need of parish relief. (*q*)

By the 1 & 2 Will. 4, c. 60, s. 11, an Act for the better regulation of vestries "if any churchwarden, rate-collector, overseer, or other parish officer, shall refuse to call meetings according to the provisions of this Act, or shall refuse or neglect to make and give the declarations and notices directed to be made and given by this *Act, or to receive the vote of any rate-payer as aforesaid, or shall in *205] any manner whatsoever alter, falsify, conceal, or suppress any vote or vote as aforesaid, such churchwarden, rate-collector, overseer, or other parish officer shall be deemed and taken to be guilty of a misdemeanor."

It has been doubted whether a clergyman who refuses to marry a couple is indictable for such refusal; and where an indictment against a clergyman for refusing to marry a couple alleged that the parties required the clergyman to solemnise

(*g*) *Reg. v. Wyat*, 1 Salk. 380. *Crowther's case*, Cro. Eliz. 654; indictment against constable for refusing to make hue and cry after notice of a burglary.

(*h*) *Reg. v. Wyat*, 1 Salk. 381.

(*i*) 2 Nolan 475. *Tawney's case*, 1 Bott. 358, pl. 371; *Rex v. Winship*, Cald. 72.

(*k*) *Rex v. Commings*, 5 Mod. 179; 2 Nol. 453, 476, where it is observed in the note (c) that this case occurred prior to 17 Geo. 2, c. 38.

(*l*) *Rex v. Barlow*, 2 Salk. 609; 1 Bott. 357, pl. 369. The objection was, that the word used in the Act is "may," which does not require it as a duty. But the Court held the word "may" to be imperative, and the same as "shall." By the 18 Geo. 3, c. 19, constables are now to be paid for parish business out of the poor's rate.

(*m*) *Rex v. Davis*, 1 Bott. 361, pl. 378; Say. 163, s. c.

(*n*) 2 Nol. 476; *Rex v. Boys*, Say. 143. But otherwise where the justices have no jurisdiction: *Rex v. Smith*, 1 Bott. 415, pl. 461.

(*o*) *Rex v. Meredith*, R. & R. 46. This case occasioned much doubt and discussion. It came under consideration in Mich. Term, 1802, and was adjourned until the following Hilary Term, when it was further adjourned, as there was a difference of opinion among the judges. Lord Ellenborough, C. J., Lord Alvanley, C. J., Heath, J., Rooke, J., and Graham, B., seemed to be of opinion that the indictment was good, and the conviction proper, the overseer having taken the pauper under his care; but McDonald, C. B., Gross, J., Thomson, B., Lawrence, J., Le Blanc, J., and Chambre, J., thought otherwise, and were of opinion, that except in a case of immediate and urgent necessity, the overseer was only bound to act under an order of justices, in a case where such an order could be had.

(*p*) *Rex v. Booth*, R. & R. 47, note (*a*).

(*q*) *Rex v. Warren*, cor. Holroyd, J., Worcester Lent Assizes, 1820. In a case where the parents of a bastard child had neglected to provide necessaries for its subsistence, it was decided that the officers of the parish in which the child was born were obliged to provide such necessaries without an order of justices: *Hays v. Bryant*, 1 H. Blac. 253.

a marriage between them on or before the 14th day of August then next, and that he unlawfully refused and neglected so to do, and the evidence was that on the 2d of August, at 9 P. M., the parties desired him to fix a time for the marriage before the 14th of August, and he said, "I'll marry him, when he has expressed a desire to be confirmed;" and no other application was made; it was held that the tender was insufficient; for it ought to have been made at a time when the ceremony could have been lawfully performed, and therefore the evidence did not sustain the averment of a refusal.^(r)

Upon an indictment against an officer for neglect of duty, it is sufficient to state that he was such officer, and it is not necessary to state his appointment.^(s) And in the case of a delinquent in India, prosecuted under the 24 Geo. 3, c. 25, for neglect of duty, it was held not to be necessary to state that the neglect was corrupt; the statute making it a misdemeanor if it was wilful.^(t) And the indictment for neglect of duty need not aver that the defendant had notice of all the facts it states, if it was his duty to have known them.^(u) Where some of the charges against the defendant were for disobeying orders, and it was stated that those orders were made and communicated to him, but their continuance in force was not averred, such an averment was insisted upon as essential; but the Court said that the orders must be taken to continue in force until they were revoked; and the objection was overruled.^(v) Other charges in the same case against the defendant were for not acting upon particular events, within the settlement, as those events made it his duty to act; but it was not averred that he had notice of those events. The Court, however, held that an allegation of notice was not necessary; for as the events happened within a foreign settlement, whilst the defendant was one of the council in such settlement, he was bound to take notice of them.^(w)

By the 33 Geo. 3, c. 55, two justices at a petty or special sessions of the peace, upon complaint on oath of any neglect of duty or disobedience of any warrant or order of any justice of the peace, by any constable, overseer of the poor, or other peace or parish officer, such constable, overseer, or other officer, having been duly summoned, may impose, upon conviction, any reasonable *fine or fines not exceeding the sum of forty shillings, as a punishment for such neglect of [*206 duty or disobedience.

The absence or misconduct of the chief officers of corporations at the time of elections, whereby the completion of the election of other chief officers may be prevented, is punishable by the 11 Geo. 1, c. 4, s. 6, which enacts, "that if any mayor, bailiff or bailiffs, or other chief officer or officers of any city, borough, or town corporate, shall voluntarily absent himself or themselves from, or knowingly and designedly prevent or hinder the election of any other mayor, bailiff, or other chief officer in the same city, borough, or town corporate, upon the day, or within the time appointed by charter or ancient usage for such election;" such offender being convicted shall, for every offence, be imprisoned for six months, and be for ever disabled from exercising any office belonging to the same city, borough, or corporation. This voluntary absence from the election of a chief officer must be such an absence whereby the mischief complained of in the preamble of the statute, namely, the preventing the completion of the election of a chief officer, may possibly be occasioned. It has been decided, therefore, that a chief officer voluntarily absenting himself upon the charter day of election of his successor is not indictable, unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose.^(x)

By the 3 & 4 Will. 4, c. 94, s. 41, "if any master in ordinary of the high court of Chancery, or any person holding any office, situation, or employment in any

^(r) *Reg. v. James*, 2 Den. C. C. 1; 3 C. & K. 167. The indictment seemed open to several objections; it did not aver that the parties might lawfully marry; or that the clergyman was required to perform the ceremony at a lawful time, between the appointed hours. Strong intimations were thrown out that a refusal to marry is merely an ecclesiastical offence.

^(s) *Rex v. Holland*, 5 T. R. 607.

^(u) *Id. Ibid.*

^(w) *Id. Ibid.*

^(t) *Id. Ibid.*

^(v) *Id. Ibid.*

^(z) *Rex v. Corry*, 5 East 372.

office of the said Court, or under any of the judges or officers thereof, shall, for anything done or pretended to be done relating to his office, situation, or employment, or under color of doing anything relating to his office, situation, or employment, wilfully take, demand, receive, or accept, or appoint or allow any person whatsoever to take for him or on his account, or for or on account of any person by him named, or in trust for him, or for any other person by him named, any fee, gift, gratuity, or emolument, or anything of value, other than what is allowed or directed to be taken by him as aforesaid, the person so offending, when duly convicted, shall forfeit and pay the sum of £500, and shall be removed from any office, situation, or employment he may hold in the said Court, and shall be rendered, and is hereby rendered, incapable for ever thereafter of holding any office, situation, or employment in the said Court, or otherwise serving his Majesty his heirs, or successors."

By sec. 42, "any such offender may be prosecuted either by information at the suit of his Majesty's Attorney-General, or by criminal information before his Majesty's Court of King's Bench, or by indictment."

By the 15 & 16 Vict. c. 80, masters in ordinary in the court of Chancery are abolished, and certain duties imposed upon the chief and junior clerks of the Master of the Rolls and Vice-Chancellors; and by sec. 24, "Every chief clerk and every junior clerk" appointed under the Act "shall be subject and liable to such *207] and the same prohibitions, prosecutions, penalties and punishments," *a are by the preceding Act "imposed and directed with respect to persons holding any office, situation, or employment in the said Court of Chancery, or under any of the judges or officers thereof, in the same manner as if the enactments therein contained relating to such officers of the said Court respectively were here repeated." And by the 18 & 19 Vict. c. 134, s. 2, the provisions contained in the preceding section are applied to junior clerks appointed under that Act.

Public officers may also be indicted for frauds committed in their official capacities.¹ Thus where two persons were indicted for enabling others to pass their accounts with the pay office in such a way as to enable them to defraud the government, though it was objected that it was only a private matter of account and not indictable, the Court held otherwise, as it related to the public revenue.(xx) An if an overseer of the poor receive from the putative father of a bastard child born within the parish a sum of money as a composition with the parish for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this sum in his accounts with the parish.(y) It was objected in this case, that the defendant was not bound to bring this sum to account, the contract being illegal;(z) that the whole might have been recovered back, and that the defendant himself would have been personally answerable for it to the putative father; that the money, therefore, was not the money of the parish, and that the parish was neither defrauded nor damaged by its being omitted in the overseer's accounts. But Lord Ellenborough was of opinion, that though the defendant would have been liable to the putative father for so much of the money as was not expended upon the maintenance of the child and the lying-in of the mother yet having taken the money as overseer for the benefit of the parish, he was bound to bring it to account, and that he was guilty of an indictable offence by attempting to put it into his own pocket.

So a superintendent of the county constabulary force is indictable for rendering false accounts of the moneys received by the constables and by them accounted for to him, it being his duty to render such accounts to the chief constable as a means

(xx) *Rex v. Bembridge*, cited 6 East 136.

(y) *Rex v. Martin*, 2 Campb. 268.

(z) See *Townson v. Wilson*, 1 Campb. 396.

¹ Gross negligence in the discharge of a fiduciary duty is evidence of fraud and misbehavior in office. An habitual neglect to account for small sums by a public officer authorizes and requires the presumption that the sums retained and not accounted for were retained for sinister and selfish purposes; and a gross and unscrupulous negligence in the keeping of his accounts, instead of rebutting such presumption, strengthens and supports it: *Comm. v. Rodee*, 6 B. Mon. 171.

for ascertaining the sum to be paid to himself for the pay of the constables.(a) So a clerk to the justices of the peace who impose a penalty under the Alehouse Act (9 Geo. 4, c. 61), is indictable for wilfully neglecting and refusing to pay a moiety of such penalty to the treasurer of the county according to the provisions of that Act.(b)

The 6 & 7 Vict. c. 26, s. 24, makes the officers or servants of Milbank prison liable to certain punishments on conviction before a justice of the peace for furnishing convicts with prohibited articles.

It may be observed, that where a duty is thrown on a body consisting of several persons, each is individually liable for a *breach of duty, as well for acts of [*208 commission as for omission; and where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his office, it is not necessary to state that he had notice of those acts, for he is presumed from his situation to know them.(c)

Extortion in a large sense signifies any oppression under color of right: but in a more strict sense signifies the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due.(d)¹ By the statute of Westm. (3 Edw. 1), c. 26, which is only in affirmance of the common law, it is declared and enacted to be extortion for any sheriff or other minister of the King, whose office any way concerns the administration or execution of justice, or the common good of the subject, to take any reward whatsoever, except what he received from the King. This statute extends to escheators, coroners, bailiffs, gaolers, and other inferior officers of the King, whose offices were instituted before the making of the Act.(e) Justices of the peace, whose office was instituted after the Act, are bound by their oath of office to take nothing for their office of justice of the peace to be done, but of the King, and fees accustomed, and costs limited by statute. And generally no public officer may take any other fees or rewards for doing anything relating to his office than some statute in force gives him, or such as have been anciently and accustomedly taken; and if he do otherwise, he is guilty of extortion.(f) And it should be observed, that all prescriptions which have been contrary to the statute and to the common law, in affirmance of which it was made, have been always holden to be void; as where the clerk of the market claimed certain fees as due time out of mind for the examination of weights and measures; this was adjudged to be void.(g)

But the stated and known fees allowed by the courts of justice to their respective officers, for their labor and trouble, are not restrained by the common law, or by the statute of Westm. 1, c. 26, and therefore such fees may be legally demanded and insisted upon without any danger of extortion.(h) And it seems that an officer who takes a reward, which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigor and success.(i) But it has been always holden, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take anything for is merely void, however freely and voluntarily it may appear to have been made.(k)

(a) Reg. v. Baxter, Salop Spr. Ass. 1850, MSS. C. S. G.; 5 Cox C. C. 302, Patteson, J.

(b) Reg. v. Dale, Dears. C. C. 37.

(c) Rex v. Holland, 5 T. R. 607.

(d) 4 Blac. Com. 141; 1 Hawk. P. C. c. 68, s. 1.

(e) Inst. 209; Burn's Just. tit. *Extortion*.

(f) Dalt. c. 41; Burn's Just. tit. *Extortion*.

(g) 1 Hawk. P. C. c. 68, s. 2; Bac. Abr. tit. *Extortion*.

(h) 1 Hawk. P. C. c. 68, s. 3; 2 Inst. 210; Co. Lit. 368; Bac. Abr. tit. *Extortion*.

(i) Bac. Abr. tit. *Extortion*; 2 Inst. 210; 3 Inst. 149; Co. Lit. 368.

(k) Bac. Abr. tit. *Extortion*.

¹ Williams v. State, 2 Sneed 160; State v. Brown, 12 Minn. 490; People v. Whaley, 8 Cow. 661; People v. Rust, 1 Caines 130; Gilmore v. Lewis, 12 Ohio 281; Cross v. State, 1 Yerg. 261; Shalluch v. Woods, 1 Pick. 171; Comm. v. Bayley, 7 Ibid. 279.

It has been held to be extortion to oblige the executor of a will to prove it in the bishop's court, and to take fees thereon, when the *defendants knew that
 *209] it had been proved before in the Prerogative Court.(l) And it is extortion in a *churchwarden* to obtain a silver cup or other valuable thing, by color of his office.(m) And a *coroner* is guilty of this offence, who refuses to take the view of a dead body until his fees are paid.(n) So if an *under-sheriff* obtain his fees by refusing to execute process till they are paid,(o) or take a bond for his fee before execution is sued out,(p) it will be extortion. And it will be the same offence in a *sheriff's officer* to bargain for money to be paid him by A. to accept A. and B. as bail for C., whom he has arrested;(q) or to arrest a man in order to obtain a release from him;(r) and also in a gaoler to obtain money from his prisoner by color of his office.(s) In the case of a miller, where the custom has ascertained the toll, if the miller takes more than the custom warrants, it is extortion;(t) and the same if a ferryman takes more than is due by custom for the use of his ferry.(u) And it was held that if the farmer of a market erects so many stalls, as not to leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the farmer, the taking money for the use of the stalls in such a case is extortion.(v) Where a collector of post-horse duty demanded a sum of money of a person, charging him with having let out post-horses without paying the duty, and threatening him with an Exchequer process and he thereon gave him a promissory note for five pounds, which was afterwards paid and the proceeds handed over to the farmer of the post-horse duties, it was held to be extortion.(w)

The question of exemption from toll could not be tried on an indictment against a turnpike-keeper for extortion in taking the toll; the general right to demand toll not having been denied, nor the ground of exemption notified, at the time when the toll was taken.(x) And now, by the 4 Geo. 4, c. 95, s. 50, no person who shall take more toll than he is authorized to take, shall be prosecuted by indictment for extortion or otherwise.

The 33 Geo. 3, c. 52, s. 62, enacts, that the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under color thereof, whether it be for the use of the party receiving the same, or for, or pretended to be for the use of the East India Company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his Majesty, or the Company in the East Indies, shall be deemed to be extortion and a misdemeanor at law, and punished as such. The offender is also to forfeit to the King the present
 *210] so received, or its full value; but the Court may order such *present to be restored to the party who gave it, or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

An information filed by the Attorney-General charged that the defendant, a British subject, held for a long time an office in the East Indies, under the East India Company, viz., the office of resident at Tanjore, and during all that time resided in the East Indies, and that whilst he held the said office, and within six years before the filing of the information, in the East Indies he did unlawfully receive from a certain person in the East Indies a sum of money, viz., 2000 rupees, of

(l) *Rex v. Loggen*, 1 Str. 73.

(m) *Roy v. Eyres*, 1 Sid. 307.

(n) 3 Inst. 149.

(o) *Hestcott's case*, 1 Salk. 330. The Court said that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion.

(p) *Empson v. Bathurst*, Hutt. 52, where it is said that an obligation made by extortion is against common law, for it is a robbery; and that the sheriff's fee is not due until execution.

(q) *Stotesbury v. Smith*, 2 Burr. 924.

(r) *Williams v. Lyons*, 8 Mod. 189.

(s) *Rex v. Broughton*, Trem. P. C. 111; Stark. 588.

(t) *Rex v. Burdett*, 1 Lord Raym. 149.

(u) *Rex v. Roberts*, 4 Mod. 101.

(v) *Rex v. Burdett*, 1 Lord Raym. 149.

(w) *Rex v. Higgins*, 4 C. & P. 247 (19 E. C. L. R.), Vaughan, B.

(x) *Rex v. Hamlyn*, 4 Campb. 379.

the value of £200 of lawful money of Great Britain, as a gift and present, against the statute; whereby he was guilty of extortion and a misdemeanor, and by force of the statute had forfeited the sum of £200, the value of the said rupees; and the Court of Queen's Bench held that it was no ground to arrest the judgment that the count did not state whether the rupees were Bombay, Madras, or Sicca rupees, or state the value of a single rupee; and that Court and the Court of Exchequer Chamber held that the count was good, although it did not aver that the gift was received extorsively or under color of the office; first, because, supposing that the statute were confined to such cases, the information was good after the verdict by the 7 Geo. 4, c. 64, s. 21, as it described the offence in the words of the statute creating it; and secondly, because the 33 Geo. 3, c. 52, extended to any receipt of a gift by any officer; for the object of the Legislature was to prevent any officer from receiving any gift or present of money in the East Indies absolutely, whatever the reason of the gift might be; and, although the count did not allege for whose use or pretended use the gift was received; for even if an officer receive a present under color of its being a present to the Queen, he would be guilty of an offence within the statute.(y)

Two persons may be indicted jointly for extortion where no fee was due; and there are no accessories in this offence. Upon an *indictment against the Chancellor and the registrar of a bishop, it was objected that the offices of [*211 the defendants were distinct, that what might be extortion in one might not be so in the other, and that therefore the indictment ought not to be joint. But by Parker, C. J., this would be an exception if they were indicted for taking more than they ought; but it is only against them for contriving to get money where none is due: and this is an entire charge. For there are no accessories in extortion: but he that is assisting is as guilty as the extortioner, as he that is party to a riot is answerable for the act of others (z) And an indictment against three averring that they, *colore officiorum suorum*, took so much, is good, for they might take so much in gross, and afterwards divide it amongst them, of which the party grieved could have no notice.(a)

It is said, that an indictment for extortion may be laid in any county by the 31 Eliz. c. 5, s. 4;(b) but this position has been questioned.(c) It may be tried and

(y) Reg. v. Douglas, 13 Q. B. 42 (66 E. C. L. R.). The jury had found a verdict on several counts, charging receipts of sums in rupees as gifts, after which followed a finding as to each count severally that the sum received, as in the count mentioned, was the sum of so many rupees, which sum of rupees, at the time of receiving them, was of the value of so much British money, being at the rate of 1s. 11d. per rupee; and the Court of Queen's Bench adjudged fine and imprisonment separately upon each count upon which the defendant was convicted; and further, that the defendant, in pursuance of the statute, do also forfeit to the Queen the several sums following (naming the values of the sums in rupees, as found on each count respectively), the said forfeitures amounting together to the sum of (the aggregate of the values); and further, that the defendant be imprisoned until he shall have paid the said fines and forfeitures. And the Court of Exchequer Chamber held, 1st, that this judgment was good, although it did not give the defendant the option of forfeiting the gifts actually received, as the gift itself was money; 2dly, that it was right to estimate the value at the time of the receipt, and not of the conviction; 3dly, that imprisonment in default of paying the forfeiture was rightly awarded, as that forfeiture was not arbitrarily imposed by the Court, but fixed by the statute, and super-added, by authority of the statute, to the other punishments of the offence. The Court of Queen's Bench held that the alterations in the Madras Courts made by several statutes did not preclude the issuing of a mandamus under the 13 Geo. 3, c. 63, s. 40, to examine witnesses, to the Madras Court as finally constituted, and that such a mandamus directed to the Chief Justice and other judges, who were two, of the Madras Supreme Court, requiring them to hold a Court and examine witnesses, was well executed by the Chief Justice and one other judge. See also this case as to what parchment writings are such examinations as are required by the Act to be returned to such a mandamus.

(z) Rex v. Loggen, 1 Str. 75. *Quære*, whether this was not an indictment for a conspiracy to defraud, and not for extortion. But as to the rule, that several persons may be jointly indicted for extortion, see Rex v. Atkinson, Lord Raym 1248; 1 Salk. 382.

(a) Lake's case, 3 Leon. 268; Com. Dig. tit. *Extortion*.

(b) 1 Hawk. P. C. c. 68, s. 6, note (3); Burn's Just. tit. *Extortion*; Stark. Crim. Plead. 585, note (k).

(c) 2 Hawk. P. C. c. 26, s. 50; 2 Chit. Crim. Law 294, in the note.

determined by justices of the peace at their sessions by virtue of the term "extortions" in their commission.^(d) A count for extortion ought to charge a single offence only; because every extortion from every particular person is a separate and distinct offence, and each offence requires a separate and distinct punishment, and therefore a count charging the defendant with extorting divers sums exceeding the ancient rate for ferrying men and cattle over a river is bad.^(e) The indictment must state a sum which the defendant received: but it is not material to prove the exact sum as laid in the indictment; so that if a man be indicted for taking extorsively twenty shillings, and there be proof but of one shilling, it will be sufficient.^(f) An indictment for extortion, where nothing was due, ought to state that nothing was due;^(g) and if it be for taking more than was due, it ought to show how much was due.^(h) And the extorsive agreement is not the offence, but the taking; for a pardon after the agreement, and before the taking, does not pardon the extortion.⁽ⁱ⁾

The offence of extortion is punishable at common law by fine and imprisonment; and also by a removal from the office in the execution of which it was committed;^(k) and there is a further additional punishment by the statute of Westm. 1, c. 26, by which it is enacted, "that no sheriff nor other King's officer shall take any reward to do his office, but shall be paid of that which they take of the King; and that he who so doth shall yield twice as much, *and shall be punished at the King's pleasure."^(l) And an action lies to recover this double value.^(m)

It is an offence at common law to refuse to serve an office when duly elected.⁽ⁿ⁾ And the refusal of persons to execute ministerial offices to which they are duly appointed, and from the execution of which they have no proper ground of exemption, seems in general to be punishable by indictment.

Thus it has been held to be indictable for a constable, after he has been duly chosen, to refuse to execute the office,^(o) or to refuse to take the oath for that purpose.^(p) But a person is not liable to serve the office of constable unless he be resident in a parish. Where, therefore, a person occupied a house and paid parish rates in respect of it, and carried on the trade of a printer, frequenting the house daily on all working days, and sometimes remaining there during the night at work, but not sleeping in the house, it was held that he was not liable to serve the office of constable in the parish where the house was situated.^(q) But where a person occupied a warehouse in M., and usually slept at a lodging-house in M. from Monday till Saturday, when he returned to his mother's in H., where he also had premises, and he did suit and service to the court-leet of H., the Court thought that he was liable to be appointed a constable of M.^(r)

It is sufficient, in an indictment for refusing to execute the office of constable, to state that the defendant unlawfully, &c., "did neglect and refuse to take upon himself the execution of the said office;" and it is not necessary to state that he refused to be sworn.^(s) Upon such an indictment, proof that he refused to be sworn is sufficient *prima facie* evidence of a refusal to take the office; but if it

(d) *Rex v. Loggen*, 1 Str. 73.

(e) *Rex v. Roberts*, Carth. 226.

(f) *Rex v. Burdett*, 1 Lord Raym. 149; and see *Rex v. Gillham*, 6 T. R. 267.

(g) *Lake's case*, 3 Leon 268; Com. Dig. tit. *Extortion*.

(h) *Ibid.*

(i) By Holt, C. J., in *Rex v. Burdett*, 1 Lord Raym. 149.

(k) 1 Hawk. P. C. c. 68, s. 5; Bac. Abr. tit. *Extortion*.

(l) By the "king's pleasure" is meant by the king's justices before whom the cause depends, and at their discretion: 2 Inst. 210.

(m) Com. Dig. 323, tit. *Extortion* (C).

(n) *Rex v. Bower*, 1 B. & C. 587 (8 E. C. L. R.).

(o) *Rex v. Lowe*, 2 Str. 92; *Reg. v. Chapple*, 3 Campb. 91; *Rex v. Genge*, Cowp. 13; *Rex v. Clerke*, 1 Keb. 393.

(p) *Rex v. Harpur*, 5 Mod. 96; *Fletcher v. Ingram*, 5 Mod. 127.

(q) *Rex v. Adlard*, 4 B. & C. 772 (10 E. C. L. R.); 7 D. & R. 340; see *Donne v. Martyn*, 8 B. & C. 62 (15 E. C. L. R.).

(r) *Rex v. Mosley*, 3 A. & E. 488 (30 E. C. L. R.); 5 N. & M. 261 (56 E. C. L. R.). See this case as to what is an excessive fine for refusing to serve the office.

(s) *Rex v. Brain*, 3 B. & Ad. 614 (23 E. C. L. R.).

were proved that, although not sworn, he had acted as constable, the refusal to take the oath would not prove that he refused to take the office.^(s)

Where there is a special custom of swearing-in constables, as in the city of London, it is unnecessary to set such custom out in the indictment.^(s)

The 1 & 2 Will. 4, c. 41, which authorizes justices in cases of tumult, riot, &c., to appoint special constables, enacts, by secs. 7 & 8, that any person appointed and neglecting to take the oath, and act, shall be liable to certain penalties.^(t) So a person is indictable for refusing to take upon himself the office of overseer of the poor.^(u) For though the 43 Eliz. c. 2 says only that certain *persons [*213 therein described shall be overseers, and gives no express indictment for a refusal of the office, yet upon the principles of common law, which are that every man shall be indicted for disobeying a statute, the refusal to serve when duly appointed is indictable.^(v) But there should be previous notice of the appointment, and the indictment should show that the defendant was bound to undertake the office by setting forth how he was elected.^(w) And if an indictment for refusing to serve the office of constable on being thereto chosen by a corporation do not set forth the prescription of the corporation so to choose, it is bad; for a corporation has no power of common right to choose a constable.^(x)

An indictment for refusing to execute an office must aver that the party had notice of the appointment.^(y)

*CHAPTER THE FIFTEENTH.

[*214

OF BUYING AND SELLING OFFICES.

CONCERNING the sale of offices of a public nature, it has been well observed, that nothing can be more palpably prejudicial to the good of the public, than to have places of the highest concernment, on the due execution whereof the happiness of both king and people depends, disposed of, not to those who are most able to execute them, but to those who are most able to pay for them; nor can anything be a greater discouragement to industry and virtue than to see those places of trust and honor, which ought to be the rewards of persons who by their industry and diligence have qualified themselves for them, conferred on those who have no other recommendation than that of being the highest bidders; neither can anything be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of having been at a great expense in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations.^(a)

The buying and selling such offices has therefore been considered an offence

(s) *Rex v. Brain*, 3 B. & Ad. 614 (23 E. C. L. R.).

(t) See also 5 & 6 Will. 4, c. 43, and c. 76, s. 83; 2 & 3 Vict. c. 93, s. 8. Special constables appointed under the 1 & 2 Will. 4, c. 41, continue to retain their authority till they have notice under s. 9 of the determination of their services, although such notice may not be given for many years: *Reg. v. Porter*, 9 C. & P. 778 (38 E. C. L. R.), Coleridge, J.

(u) *Rex v. Jones*, 2 Str. 1145; s. c., 7 Mod. 410; 1 Bott. 360, pl. 377; *Rex v. Poynder*, 1 B. & C. 178 (8 E. C. L. R.); s. c., 2 D. & R. 258; *Rex v. Hall*, 1 B. & C. 123 (8 E. C. L. R.); s. c., 2 D. & R. 241.

(v) *Rex v. Jones*, 1 Bott. *supra*.

(w) *Rex v. Harpur*, 5 Mod. 96. In *Rex v. Burder*, 4 T. R. 778, it was held that an appointment of an overseer of the poor for the year next ensuing must be understood to be for the overseer's year: and an indictment, stating that the defendant was appointed "overseer of the poor of the parish of A.," and that he afterwards refused "to take the said office of overseer of the parish to which he was appointed," was held good on demurrer.

(x) *Rex v. Bernard*, 2 Salk. 52; 1 Lord Raym. 94.

(y) *Rex v. Fearnley*, 1 T. R. 316; *Rex v. White*, Cald. 183; *Rex v. Winship*, Cald. 72; *Rex v. Kingston*, 8 East 41.

(a) 1 Hawk. P. C. c. 67, s. 3; Bac. Abr. tit. *Offices and Officers*.

malum in se, and indictable at common law.^(b) In a case of an indictment for conspiracy to obtain money, by procuring from the lords of the Treasury the appointment of a person to an office in the customs, it was proposed to argue that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of coast-waiter. But Lord Ellenborough, C. J., said that if that were to be made a question, it must be debated on a motion in arrest of judgment, or on a writ of error; but that, after reading the case *Rex v. Vaughan*^(c) it would be very difficult to argue that the offence charged in the indictment was not a misdemeanor. And Grose, J., afterwards, in passing sentence, said that there could be no doubt but that the offence charged was clearly a misdemeanor at common law.^(d)

The case of *Rex v. Vaughan*, was an attempt only to bribe a cabinet minister and a member of the Privy Council to give the defendant an office in the colonies. And where the defendant, who was clerk to the agent for the French prisoners of war at Porchester Castle, took bribes in order to procure the exchange of some of them out of their turn, it appears to have been made the subject of an indictment.^(e)

*But it has been endeavored to prevent the mischiefs of buying and selling offices, by several statutes.

The 12 Rich. 2, c. 2, enacted, "that the chancellor, treasurer, keeper of the privy seal, steward of the King's house, the King's chamberlain, clerk of the rolls, the justices of the one bench and of the other, barons of the Exchequer, and all other that shall be called to ordain, name, or make, justices of the peace, sheriffs, escheators, customers, comptrollers, or any other officer or minister of the King, shall be firmly sworn that they shall not ordain, name, or make, any of the above-mentioned officers for any gift or brokage, favor or affection; nor that none which pursueth by himself, or by other, privily or openly, to be in any manner of office, shall be put into the same office, or any other, but that they make all such officers and ministers of the best and most lawful men, and sufficient to their estimation and knowledge."^(g)

The 4 Hen. 4, c. 5, ordained "that no sheriff shall let his bailiwick to farm to any man for the time that he occupieth such office."

But a principal statute relating to this subject is the 5 & 6 Edw. 6, c. 16,^(h) which, for the avoiding corruption which might thereafter happen in the officers, in places wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced should thereafter be preferred, enacts, that if any person bargain or sell any office, or deputation of office, or take any money or profit directly or indirectly, or any promise, &c., bond, or any assurance to receive any money, &c., for any office or deputation of office, or to the intent that any person should have, exercise, or enjoy, any office, or the deputation of any office, which office, or any part or parcel thereof, shall in anywise concern the administration or execution of justice, or the receipt, controlment, or payment of the King's treasure, rent, revenue, &c., or any the King's customs, or the keeping the King's towns, castles, &c., used for defence, or which shall concern any clerkship in any court of record where justice is ministered; the offender shall not only forfeit all his right to such office or deputation of office, but also shall be adjudged a person disabled to have, occupy, or enjoy such office or deputation. The statute further enacts, that such bargains, sales, bonds, agreements, &c., shall be void;⁽ⁱ⁾ and provides that the Act shall not

(b) *Stockwell v. North*, Noy 102; Moor 781, s. c.

(c) 4 Burr. 2494.

(d) *Rex v. Pollman*, 2 Campb. 229.

(e) 4 Burr. 2494. A criminal information was granted against the defendant for offering the Duke of Grafton, then First Lord of the Treasury, the sum of £5000 as a bribe to procure the reversion of the office of clerk of the Supreme Court of the island of Jamaica.

(f) *Rex v. Beale*, cited in *Rex v. Gibbs*, 1 East R. 183.

(g) For the exposition of this statute, see the Earl of Macclesfield's trial, 6 Sta. Tri. 416 Howell's Sta. Tri. 767.

(h) Repealed, "so far as regards the revenue of customs, or offices in the service of customs," by 6 Geo. 4, c. 105, s. 10.

(i) Sec. 3.

extend to any office whereof any person shall be seised of any estate of inheritance, nor to any office of the keeping of any park, house, manor, garden, chase, or forest.^(k) It provides also that all judgments given or things done by offenders, after the offence and before the offender shall be removed from the exercise of the office or deputation, shall be good and sufficient in law.

The 26 & 27 Vict. c. 125, repeals the last two sections of the 5 & 6 Edw. 6, c. 15.^(l)

*It has been held that the offices of chancellor, registrar, and commissary in ecclesiastical courts, are within the meaning of this statute,^(m) also [216 the place of cofferer,⁽ⁿ⁾ and that of surveyor of the customs;^(o) and the place of customer of a port;^(p) and the offices of collector and supervisor of the excise;^(q) and in a writ of error on a judgment in Ireland it was held clearly that the offices of clerk of the crown, and clerk of the peace, were within the statute.^(r) But offices in fee have been held to be out of the statute;^(s) and the sale of a bailiwick of a hundred is not within it, for such an office does not concern the administration of justice, nor is it an office of trust.^(t) And for the like reason the office of clerk to the deputy registrar in the prerogative Court of Canterbury is not within the Act.^(u) It has also been adjudged that a seat in the six clerks' office is not within the statute, being a ministerial office only;^(v) and it was held that it did not extend to military officers,^(w) nor to the purser of a ship,^(x) but this last decision was doubted;^(y) and in a latter case it was said by Lord Mansfield, that if the Lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corrupter and corrupted.^(z) It was decided also that this statute did not extend to the plantations.^(a) But with respect to military and naval commissions, and the different places in the public departments of government, the colonies or plantations, or in the appointment of the East India Company, alterations have been made by a recent statute, which will be presently mentioned.

One who makes a contract for an office contrary to the purport of this statute, is so far disabled to hold the same, that he cannot at any time during his life be restored to a capacity of holding it by any grant or dispensation whatever.^(b)

*With regard to the *deputation* of an office, it is held that where an office is within the statute, and the salary is certain, if the principal make a [217

(k) Sec. 4.

(l) Sec. 5. The 6 Geo. 4, c. 89, authorized the purchase of the office of receiver and comptroller of the seal of the Court of King's Bench and Common Pleas, and of the *custos brevium* of the Court of Common Pleas by the Commissioners of the Treasury, for certain annuities; and after the confirmation of the agreement by Parliament the rights and interests of all persons claiming or entitled to claim under the letters patent mentioned in the Act, are to cease and determine.

(m) 12 Co. 78; 3 Inst. 148; Cro. Jac. 269; 1 Hawk. P. C. c. 67, s. 4.

(n) Sir Arthur Ingram's case, 3 Bulst. 91; s. c., Co. Lit. 234, where it is said that the king could not dispense with this statute by any *non obstante*; and Cro. Jac. 385, s. c. is cited.

(o) 2 And. 55, 107.

(p) 1 H. Blac. 327.

(q) Law v. Law, Cas. temp. Talb. 140; 3 P. Wms. 391, s. c.

(r) Macarty v. Wickford, Trin. 9 Geo. 2, B. R.; Bac. Abr. *Officer and Officers* (F). It was also held in this case, that the statute did not extend to Ireland. But see *post*, 49 Geo. 3, c. 126, next page.

(s) Ellis v. Ruddle, 2 Lev. 151.

(t) Godbolt's case, 4 Leon. 33; 4 Mod. 233, s. c. cited.

(u) Aston v. Gwinnell, 3 Y. & J. 136.

(v) Sparrow v. Reynold, Pasch. 26 Car. 2, C. B.; Bac. Abr. *Offices and Officers* (F).

(w) 1 Vern. 98.

(x) 2 Vern. 308; Ca. temp. Talb. 40.

(y) See 1 H. Blac. 326, where it is said by Lord Loughborough, C. J., that the case in 2 Vern. is contrary to an evident principle of law.

(z) Purdy v. Stacy, 5 Burr. 2698.

(a) Blankard v. Galdy, 4 Mod. 222; 2 Salk. 411; 2 Lord Raym. 1245, s. c. cited, 2 Mod. 45, s. c. undetermined; and see Bac. Abr. *Offices and Officers* (F). But if the office, though in the plantations, had been granted under the great seal of England, the sale of it would have been held criminal at common law. See the judgment of Lord Mansfield in *Rex v. Vaughan*, 4 Burr. 2500.

(b) Hob. 75; Co. Lit. 234; Cro. Car. 361; Cro. Jac. 386; Ca. temp. Talb. 107.

deputation reserving a less sum out of the salary, it is good: so, if the profits uncertain, arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good: for in these cases the deputy is not to pay unless the profits arise to so much; and though a deputy in his constitution is in place of his principal, yet he has no right to his fees, though still continuing to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation of an agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute.(c)

But this statute has been much extended by the 49 Geo. 3, c. 126, which, after reciting it, enacts, "that all the provisions therein contained shall extend to Scotland and Ireland, and to all offices in the gift of the crown, or of any office appointed by the crown; and all commissions, civil, naval, or military; and to all places and employments, and to all deputations to any such offices, commissions, places, or employments, in the respective departments or offices, or under the appointment or superintendence and control of the lord high treasurer, or commissioners of the treasury, the secretary of state, the lords commissioners for executing the office of lord high admiral, the master-general and principal officers of his Majesty's ordnance, the commander-in-chief, the secretary of war, the paymaster-general of his Majesty's forces, the commissioners for the affairs of India, the commissioners of the excise, the treasurer of the navy, the commissioners of the navy, the commissioners for victualling, the commissioners of transports, the commissary-general, the storekeeper-general, and also the principal officers of any other public department or office of his Majesty's government in any part of the United Kingdom, or in any of his Majesty's dominions, colonies, or plantations, which now belong or may hereafter belong to his Majesty; and also to all offices, commissions, places, and employments belonging to or under the appointment or control of the East India Company,(d) in as full and ample a manner as if the provisions of the said Act were repeated, and made part of this Act: and the said Act and this Act shall be construed as one Act, as if the same had been herein repeated and re-enacted."

Sec. 3. "If any person or persons shall sell, or bargain for the sale of, or receive, have, or take any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, or any promise, agreement, covenant, contract, bond or assurance; or shall by any way, device, or means, contract or agree to receive or have any money, *218] fee, gratuity, loan of money, reward, or *profit, directly or indirectly; and also if any person or persons shall purchase, or bargain for the purchase of, or give or pay any money, fee, gratuity, loan of money, reward, or profit, or make or enter into any promise, agreement, covenant, contract, bond, or assurance to give or pay any money, fee, gratuity, loan of money, reward, or profit; or shall by any ways, means, or device, contract or agree to give or pay any money, fee, gratuity, loan of money, reward or profit, directly or indirectly, for any office, commission, place, or employment, specified or described in the said recited Act (5 & 6 Edw. 6, c. 16), or this Act, or within the true intent or meaning of the said Act, or this Act, or for any deputation thereto, or for any part, parcel, or participation of the profits thereof, or for any appointment or nomination thereto, or resignation thereof, or for the consent or consents, or voice or voices of any person or persons, to any such appointment, nomination, or resignation; then and in every such case, every such person, and also every person who shall wilfully and knowingly aid, abet or assist such person therein, shall be deemed and adjudged guilty of a misdemeanor."

Sec. 4. "If any person or persons shall receive, have, or take, any money, fee,

(c) Bac. Abr. *Offices and Officers* (F); 1 Hawk. P. C. c. 67, s. 5; Salk. 468; 6 Mod. 234; Godolphin v. Tudor, Comb. 356, s. p.

(d) By the 33 Geo. 3, c. 52, s. 66, it was enacted that the making or entering into or being a party to any corrupt bargain or contract, for the giving up or obtaining, or in any other manner touching or concerning the trust and duty of any office or employment under the crown, or the East India Company, by any British subject there resident, should be deemed a misdemeanor.

award, or profit, directly or indirectly, or take any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree to receive or have any money, fee, gratuity, loan of money, reward, or profit, directly or indirectly, for any interest, solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, or pretended to be made, or under any pretence of making, or causing or procuring to be made, any *interest, solicitation, petition, request, recommendation, or negotiation*, in or about or in anywise touching, concerning, or relating to, any nomination, appointment, or deputation to, or resignation of, any such office, commission, place, or employment, as aforesaid, or under any pretence for using or having used any interest, solicitation, petition, request, recommendation, or negotiation, in or about any such nomination, appointment, deputation, or resignation, or for the obtaining or having obtained the consent or consents, or voice or voices, of any person or persons as aforesaid to such nomination, appointment, deputation, or resignation; and also if any person or persons shall give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward, or profit, or make, or cause, or procure to be made, any promise, agreement, covenant, contract, bond, or assurance, or by any way, means, or device, contract or agree, or give or pay, or cause or procure to be given or paid, any money, fee, gratuity, loan of money, reward, or profit, for any solicitation, petition, request, recommendation, or negotiation whatever, made or to be made, that shall in anywise touch, concern, or relate to any nomination, appointment, or deputation to, or resignation of, any such office, commission, place, or employment as aforesaid, or for the obtaining or having obtained, directly or indirectly, the consent or consents, or voice or voices, of any person or persons as aforesaid, to any such nomination, appointment, deputation, or resignation; and also if any person or persons shall, for or in expectation of gain, fee, gratuity, loan of money, reward, or profit, solicit, *recommend, or negotiate, in any manner, for any person or persons, in any matter that shall in anywise touch, concern, or relate to, [*219 any such nomination, appointment, deputation, or resignation aforesaid, or for the obtaining, directly or indirectly, the consent or consents, or voice or voices, of any person or persons to any such nomination, appointment, or deputation, or resignation aforesaid, then and in every such case every such person, and also every person who shall wilfully and knowingly aid, abet or assist, such person therein, shall be deemed and adjudged guilty of a misdemeanor."

Sec. 5. If any person shall open or keep any house or place for the soliciting or negotiating any business relating to vacancies in offices, &c., in or under any public department, or to the sale or purchase of such offices, or appointment to them, or resignation, transfer, or exchange of them, such offender, and every person aiding or assisting therein, is guilty of a misdemeanor. And by sec. 6, any person advertising any office, place, &c., or the name of any person as broker, &c., or printing any advertisement or proposal for such purposes, is liable to a penalty of £50.

There are, however, several exceptions from the provisions of this statute. It does not extend to commissions or appointments in the band of gentlemen pensioners, or in his Majesty's yeoman guard, or in the Marshalsea, or the Court of the King's Palace at Westminster; or to purchases and exchanges of commissions in his Majesty's forces, at the regulated prices; or to anything done in relation thereto by authorized regimental agents not advertising and not receiving money, &c., in that behalf.^(e) But officers receiving or paying, or agreeing to pay, more than the regulated prices, or paying agents for negotiating, on conviction by a court-martial, are to forfeit their commissions, and be cashiered.^(f)

And it is provided also, that every person who shall sell his commission in his Majesty's forces, and not continue to hold any commission, and shall upon or in relation to such sale receive, directly or indirectly, any money, &c., beyond the regulated price of the commission sold, and every person who shall aid or assist such person therein, shall be guilty of a misdemeanor.

(e) 49 Geo. 3, c. 126, s. 7; and the 53 Geo. 3, c. 54, except purchases, &c., of any commissions or appointments in the battle-axe guards in Ireland.

(f) 49 Geo. 3, c. 126, s. 8. And the commission is to be sold, and half the produce, not exceeding £500, to be paid to the informer, and the remainder to go to the King.

This Act also provides, that it shall not extend to any office excepted from the 5 & 6 Edw. 6, c. 16, or to any office which was legally saleable before the passing of this Act, and in the gift of any person by virtue of any office of which such person is or shall be possessed under any patent or appointment for his life; or to render invalid, or in any manner to affect any promise, covenant, trust, &c., entered into or declared before the passing of this Act, and which then was valid in law or equity. (g)

With respect to *deputations* to offices, it is enacted, that the Act shall not extend to prevent or make void any deputation to any office, in any case in which it is lawful to appoint a deputy, or any agreement, &c., lawfully made in respect of a *220] allowance or payment to such principal or deputy respectively, out of the fees or profits of such office. (h)

Annual reservations, charges, or payments, out of fees or profits of any office, to any person who shall have held such office, in any commission, or appointment of any person succeeding to such office, and agreements, &c., for securing such reservations, charges, or payments, are also excepted; provided that the amount of the reservations, &c., and the circumstances and reasons under which they shall have been permitted, shall be stated in the commission or instrument of appointment of the successor. (i)

The statute enacts, that when the right, estate, or interest, of any person shall be forfeited under any of its provisions, or the provisions of the 5 & 6 Edw. 6, c. 16, the right of such appointment shall vest in the King. (k)

Offences against this Act, or the 5 & 6 Edw. 6, c. 16, by any governor, lieutenant-governor, or person having the chief command, civil or military, in his Majesty's dominions, colonies, or plantations, or his secretary, may be prosecuted and determined in the Court of King's Bench at Westminster, in the same manner as any crime, &c., committed by any person holding a public employment abroad may be prosecuted under the provisions of the 42 Geo. 3, c. 85. (l)

Any person who shall commit in Scotland any misdemeanor against this Act shall be liable to be punished by fine and imprisonment, or by the one or the other of such punishments, as the judge or judges, before whom the offender shall be committed, may direct. (m)

Where by an agreement, reciting that the plaintiff carried on the business of a law stationer, and sub-distributor of stamps, collector of assessed taxes, and agent for the Birmingham Fire Office, and that being desirous of giving up his said business, he had agreed with the defendant for the sale of the same for the sum of £300, it was witnessed that, in consideration of the sum of £300, the plaintiff agreed to sell and the defendant agreed to buy all the said business of a law stationer so carried on by the plaintiff, and all his good-will and interest therein, and that the plaintiff should not at any time afterwards carry on the business of a law stationer, or collect any of the assessed taxes, but would use his utmost endeavors to introduce the defendant to the said business and offices; it was held that the agreement was a contract for the sale of the offices of sub-distributor of stamps and collector of assessed taxes, and illegal within both the 5 & 6 Edw. 6, c. 16, and 49 Geo. 3, c. 126. It was one entire contract, and the defendant could not be called upon to pay, except upon the performance by the plaintiff of the whole consideration. According to the plain words of the agreement, a part of the consideration was the agreement by the plaintiff to recommend the defendant to the offices, which was prohibited by the statutes. (n)

*221] Where a British subject, being a lieutenant in a regiment in the *East India service, and divers other officers in the said regiment, agreed with G. that the said lieutenant and other officers should subscribe and pay to the said

(g) 49 Geo. 3, c. 126, s. 9.

(h) 49 Geo. 3, c. 126, s. 10. And see *ante*, 217.

(i) *Id.* s. 11. Sec. 12 contains an exception as to the masters, six clerks, and examiners of the Chancery in Ireland, till after the death, &c., of the present possessors.

(k) *Id.* s. 2.

(l) *Id.* s. 14.

(m) 49 Geo. 3, c. 126, s. 13.

(n) *Hopkins v. Prescott*, 4 C. B. 578 (56 E. C. L. R.).

. G., being a major and their senior in the said regiment, and that he should accept from them a certain sum of money in consideration of his resigning his said position as major in the said regiment, and creating a vacancy of major therein, and the money was paid to A. G., and he resigned his said position in pursuance of the said agreement; it was held that the agreement was illegal, under the 49 Geo. 3, c. 126, s. 4, and that a bond given in pursuance of it was void. (o)

The sale of an East India Director's nomination to a cadetship is within the 49 Geo. 3, c. 126, s. 3, although by the practice of the Company such nomination is given only in the form of a presentation of the party by the Director to the Court of Directors, "provided he shall appear to" them "eligible for that station," and must afterwards be examined by the committee appointed for that purpose, and passed; and although the nomination only gives the party, when examined and passed, a right to go out to India, which he must do at his own expense, and obtain a commission on his landing; but before that time he receives no pay from the Company, and is not under their control. For the object of the enactment was to prevent all corrupt bargains for the sale of patronage in matters of public concernment; and with that view it is immaterial whether that to which the nomination is sold can be described with most critical correctness by any of the terms, "office, commission, place, or employment." And a cadetship may be described in an indictment under the Act as an "office, commission, place, and employment." (p)

A., an attorney, who held the offices of clerk of the peace for a liberty, clerk to the commissioners of land and assessed taxes, clerk to the commissioners of sewers, clerk to the magistrates, clerk to the deputy-lieutenants, steward of divers manors, and coroner to the said liberty, entered into articles of partnership with B., by which, after reciting that he held many offices, &c., and that it had been agreed that they should enter into partnership "in the said business and in the emoluments of the said offices, &c., upon the terms thereafter expressed," it was agreed that they should enter into partnership for twenty years, and that "all the profits and emoluments arising from the said offices," &c., during the said partnership, should be considered as partnership property, and distributed accordingly; it was also agreed that if A. died within the term, then, during such period as no son of A. should be a partner in the said business, B. should be interested in one moiety of the said business, and the executors of A. should be entitled to the profits of the other moiety of the said business, to be applied as part of his personal estate; and it was held that the agreement was not a contract for the sale of an office within the 5 & 6 Edw. 6, c. 16 or 49 Geo. 3, c. 126. (q)

Where a count of an indictment for a misdemeanor in the sale of the office of a chaplain in the East Indies, alleged that the *defendants unlawfully and corruptly did contract and agree with D. N. to procure the appointment to [222] certain office and employment under the appointment and control of the East India Company, to wit, the office and employment of a chaplain in India, of a person duly qualified for the said office to be named by the said D. N. in that behalf; it was held that the count was bad; for the contract or agreement must be to receive money or profit, and the word "corruptly," is not sufficient to bring it within the Act. (r)

(o) *Græme v. Wroughton*, 11 Exch. 146.

(p) *Reg. v. Charretie*, 13 Q. B. 447 (66 E. C. L. R.).

(q) *Serry v. Clifton*, 9 C. B. 110 (67 E. C. L. R.). It was also held that the latter clause was not a violation of the 22 Geo. 2, c. 46, s. 11, repealed by the 7 & 8 Vict. c. 73.

(r) *Samo v. The Queen*, 2 Cox C. C. 178.

*223]

*CHAPTER THE SIXTEENTH.

OF BRIBERY.

BRIBERY is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and incline him to do that which is contrary to the known rules of honesty and integrity.^(a) And it seems that an offence will be committed by any person in an official situation, who shall corruptly use the power or interest of his place for rewards or promises: as in the case of one who was clerk to the agent for French prisoners of war, and indicted for taking bribes in order to procure the exchange of some of them out of prison.^(b) And bribery sometimes signifies the taking or giving of a reward for the performance of offices of a public nature.^(c) Corrupt and illegal practices in giving reward for making promises, in order to procure votes in the elections of members to serve in Parliament, are also denominated bribery, and punishable by common law, and by statute.^(d) So, giving refreshments to voters before they vote, in order to induce them to vote for a particular candidate, is bribery at common law.^(e) And an attempt to influence persons serving as jurymen corruptly to one side, by gift or promise (which, with other practices tending to influence a jury, will be considered in treating of the crime called *embracery*),^(f) may be mentioned as a species of bribery.

The law abhors the least tendency to corruption; and upon the principle which has been already mentioned, of an attempt to commit even a misdemeanor, being itself a misdemeanor,^(g) attempts to bribe, though unsuccessful, have in several cases been held to be criminal. Thus, it is laid down generally, that if a person offers a bribe to a judge, meaning to corrupt him in a case depending before him, and the judge takes it not; yet this is an offence punishable by law in the person that offers it.^(h) And it has been held to be a misdemeanor to attempt to bribe a cabinet minister, and a member of the Privy Council, to give the defendant an office in the colonies.⁽ⁱ⁾ And an information was granted against a man for promising money to a member of a corporation, to induce him to vote for the election of a mayor.^(j) An information also appears to have been exhibited against a person for attempting by bribery to influence a jurymen in giving his verdict.^(k) Where a police officer was offered £1000 to assist a party in obtaining possession of a ward of the Court of Chancery, who had a fortune of £5000, and who afterwards married such party; Lord Eldon, C., said "the endeavor to bribe a man to commit an offence is itself a very serious offence, and a person who made that offer may not be aware of his danger."^(l)

Bribery at elections for members of Parliament was always a crime at common law, and consequently punishable by indictment or information;^(m) but in order to enforce the common law, and because it had not been found sufficient to pre-

(a) 3 Inst. 149; 1 Hawk. P. C. c. 67, s. 2; 4 Blac. Com. 139.

(b) Rex v. Beale, E. T. 38 Geo. 3, cited in Rex v. Gibbs, 1 East R. 183; and see Rex v. Vaughan, 4 Burr. 2494, ante, 214.

(c) 1 Hawk. P. C. c. 67, s. 3. As to this species of bribery, see the preceding chapter.

(d) Rex v. Pitt, 3 Burr. 1338; 2 Geo. 2, c. 24; 49 Geo. 3, c. 118.

(e) Hughes v. Marshall, 2 Tyrw. 134; s. c., 2 C. & J. 118; 5 C. & P. 151 (24 L. R.).

(f) Post, Chap. xxi.

(g) Ante, p. 84.

(h) 3 Inst. 147; Rex v. Vaughan, 4 Burr. 2500; ante, 214.

(i) Vaughan's case, 4 Burr. 2494, ante, 214; and see Rex v. Pollman, 2 Campb. 23.

(j) Plympton's case, 2 Ld. Raym. 1377.

(k) Young's case, cited in Rex v. Higgins, 2 East R. 14 and 16.

(l) Wade v. Broughton, 3 Ves. & B. 172.

(m) Rex v. Pitt, 3 Burr. 1335, by Lord Mansfield, C. J.

¹ Dishon v. Smith, 10 Iowa 212; State v. Ellis, 33 N. J. (Law) 102.

the evil, considerable penalties have been imposed upon this offence by different statutes.

The 7 & 8 Will. 3, c. 7, s. 4, enacts, that all contracts, promises, bonds, and securities to procure any return of any member to serve in Parliament, or anything relating thereunto, shall be void; and that whoever makes or gives such contract, security, promise, or bond, or any gift or reward, to procure a false or double return, shall forfeit three hundred pounds.⁽ⁿ⁾

The 17 & 18 Vict. c. 102 consolidated and amended the laws relating to bribery, treating and undue influence at elections of members of Parliament.

Sec. 2. "The following persons shall be deemed guilty of bribery, and shall be punishable accordingly:—

1. "Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or to endeavor to procure, any money, or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person in order to induce any voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election:

2. "Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavor to procure, any office, place, or employment to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election:

3. "Every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement as aforesaid, to or for any person, in order to induce such person to procure, or endeavor to procure, the return of any person to serve in Parliament, or the vote of any voter at any election:

*4. "Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise, or endeavor to procure the return of any person to serve in Parliament, or the vote of any voter at any election:

5. "Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election.

"And any person so offending shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine and imprisonment, and shall also be liable to forfeit the sum of one hundred pounds to any person who shall sue for the same, together with full costs of suit; provided always, that the aforesaid enactment shall not extend or be construed to extend to any money paid or agreed to be paid for or on account of any legal expenses *bonâ fide* incurred at or concerning any election."

Sec. 3. "The following persons shall also be deemed guilty of bribery, and shall be punishable accordingly:—

1. "Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place or employment for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting, at any election:

2. "Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration

(n) One-third to the King, one-third to the poor of the place concerned, and one-third to the informer with his costs, to be recovered by action or information. But if it appears to be a void election, an action for this penalty is not maintainable: 1 Hawk. P. C. c. 67, s. 8, in the margin.

on account of any person having voted or refrained from voting, or having induced any other person to vote or to refrain from voting, at any election.

"Any person so offending shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine and imprisonment, and shall also be liable to forfeit the sum of ten pounds to any person who shall sue for the same, together with full costs of suit."

Sec. 4. "Every candidate at an election, who shall corruptly by himself, or by or with any person, or by any other ways or means on his behalf, at any time, either before, during, or after any election, directly or indirectly, give or provide, or cause to be given or provided, or shall be accessory to the giving or providing, or shall pay, wholly or in part, any expenses incurred for any meat, drink, entertainment, or provision to or for any person, in order to be elected, or for being elected, or for the purpose of corruptly influencing such person or any other person to give or refrain from giving his vote at such election, or on account of such person having voted or refrained from voting, or being about to vote or refrain from voting, at such election, shall be deemed guilty of the offence of treating, and shall forfeit the sum of fifty pounds to any person who shall sue for the same, with full costs of suit; and every voter who shall corruptly accept or take any such meat, drink, entertainment, or provision, shall be incapable *of voting at such election, and his vote, if given, shall be utterly void and of none effect."

Sec. 5. "Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, make use of, or threaten to make use of, any force, violence, or restraint, or inflict, or threaten the infliction by himself or by or through any other person, of any injury, damage, harm, or loss, or in any other manner practice intimidation upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting, at any election, or who shall by abduction, duress, or any fraudulent device or contrivance, impede, prevent, or otherwise interfere with the free exercise of the franchise of any voter, or shall thereby compel, induce, or prevail upon any voter, either to give or to refrain from giving his vote at any election, shall be deemed to have committed the offence of undue influence, and shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine or imprisonment, and shall also be liable to forfeit the sum of fifty pounds to any person who shall sue for the same, together with full costs of suit."

Sec. 6. When it is proved before a revising barrister that any person has been convicted of bribery or undue influence, or has had judgment against him for any penal sum recovered for bribery, treating, or undue influence, the barrister is to expunge from the list of voters the name of such person, or disallow his claim to be inserted, and make a separate list of such persons.

Sec. 7. "No candidate before, during, or after any election shall in regard to such election, by himself or agent, directly or indirectly, give or provide to or for any person having a vote at such election, to or for any inhabitant of the county, city, borough, or place for which such election is had, any cockade, ribbon, or other mark of distinction; and every person so giving or providing shall for every such offence forfeit the sum of two pounds to such person as shall sue for the same, together with full costs of suit; and all payments made for on account of any chairing, or any such cockade, ribbon, or mark of distinction as aforesaid, or of any bands of music or flags or banners, shall be deemed illegal payments within this Act."

Sec. 8. No voter is to be compelled to serve as a special constable during an election unless he consents so to act, or shall be liable to any fine for refusing to act. Sec. 9 provides for the recovery of penalties imposed by the Act.

Sec. 10. "It shall be lawful for any criminal Court, before which any prosecution shall be instituted for any offence against the provisions of this Act, to order payment to the prosecutor of such costs and expenses as to the said Court shall appear to have been reasonably incurred in and about the conduct of such prosecution; provided always, that no indictment for bribery or undue influence shall be triable before any Court of quarter sessions."

Sec. 12. "In case of any indictment or information by a private prosecutor for

any offence against the provisions of this Act, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the defendant *by reason of such indictment or information, such costs to be taxed by the proper officer of the Court in which such judgment shall be given." [*227]

Sec. 13. "It shall not be lawful for any Court to order payment of the costs of prosecution for any offence against the provisions of this Act, unless the prosecutor shall, before or upon the finding of the indictment or the granting of the information, enter into a recognizance, with two sufficient sureties, in the sum of two hundred pounds (to be acknowledged in like manner as is now required in cases of writs of *certiorari* awarded at the instance of a defendant in an indictment), with the conditions following; that is to say, that the prosecutor shall conduct the prosecution with effect, and shall pay to the defendant or defendants, in case he or they shall be acquitted, his or their costs."

Sec. 14. "No person shall be liable to any penalty or forfeiture hereby enacted or imposed, unless some prosecution, action or suit for the offence committed shall be commenced against such person within the space of one year next after such offence against this Act shall be committed, and unless such person shall be summoned or otherwise served with writ or process within the same space of time, so as such summons or service of writ or process shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the Court out of which such writ or other process shall have issued; and in case of any such prosecution, suit, or process as aforesaid, the same shall be proceeded with and carried on without any wilful delay." (q)

Sec. 23. "The giving or causing to be given to any voter on the day of nomination or day of polling, on account of such voter having polled or being about to poll, any meat, drink, or entertainment, by way of refreshment, or any money or ticket to enable such voter to obtain refreshment, shall be deemed an illegal act, and the person so offending shall forfeit the sum of forty shillings for each offence to any person who shall sue for the same, together with full costs of suit." (r)

Sec. 36. "If any candidate at any election for any county, city, or borough shall be declared by any election committee guilty, by himself or his agents, of bribery, treating, or undue influence at such election, such candidate shall be incapable of being elected or sitting in Parliament for such county, city, or borough during the Parliament then in existence."

Sec. 38. Throughout this Act, in the construction thereof, except there be something in the subject or context repugnant to such construction, the word "county" shall extend to and mean *any county, riding, parts, or division of a county, [228] stewardry, or combined counties respectively returning a member or members to serve in Parliament; and the words "city or borough" shall mean any university, city, borough, town corporate, county of a city, county of a town, cinque port, district of burghs, or other place or combination of places (not being a county as hereinbefore defined), returning a member or members to serve in Parliament; and the word "election" shall mean the election of any member or members to serve in Parliament; and the words "returning officer" shall apply to any person or persons to whom, by virtue of his or their office under any law, custom, or statute, the execution of any writ or precept doth or shall belong for the election of a member or members to serve in Parliament, by whatever name or title such

(q) As to what is wilful delay within this section, see *Taylor v. Vergette*, 7 H. & N. 143. And the 26 & 27 Vict. c. 29, s. 5, extends this section to "a misdemeanor or to any other offence under" the 17 & 18 Vict. c. 102, 20 & 21 Vict. c. 87, and 26 & 27 Vict. c. 29, "not punishable by a penalty or forfeiture, as well as to proceedings for any offence punishable by a penalty or forfeiture." This seems to have been introduced to get rid of the doubt entertained in *Reg. v. Leatham*, 3 Law T. 504, as to whether sec. 14 applied to an information for a misdemeanor, and not for a penalty or forfeiture: but it seems in terms only to apply to offences under the Acts; and not to common law offences.

(r) Sec. 35 renders parties in actions competent and compellable to give evidence as under the 14 & 15 Vict. c. 99, and "The Evidence Amendment Act, 1853;" but "any such evidence shall not thereafter be used in any indictment or criminal proceeding under this Act against the party giving it."

person or persons may be called; and the words "revising barrister" shall extend to and include an assistant barrister and chairman, presiding in any Court held for the revision of the list of voters, or his deputy in Ireland, and a sheriff or Sheriff Court of Appeal in Scotland, and every other person whose duty it may be to hold a court for the revision and correction of the lists or registers of voters in any part of the United Kingdom; and the word "voter" shall mean any person who has claims to have a right to vote in the election of a member or members to serve in Parliament; and the words "candidate at an election" shall include all persons elected as members to serve in Parliament at such election, and all persons nominated as candidates, or who shall have declared themselves candidates at or before such election; and the words "personal expenses," as used herein with respect to the expenditure of any candidate in relation to any election, shall include the reasonable travelling expenses of such candidate, and the reasonable expenses his living at hotels or elsewhere for the purposes of and in relation to such election.

The 21 & 22 Vict. c. 87, s. 3, repeals so much of this section as defines "candidate at an election," and enacts that these words "shall include all persons elected to serve in Parliament at such election, and all persons nominated as candidates at such election, or who shall have declared themselves candidates on or after the date of the issuing of the writ for such election, or after the dissolution or vacancy of the office of which such writ shall have been issued: provided that nothing herein contained shall be construed to impose any liability on any person nominated without his consent." (s)

The 17 & 18 Vict. c. 102, was amended by the 21 & 22 Vict. c. 87.

Sec. 1. "It shall be lawful for any candidate, or his agent by him appointed in writing according to the provisions of the first-mentioned Act, to provide conveyances for any voter for the purpose of polling at an election and not otherwise, but it shall not be lawful to pay any money or give any valuable consideration to a voter for or in respect of his travelling expenses for such purpose." (t)

The 26 & 27 Vict. c. 29, further amends the law on these subjects.

*229] Sec. 2. "No payment (except in respect of the personal expenses of a candidate), (u) and no advance, loan, or deposit, shall be made by or on behalf of any candidate at an election, before, or during, or after such election, in respect of or in relation to such election, otherwise than through an agent or agents (v) whose name and address or names and addresses have been declared in writing to the returning officer on or before the day of nomination, or through an agent or agents to be appointed in his or their place as herein provided; and a person making any such payment, advance, loan, or deposit, otherwise than through such agent or agents, shall be guilty of a misdemeanor, or in Scotland an offence punishable by fine and imprisonment." The section adds: "It shall be the duty of the returning officer to publish, on or before the day of nomination, the name and address or the names and addresses of the agent or agents appointed in pursuance of this section. In the event of the death or legal incapacity of an agent appointed in pursuance of this section, the candidate shall forthwith appoint another agent in his place on giving notice to the returning officer of the name and address of the person so appointed, which shall be forthwith published by the returning officer."

Sec. 3. "All persons who have any bills, charges, or claims upon any candidate for or in respect of any election shall send in such bills, charges, or claims within one month from the day of the declaration of the election to such agent or agent as aforesaid, otherwise such persons shall be barred of their right to recover such claims, and every or any part thereof: provided always, that in case of the death

(s) See *Edwards v. Whitehurst*, 5 H. & N. 131.

(t) The rest of this section is repealed by the 26 & 27 Vict. c. 29.

(u) Personal expense of the candidate, such as hotel bills, railway fares, and the like, were not within the 17 & 18 Vict. c. 102, s. 16, which required bills to be sent in within a month: *Grant v. Gwinness*, 17 C. B. 190 (84 E. C. L. R.).

(v) Where articles connected with an election were supplied upon orders of a candidate given personally, the right of the creditor to maintain an action for the price was not affected by either sec. 18, or sec. 31, of the 17 & 18 Vict. c. 102: *Nurton v. Dickson*, 2 H. & N. 637.

within the said month of any person claiming the amount of such bill, charge, or claim, the legal representative of such person shall send in such bill, charge, or claim within one month after obtaining probate or letters of administration, or confirmation as executor, as the case may be, or the right to recover such claim shall be barred as aforesaid: provided also, that such bills, charges, and claims shall and may be sent in and delivered to the candidate, if, and so long as, during the said month, there shall, owing to death or legal incapacity, be no such agent." (x)

Sec. 4. "A detailed statement of all election expenses incurred by or on behalf of any candidate, including such excepted payments as aforesaid, shall, within two months after the election, (or in cases where by reason of the death of the creditor no bill has been sent in within such period of two months, then within one month after such bill has been sent in,) be made out and signed by the agent or, if there be more than one, by every agent who has paid the same (including the candidate in case of payments made by him), and delivered, with the bills and vouchers relative thereto, to the returning officer, and the returning officer for the time being shall, at the expense of the candidate, within fourteen days, [*230 insert or cause to be inserted an abstract of such statement, with the signature of the agent thereto, in some newspaper published or circulating in the county or place where the election was held; and any agent or candidate who makes default in delivering to the returning officer the statement required by this section shall incur a penalty not exceeding five pounds for every day during which he so makes default; and any agent or candidate who wilfully furnishes to the said returning officer an untrue statement shall be guilty of a misdemeanor, or in Scotland of an offence punishable by fine and imprisonment." (y)

Sec. 6. "In any indictment or information for bribery or undue influence, and in any action or proceeding for any penalty for bribery, treating, or undue influence, it shall be sufficient to allege that the defendant was at the election at or in connection with which the offence is intended to be alleged to have been committed guilty of bribery, treating, or undue influence (as the case may require); and in any criminal or civil proceedings in relation to any such offence the certificate of the returning officer in this behalf shall be sufficient evidence of the due holding of the election, and of any person therein named having been a candidate thereat."

The 15 & 16 Vict. c. 57, which was passed for the more effectual inquiry into the existence of corrupt practices at elections of members of Parliament, provide that, upon a joint address of both Houses of Parliament, Her Majesty may appoint commissioners to inquire into corrupt practices at elections, and makes provision for the conducting of such an inquiry. Sec. 8 empowers the commissioners to summon any person whose evidence they may deem material to the inquiry, and to require any person to produce books, papers, &c., necessary for arriving at the truth of the things to be inquired into by them; and provides that all persons "shall answer all questions put to them by the commissioners touching the matters to be inquired into by them, and shall produce all books, papers, deeds and writings required of them, and in their custody or under their control according to the tenor of the summons: provided always that no statement made by any person in answer to any question put by such commissioners shall, except in cases of indictment for perjury committed in such answers, be admissible in evidence in any proceeding civil or criminal." (z)

(x) The "agent for election expenses," duly appointed under the 17 & 18 Vict. c. 102, s. 31, was not necessarily without further appointment the agent to whom bills were to be sent under sec. 16: *Grant v. Gwinness*, 17 C. B. 190 (84 E. C. L. R.); but the words of sec. 16 were "to some authorized agent of such candidate."

(y) The section adds: "The said returning officer shall preserve all such bills and vouchers, and during six months after they have been delivered to him permit any voter to inspect the same, on payment of a fee of one shilling."

(z) In *Reg. v. Leatham*, 3 Law T. 777, it was held this proviso did not prevent a letter, which had been produced before commissioners under this section, from being admissible on the trial of an information for bribery; for the proviso applies to statements made, and not to documents produced.

Sec. 9 provided that persons implicated in corrupt practices, who were examined and made a faithful discovery, should be indemnified; but sec. 10 made it necessary that such person should have obtained a certificate from the commissioners that he had "made a true disclosure touching all things to which he has been so examined." Both secs. 9 and 10 are repealed by the 26 & 27 Vict. c. 29; sec. 7 of which enacts that "no person who is called as a witness before any election committee, or any commissioners appointed in pursuance of the" 15 & 16 Vict. c. 57, "shall be excused from answering any question relating to any corrupt practice at, or connected with, any election forming the subject of inquiry by such committee or commissioners, on the ground that the answer thereto may criminate or tend to criminate himself: provided always, that where any witness shall answer every question relating to the matters aforesaid which he shall be required by such committee or commissioners (as the case may be) to answer, and the answer to which may criminate, or tend to criminate him, he shall be entitled to receive from the committee, under the hand of their clerk, or from the commissioners, under their hands (as the case may be), a certificate stating that such witness was, upon his examination, required by the said committee or commissioners to answer questions or a question relating to the matters aforesaid, the answers or answer to which criminated or tended to criminate him, and had answered all such questions or such question; and if any information, indictment, or action be at any time thereafter pending in any court against such witness for any offence under the Corrupt Practices Prevention Acts, or for which he might have been prosecuted or proceeded against under such Acts, committed by him previously to the time of his giving his evidence, and at or in relation to the election concerning or in relation to which the witness may have been so examined, the Court shall, on production and proof of such certificate, stay the proceedings in such last-mentioned information, indictment, or action, and may, at its discretion, award to such witness such costs as he may have been put to in such information, indictment, or action: provided that no statement made by any person in answer to any question put by or before such election committee or commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal." (a)

Sec. 9. "Where an election committee has reported to the House of Commons that certain persons named by them have been guilty of bribery or treating, and where it appears by the report of any commission of inquiry into corrupt practices at any election made to Her Majesty and laid before Parliament that certain persons named by them have been guilty of the offences of bribery or treating, and have not been furnished by them with certificates of indemnity, such report, with the evidence taken by the commission, shall be laid before the Attorney-General, with a view to his instituting a prosecution against such persons if the evidence should, in his opinion, be sufficient to support a prosecution." (b)

The 4 & 5 Vict. c. 57, 5 & 6 Vict. c. 102, and 26 & 27 Vict. c. 29, s. 8, regulate the proceedings of committees of the House of Commons in cases of bribery. *It may be well to notice the decisions on the repealed statutes in this place.

It was held that, notwithstanding the 2 Geo. 2, c. 24, which made the offender liable to forfeit five hundred pounds, bribery in elections of members to serve in Parliament remained a crime at common law; that the Legislature never meant to take away the common law crime, but to add a penal action; and that this appears by the words in the statute—"or being otherwise lawfully convicted thereof." (c) And a conviction upon an information granted by the Court of King's Bench was just the same as if the party had been convicted upon an indictment. (d) But as the offender was equally liable to the penalties of the statute, (e) that Court would

(a) Sec. 8 makes regulations as to the proceedings of election committees.

(b) Sec. 11 continues the Acts in force "for a period of five years from the date of the passing of this Act, and from thenceforth until the end of the then next session of Parliament."

(c) *Rex v. Pitt*, 3 Burr. 1335; s. o., 1 Blac. R. 380.

(d) *Rex v. Pitt*, 3 Burr. 1339.

(e) *Coombe v. Pitt*, 1 Blac. R. 524.

by information until the two years were expired,(f) in ordinary cases there might possibly be particular cases, founded on particular facts, where it might be right to grant information before the expiration of the time for commencing the prosecution on the statute.(g) And in one case, where the defendant had been convicted of bribery, and the time for bringing the prosecution was not expired, the Court permitted him to enter into a recognizance to answer at the expiration of that time.(h)

There is a great difference between the two parts of sec. 7, of the 2 Geo. 2, the first part, which was applicable to the voter, contained the word "bribe," which was not repeated in the second. From this it might be taken that, in the first part, the party tendering the bribe, proof should be required of mere solicitation. Then, in the second part, the words went on thus, "contract for any money," the agreement, therefore, would subject the defendant to the penalty.(k) In the second part the words were "corrupt or procure."

Accordingly, it was necessary that the vote should be actually given, but the agreement was complete by effecting an agreement amounting to corruption, although the vote was not given. If, therefore, A. gave money to B. to induce him to vote for a candidate, and B. agreed to do so, in consideration of the gift, A. was liable to the penalty, for *corrupting, although B. never gave the vote.(l) [*233] The learned judges thought that A. was equally liable, if B. never gave the vote according to the agreement at all, as A. had done all that lay with him to induce B. to vote according to the agreement.(n)

A friend of the candidate gave an elector five guineas to vote, and took a note for that sum, but at the same time gave a counter note to deliver up the five guineas when the elector had voted, it was held to be an absolute gift and not a loan, and the Act, although the elector voted for the opposite party.(o) And it was held that a voter with the voter that he did not vote for a particular candidate was not within the Act.(p) In an action upon this statute it was held, that, at the time of election, any one was a candidate for whom a vote was asked; and that it was not competent to the defendant to dispute a man's right of voting, if he asked him for his vote; it being immaterial whether the voter bribed him to vote or not, if he claimed to have such a right.(q) A declaration under the statute must have stated what the bribe was, and specified that the defendant gave money or some other particular species of reward; and where it stated that the defendant did receive a gift or reward," in the disjunctive, it was held that, in arrest of judgment, the charge being of a criminal nature.(r)

Now the 26 & 27 Vict. c. 29, s. 5, *supra*, note (q) p. 227.

Ibid., 3 Burr. 1340.

Raydon, 3 Burr. 1359. But where that time had expired, the Court held that the evidence of the witness, by whose evidence the defendant was convicted of bribery, was no ground for postponing the judgment: *Raydon*, 3 Burr. 1387; s. c., 1 Blac. R. 404. And the Court refused to stay judgment *postea* on the ground that the defendant had made a discovery of another witness against the statute, who had been convicted on his (the defendant's) oath. *Curgenven*, 3 Wils. 35. And see the cases collected in 1 Hawk. P. C. c. 67, s. 10, note (4), where see also as to the Court of King's Bench granting a new trial. *Geo. 2, c. 24, s. 7*, was, "if any person shall ask, receive, or take any money or reward, by way of gift, loan, or other device, or agree or contract for any money, ployment, or other reward whatsoever, to give his vote, or to refuse or forbear to give his vote in any such election; or if any person by himself or any person shall by any gift or reward, or by any promise, agreement or security reward, corrupt or procure any person or persons to give his or their vote or votes in any such election." *Henson, J., Henslow v. Fancett*, 3 A. & E. 51 (30 E. C. L. R.); 4 N. & M.

v. Fancett. See the form of declaration there.

n. and Coleridge, JJ., Ibid.

v. Stokes, 2 M. & W. 238, S. C. T. & G. 599, *post*, p. 239.

v. Norton, 3 Burr. 1235; 1 Blac. Rep. 317; Orme 296, note.

P. C. c. 67, s. 10, note (4), citing *Loft 552*, and referring also to *Allen v. Allen*, 3 M. & W. 56, where a wager between two voters, with respect to the event of an election before the poll began, was held to be illegal.

v. Pitt, 1 Blac. R. 523.

(r) *Davy v. Baker*, 5 Burr. 2471.

And where the person corrupting was sued the same rule applied. And as means of corrupting must be stated, so they must be stated accurately according to the facts. Where those means rest in agreement only, the actual agreement must be stated in order that the party may know what he has to answer, and be able to plead the verdict, whatever it may be in another action, though it not be necessary to state the matter with the same precision as in an action on agreement supposing it were legal.^(s) Where therefore a count stated that defendant corrupted a voter by promising him to pay a debt of £41, and the defence was a promise to pay the debt of £41 and the expenses in respect of pledge of a boat for such debt, it was held that there was a fatal variance between the promise alleged and that proved by reason of the omission in the declaration of all mention of the expenses.^(t) But where a count alleged that the defendant corrupted a voter by giving £10 and promising to pay £31 in addition, and the defence proved the payment of the £10 and the promise to pay £31 and also expenses of the pledge of the boat; it was held that the offence consisted in corrupting, which depends entirely on the means used in soliciting. The payment of £10 was undoubtedly corruption, and was sufficient to support this count, *234] that the promise to pay £31 more might be treated as surplusage, and, being so, the omission to add "and the expenses" was immaterial.^(u)

The words of sec. 7 were all prospective, and they were construed as if they been "in order to give," and "in order to forbear to give," and consequently it did not include a case where money was given to a voter after an election, having voted for a candidate, there having been no agreement made before election for giving such money.^(v)

Where voters for a member of Parliament had only been paid their actual travelling expenses, a difference of opinion has existed as to the legality of such payments; some committees of the House of Commons having held that such payments are legal, others (and probably theirs is the more correct opinion) that such payments are not legal, for it is obvious that such a mode of proceeding, if allowed, would lead to great abuses.^(w) And it seems, at all events, that where the sum is given to every voter coming from the same place to an election, for his travelling expenses, it is bribery; and it is not the less so though all the candidates agree in the payment of the same amount.^(x) But where an action was brought by an agent of a candidate, to recover from him the amount so paid, Tindal J., left it to the jury to say "whether the sums were paid really and *bonâ fide* travelling expenses, and travelling expenses only, or to induce the voters to give their votes."^(y)

It has since, however, been decided by the House of Lords that such payments though *bonâ fide* made for travelling expenses only, are illegal; and though they are now rendered legal to some extent by the 21 & 22 Vict. c. 87, s. 1,^(xx) the case contains so much that is valuable in other respects that it is here inserted.

Every promise to pay and every payment of travelling expenses, though fair and reasonable, to a voter in order to induce him to vote; that is, every promise on any condition, express or implied, that he should be paid his travelling expenses if he voted for a particular candidate, is bribery within the meaning of the 17 & 18 Vict. c. 102, s. 2, No. 1. But where there is both a promise and a payment in pursuance of it, only one penalty is incurred within that clause. It is a clear position of law, that if a man employs an agent for a perfectly legal purpose, that agent does an illegal act, that act does not affect the principal unless it is shown that the principal directed the agent so to act, or really meant he should do so, or afterwards ratified the illegal act, or he appointed one to be his agent to do so.

(s) Per *curiam* Baker v. Rusk, 15 B. Q. 870 (69 E. C. L. R.).

(t) Baker v. Rusk, *supra*.

(u) Baker v. Rusk, *supra*; and see Combe v. Pitt, 3 Burr. 1586.

(v) Lord Huntingtower v. Gardiner, 1 B. & C. 297 (8 E. C. L. R.). See now the 18 Vict. c. 102, s. 2, and Cooper v. Slade, *post*, p. 235.

(w) Per Alderson, B., Bayntun v. Cattle, 1 M. & Rob. 265.

(x) Bremridge v. Campbell, 5 C. & P. 186 (24 E. C. L. R.).

(xx) *Ante*, p. 228.

both legal and illegal acts, to do everything, in short, which he might think proper to support the interests of the candidate; if the candidate gives his agent such a general authority, and the agent is guilty of bribery, the candidate is no doubt responsible for it. (y) One count alleged that the defendant promised money to R. C., a voter, in order to *induce him to vote at an election; another count [*235 alleged that the defendant corruptly gave money to the voter, on account of his having voted at the said election. The defendant was a candidate at an election for Cambridge, and a printed circular had been prepared, whereby out-voters were requested to return and vote for the defendant, and in his committee-room the question was discussed whether the expense of bringing up voters was legal, and the opinion of Tindal, C. J., in *Bremridge v. Campbell* (yy) was read, on which the defendant said, "I think the expenses are legal," but limited it to the payment of expenses out of pocket; and thereupon a clerk of the defendant's agent in his presence, but without any express direction from him or his agent, wrote at the bottom of each circular the words, "Your railway expenses will be paid." In consequence of receiving one of the circulars, a voter went from Huntingdon to Cambridge in order to vote, and voted at the election for the defendant, and he was paid eight shillings for his expenses from Huntingdon by the defendant's agent. Parke, B., told the jury that, if they were satisfied upon the evidence that the defendant did, by himself or any other person on his behalf authorized so to do, promise money to the voter, in order to induce him to vote for the defendant, they must find for the plaintiff on the first count, although the money so promised was no more than the fair and reasonable expenses of the voter's travelling from Huntingdon to Cambridge, and back again; and that if they were satisfied upon the evidence that the defendant did, by himself or any other person on his behalf authorized by him so to do, give money to the voter on account of, that is to say, that the moving cause of his giving such money was the voter's having voted for the defendant, they must find for the plaintiff on the second count, although the money so given was no more than the fair and reasonable expenses of the voter's travelling from Huntingdon to Cambridge and back again, and although the defendant honestly believed that he was committing no offence thereby. The jury found a verdict for the plaintiff on both counts; and, upon a bill of exceptions, it was held that it was necessary to show that the circular was written by the authority, expressed or implied, of the defendant, and that there was not only evidence to go to the jury, but that they were well warranted in finding that both the promise and the payment were made by the authority, express or implied, of the defendant; and that although the defendant was perfectly innocent of any intention to violate the law, yet if he did authorize the memorandum to be added to the note, and that note was sent to the voter by his authority, he was acting in violation of the statute; but that the plaintiff ought not to recover two penalties, one for the promise to pay and the other for performing the promise by payment; for where there was a promise to pay, and a payment in pursuance of that promise, the Legislature meant that to be only one act of bribery (z)

*But payment of the expense of taking up the freedom of voters is clearly [*236 illegal. (a)

(y) Per Lord Wensleydale, *Cooper v. Slade*, 6 H. L. C. 746: 6 E. & B. 447 (88 E. C. L. R.).

(yy) *Supra*, p. 234.

(z) *Cooper v. Slade*, *supra*. The plaintiff consented to enter a *nolle prosequi* to the second count, and had judgment on the first count. Lord Wensleydale, at the trial, feeling certain that the Legislature did not intend to impose two penalties, one for the promise and another for giving the money, thought that any previous promise that had been made must be dismissed in considering whether the payment was "corruptly" made; that the Act did not refer to a payment pursuant to a promise previously made, but to a payment afterwards without any previous promise; and that the reasonable construction to be put upon the Act was, that if a man gave money to a voter as a reward for having voted for him, that being the moving cause of the payment, it must be a corrupt payment within the meaning of the Act. But in the House of Lords his Lordship said, "I have very great doubt whether I was right in holding that if a candidate, after the election, pays a voter money, the moving cause of his doing so being that the voter has given him his vote, the payment is corrupt."

(a) *Bayntun v. Cattle*, 1 M. & Rob. 265, Alderson, B.

A declaration under the 2 Geo. 2, c. 24, s. 7, for corrupting a voter by corruptly giving the voter the sum of £10, as a reward to him to give his vote, was supported by evidence that the defendant gave the voter a card in one room, while the voter presented to a person in another room, who thereupon gave him the money.^(b) And it was held in the same case, that the plaintiff might prove that the defendant on the same day, and at the same place, gave cards to other persons, who also obtained money by presenting them to the person in the other room.^(c)

It seems that an indictment against a voter for giving a false answer at an election is insufficient if it merely state that the voter gave the answer at an election and does not aver that the writ for holding the election, or that the election was duly held,^(d) and the same point would have applied to an indictment for bribery, but the 26 & 27 Vict. c. 29, s. 6,^(e) makes it sufficient to allege that the defendant was guilty of bribery at the election.

Where the first count charged the defendant with having paid money to or Gilbert with intent that it should be applied in bribery at an election, and several other counts charged the defendant with the actual bribery of several persons named in these counts, and the only act of the defendant was giving £2000 Gilbert for the purposes of the election, and Gilbert was the person who had bribed the persons named in the second and other counts, and the jury found the defendant guilty on all the counts, it was objected that, as the defendant was found guilty of the first count, he ought not to have been found guilty upon the other counts, appearing that there was but one act, namely, that of paying money by him to an agent; but it was held that this objection, if available at all, it would only be application at the trial that the prosecutor should be compelled to elect upon which count he would proceed. There was no doubt that a man by one and the same act might commit several distinct offences. By the 17 & 18 Vict. c. 102, s. 2, § 5, paying money to any person with intent that such person should use it to bribe electors, is declared to be equivalent to bribery, and, as such, a misdemeanor, though no person was actually bribed; and by No. 1, giving money to an elector to induce him to vote is declared to be bribery, and as such a misdemeanor; but the offences are not the same, though it may be said that they arise from one and the same act. It was further objected, that as the defendant had employed subordinate agents, by whom the bribes were given, he could not be convicted of having bribed the voters himself; but it was held, that if a man employs an agent to corrupt voters, and that agent in carrying such general instructions into effect employs subordinate agents within the scope of the authority received from the principal, such principal, with reference to the express terms of the statute, as well as upon general principles of law, will be guilty of a misdemeanor as a principal.^(f)

In an action for bribery at an election it was held, that the register of voters at an election made in pursuance of the 6 & 7 Vict. c. 18, ss. 48, 49, is a document of such a public nature as to be admissible upon its mere production by the returning officer, and therefore an examined or certified copy of it is admissible; and where the plaintiff, having given in evidence a copy of the writ and return from the office of the clerk of the crown, certified by a clerk in the office to be a true copy of the original writ and examined therewith, and the defendant's counsel having suffered it to be given in evidence as a certified copy, at the close of the case objected that the copies of the writ and return were not duly certified copies, it was held that, assuming that they were not, there was no ground for granting a new trial, for the objection came too late, and might have been cured by proving that they were examined copies, if it had been taken at the proper time. It seems that in such an action proof of the writ, return, and register of voters, is requisite and that parol evidence of an election having taken place is not sufficient.^(g) A

(b) *Webb v. Smith*, 4 Bing. N. C. 373 (33 E. C. L. R.).

(c) *Ibid.*

(d) *Reg. v. Bowler*, C. & M. 559 (41 E. C. L. R.); *Reg. v. Ellis*, C. & M. 564.

(e) *Ante*, p. 230.

(f) *Reg. v. Leatham*, 3 Law T. 504.

(g) *Reed v. Lamb*, 6 H. & N. 75.

on an indictment for personating a voter at an election for a borough, it has been held that the writ to the sheriff must be produced in order to prove that the election was duly held.^(h) But where an offence is complete before the return is made, as where the offence is preventing a voter from voting, the return need not be given in evidence ⁽ⁱ⁾ The 26 & 27 Vict. c. 29, s. 6,^(k) makes the certificate of the returning officer evidence of the election.

Where a book, which was in writing and duly signed, contained the register of voters, Byles, J., held, that though there ought to be a copy of the list printed in a book and duly signed, in order to constitute a proper register, yet this register, though irregular, was valid, and admissible in evidence.^(l)

Where an action for bribery was brought in Essex, and the sum of £10 had been paid by the defendant to the London correspondents of the Harwich Bank to the credit of a person who had a boat in his possession for a debt, and a few days afterwards the boat was released, it was held that the £10 must be taken upon the facts to have been paid at Harwich, and therefore the venue was properly laid in Essex.^(m)

The 5 & 6 Will. 4, c. 76, s. 54, enacts, "that if any person who shall have or claim to have any right to vote in any election of *mayor, or of a councillor, auditor, or assessor of any borough, shall, after the passing of this Act, ask or take any money or other reward, by way of gift, loan, or other device, or agree or contract for any money, gift, office, employment, or other reward whatsoever, to give or forbear to give his vote in any such election, or if any person, by himself or any person employed by him, shall, by any gift or reward, or by any promise, agreement, or security for any gift or reward, corrupt or procure, or offer to corrupt or procure, any person to give or forbear to give his vote in any such election, such person so offending in any of the cases aforesaid shall for every such offence forfeit the sum of fifty pounds of lawful money of Great Britain, to be recovered, with full costs of suit, by any one who shall sue for the same, by action of debt, bill, plaint, or information in any of his Majesty's courts of record at Westminster; and any person offending in any of the cases aforesaid, being lawfully convicted thereof, shall for ever be disabled to vote in any election in such borough, or in any municipal or Parliamentary election whatever in any part of the United Kingdom, and also shall for ever be disabled to hold, exercise, or enjoy any office or franchise to which he then shall or at any time afterwards may be entitled as a burgess of such borough, as if such person was naturally dead."

Sec. 55. "If any person offending in any of the cases aforesaid shall, within the space of twelve months next after such election as aforesaid, discover any other person offending in any of the cases aforesaid, so that such other person be thereon convicted, such person so discovering, and not having been before that time convicted of any such offence, shall be indemnified and discharged from all penalties and disabilities which he shall then have incurred by any such offence."⁽ⁿ⁾

Sec. 56. "No person shall be made liable to any incapacity, disability, forfeiture, or penalty by this Act imposed, in any of the cases aforesaid, unless prosecution be commenced within two years after such incapacity, disability, forfeiture, or penalty shall be incurred, anything herein contained to the contrary notwithstanding."

The 54th section contemplates three descriptions of offences: first, that of procuring the party to give his vote for a particular candidate, that is, when he acts pursuant of the corrupt agreement; secondly, that of procuring the voter, where the bribe is offered and accepted, an actual agreement is made, and the voter promises to act upon it; the third offence is a new one, not found in the old

Reg. v. Vaile, 6 Cox C. C. 470.
Ante, p. 230.

(i) Reg. v. Clarke, 1 F. & F. 654, Byles, J.

Reg. v. Clarke, 1 F. & F. 654. In Reg. v. Colebourne, Ibid., Byles, J., held that the evidence of the revising barrister was conclusive, and that, even if the list was not signed, the list would be good, though the barrister had contravened the 6 & 7 Vict. c. 3.

Reg. v. Rusk, 15 Q. B. 870 (69 E. C. L. R.).

Reg. v. Parke, B., Harding v. Stokes, M. & W. 233.

Bribery Act, where the whole that appears is the mere offer of a bribe, refused on the other side, or not assented to at the time.⁽ⁿ⁾

An *employment* is a *reward* withing the meaning of this section. The offence of *corrupting* a voter is complete where the two parties have agreed, the one to offer, the other to accept, a bribe as the condition of voting for a particular person, whether the person who has agreed to vote, votes or not for such person, or whether he intended so to vote or not. But where a bribe is offered, but not accepted, the offence is that of offering to corrupt. A declaration *in debt for the [239] penalty of £50, under the 5 & 6 Will. 4, c. 76, s. 54, alleged that the defendant did corrupt one J. W., who had a right to vote at an election of councilors for a borough, by corruptly promising to give the said J. W., if he should vote at the said election for certain candidates, employment in hauling stones and for certain hire and reward to be paid for the same; and it was held upon demurrer that the declaration was sufficient. The question was, whether any difference was made between the asker and the offerer of a gift or reward, as to the nature of the thing asked or offered. To ascertain what is the "gift or reward" contemplated in the latter branch of the clause, the Court must look at the former part of the section, and there are found in conjunction the words "any money, gift, office, employment, or other reward whatsoever." An employment, therefore, is there considered as a reward; and by the common sense of mankind it is where the party to whom it is offered wants employment. It falls, therefore, equally within the more general words of the latter part of the clause. But whether this employment was in the particular case given as a reward within the object of the Act, was a question for the jury; if only the ordinary wages were given they might probably find that the employment was not given for a corrupt reward.^(o) The demurrer having been withdrawn by leave of the Court, the defendant pleaded not guilty, and on the trial it appeared that J. W., having promised his vote in favor of certain candidates, the defendant told him that if he would vote for certain other candidates, he would give him employment in hauling stones at certain weekly wages; J. W. answered that it was a good offer, but that the difficulty was how he should get off his promise; that he would consider of it and would see the defendant again the next Friday. No further communication, however, took place, and J. W. eventually voted for the candidates to whom he had originally promised his vote. It was objected for the defendant that the evidence did not prove a corrupting of the voter, as charged in the declaration, but a mere offering to corrupt; and the plaintiff was nonsuited; but the Court, upon a rule to show cause why there should not be a new trial, held that if it were proved that there was an agreement to vote in pursuance of the offer, no matter whether the party intended to perform it or not, the offence of corrupting was complete. The evidence given in this case might be construed to prove that the offer was accepted; if the jury should be of that opinion the offence of corrupting was complete; but on the other hand they might well come to the conclusion that the voter had not made up his mind, but took time to consider further whether he would accept the offer; in that case the offence of corrupting was not complete but it was a mere offer to corrupt within the third clause of the statute.^(p)

Some cases decided upon the 2 Geo. 2, c. 24, s. 8, may throw light upon the construction of the 5 & 6 Will. 4, c. 76, s. 55. On that Act it was decided that the circumstance of a party having been, within the limited time, a plaintiff in an action on the statute, *and having prosecuted it to judgment, did not prove [240] him to have been the first discoverer. Lord Mansfield, C. J., observed that the Court had not said, nor would say, that a plaintiff cannot be the discoverer; but that the Act does not make him so, or consider him as the discoverer and that as the plaintiff could not be the witness himself in the action, some other person must have been the witness; it was not therefore to be presumed, without any evidence of it, that the plaintiff was the first discoverer.^(q) And where one

(n) Per Parke, B., *Harding v. Stokes*, 2 M. & W. 233.

(o) *Harding v. Stokes*, 1 M. & W. 354; S. C. T. & Gr. 599.

(p) *Harding v. Stokes*, 2 M. & W. 233. See *Henslow v. Faucett*, *ante*, p. 232.

(q) *Curgenvin v. Cumming*, 4 Burr. 2540.

person procured another to make an affidavit of facts amounting to bribery, and then prosecuted a third person upon these facts to conviction, it was held that the person making the affidavit was the discoverer.^(r) Not only a verdict, but judgment must be obtained to satisfy the clause; but when judgment is obtained it will relate, for the purpose of the indemnity, to the time when the discovery was first made.^(s)

*CHAPTER THE SEVENTEENTH.

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OF NEGLECTING OR DELAYING TO DELIVER ELECTION WRITS.

THE 53 Geo. 3, c. 89, was passed for the purpose of effecting the more expeditious and regular conveyance of writs for the election of members to serve in Parliament. It enacts, that the messenger, or pursuivant of the great seal, or his deputy, shall, after the receipt of such writs, forthwith carry such of them as shall be directed to the sheriffs of London or Middlesex, to the respective officers of such sheriffs, and the other writs to the general post office in London, and there deliver them to the postmaster-general for the time being, or to such other person as the postmaster shall depute to receive the same (which deputation the postmaster is thereby required to make), who, on receipt thereof, shall give an acknowledgment in writing, expressing therein the time of delivery, and shall keep a duplicate of such acknowledgment signed by the parties respectively to whom and by whom the same shall be so delivered; and that the postmaster or his deputy shall despatch all such writs free of postage, by the first post or mail, after the receipt thereof, under covers directed to the proper officers, to whom the said writs shall be respectively directed, accompanied with proper directions to the postmaster or deputy postmaster of the place, or nearest to the place where such officers shall hold their office, requiring such postmaster or deputy forthwith to carry such writs respectively to such office, and to deliver them there to the officers to whom they shall be respectively directed, or their deputies, who are required to give to such postmaster or deputy a memorandum in writing, acknowledging the receipt of every such writ, and setting forth the day and the hour the same was delivered by such postmaster or deputy, and which memorandum shall also be signed by such postmaster or deputy, who are required to transmit the same by the first or second post afterwards to the postmaster-general or his deputy at the general post office in London, who are required to make an entry thereof in a proper book for that purpose, and to file the memorandum along with the duplicate of the said acknowledgment, signed by the messenger, to the intent that the same may be inspected or produced upon all proper occasions by any person interested in such elections.^(a)

The statute, after directing that all persons to whom the writs for the election of members to Parliament ought to be and are usually directed, shall, within a month, send to the postmaster general an account of the places where they shall hold their offices, and so from time to time, as often as such places shall be changed; and of the post town nearest to such offices; or in case any such office shall be in London, Westminster, or Southwark, or within five miles thereof, shall send [*242 such account to the messenger of the great seal; ^(b) proceeds to enact, that after the death of the then messenger of the great seal the allowances of mileage shall cease, except an allowance of two guineas on each writ for the election of a member on any vacancy, and of fifty pounds on the calling of a new Parliament.^(c) And it further enacts, that whereas the messenger of the great seal and his deputy have from time to time received certain other fees for the conveyance and upon the delivery of these writs, such fees shall cease from the passing of the Act; and that

(r) *Sibly v. Cuming*, 4 Burr. 2464.

(s) 53 Geo. 3, c. 89, s. 1.

(t) *Id.* sec. 4.

(a) *Sutton v. Bishop*, 1 Bl. R. 665.

(b) 53 Geo. 3, c. 89, ss. 2, 3.

neither the messenger nor his deputy, nor any other person, shall receive or take any fee, reward or gratuity whatsoever, for the conveyance or delivery of any such writ.(d)

The sixth section enacts, "that every person concerned in the transmitting or delivery of any such writ as aforesaid who shall wilfully neglect or delay to deliver or transmit any such writ, or accept any fee, or do any other matter or thing in violation of this Act, shall be guilty of a misdemeanor, and may upon any conviction upon any indictment or information in his Majesty's Court of King's Bench be fined and imprisoned at the discretion of the Court for such misdemeanor."

Offences committed in Scotland may be punished by a fine or imprisonment, the judge before whom the offender shall be tried and convicted may direct.(e)

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*CHAPTER THE EIGHTEENTH.

OF DEALING IN SLAVES.

THE 5 Geo. 4, c. 113, repeals all the Acts and enactments relating to the slave trade, and the abolition thereof, and the exportation or importation of slaves, except so far as they have repealed any prior Acts or enactments, or may have been acted upon, or may be expressly confirmed by the present Act. It then enacts, that it shall not be lawful (except in such special cases as are thereafter mentioned) to deal in slaves, or to remove, import, ship, tranship, &c., any persons as slaves, or to fit out, employ, &c., any vessels in order to accomplish such unlawful objects, or to lend money, &c., or to become guarantee, &c., for agents in relation to such objects, or in any other manner to engage, directly or indirectly, therein, as a partner, agent, or otherwise; or to ship, &c., any money, goods, or effects, to be employed in accomplishing any of these unlawful objects; or to command, or embark on board, or contract for commanding, or embarking on board, any vessel, &c., in any capacity, knowing that such vessel, &c., is employed, or intended to be employed, in such unlawful objects; or to insure, or contract for insuring, any slaves, or other property, employed, or intended to be employed, in accomplishing any of these unlawful objects.(a) Pecuniary penalties and forfeitures are then imposed upon persons offending, by engaging in such unlawful objects.(b) And the statute then proceeds to subject certain offenders to punishments of a more serious nature.¹

By sec. 9, "if any subject or subjects of his Majesty, or any person or persons residing, or being within any of the dominions, forts, settlements, factories, or territories, now or hereafter belonging to his Majesty, or being in his Majesty's occupation or possession, or under the government of the united company of merchants of England trading to the East Indies, shall, except in such cases as are in and by this Act permitted,(c) after the first day of January, one thousand eight hundred and twenty-five, upon the high seas, or in any haven, river, creek, or place, where the admiral has jurisdiction, knowingly and wilfully carry away, convey, or remove, or aid or assist in carrying away, conveying, or removing, any person or persons as a slave or slaves, or for the purpose of his, her, or their being imported, or brought as a slave or slaves, into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred,

(d) 53 Geo. 3, c. 89, sec. 5. And the section further proceeds to give the then messenger an annual allowance for his life of £520 in compensation for these fees.

(e) Id. sec. 7.

(a) Sec. 2.

(b) Secs. 3, 4, 5, 6, 7, 8.

(c) These excepted cases are repealed by the 3 & 4. Will. 4, c. 73, s. 12, which abolishes slavery in the British colonies, plantations, and possessions abroad.

¹ For the Acts of Congress respecting the slave trade, see Revised Statutes of the United States, pp. 1047, 1048.

used, or dealt with, as a slave or slaves; or shall, *after the said first day of January, one thousand eight hundred and twenty-five, except in such cases [*244 as are in and by this Act permitted, (d) upon the high seas, or within the jurisdiction aforesaid, knowingly and wilfully ship, embark, receive, detain, or confine, or assist in shipping, embarking, receiving, detaining, or confining on board any ship, vessel, or boat, any person or persons, for the purpose of his, her, or their being carried away, conveyed, or removed, as a slave or slaves, or for the purpose of his, her, or their being imported or brought, as a slave or slaves, into any island, colony, country, territory, or place whatsoever, or for the purpose of his, her, or their being sold, transferred, used, or dealt with, as a slave or slaves, then, and in every such case, the person or persons so offending shall be deemed and adjudged guilty of piracy, felony, and robbery, and being convicted thereof shall suffer death, without benefit of clergy, and loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas, ought to suffer."

The 1 Vict. c. 91, s. 1, recites the preceding section, and provides that, after the 1st of October 1837, no person convicted of any such offence shall suffer death, but instead thereof shall be liable to transportation (e) for life, or for any term not less than fifteen (f) years, or imprisonment, with or without hard labor, in the common gaol or house of correction, for any term not exceeding three years, and the offender may be directed to be kept in solitary confinement for any portion or portions of such imprisonment, or of such imprisonment with hard labor, not exceeding one month at any one time, and not exceeding three months in any one year, as to the Court in its discretion shall seem meet. (g)

Sec. 10. "(Except in such special cases as are in and by this Act permitted, or otherwise provided for). (h) if any person shall deal or trade in, purchase, sell, barter, or transfer, or contract for the dealing, or trading in, purchase, sale, barter, or transfer, of slaves, or persons intended to be dealt with as slaves, or shall otherwise than aforesaid carry away or remove, or contract for the carrying away or removing of slaves, or other persons, as or in order to their being dealt with as slaves, or shall import or bring, contract for the importing or bringing, into any place whatsoever, slaves or other persons, as or in order to their being dealt with as slaves; or shall, otherwise than as aforesaid, (h) ship, tranship, embark, receive, detain, or confine on board, or contract for the shipping, transshipping, embarking, receiving, detaining, or confining on board of any ship, vessel or boat, slaves or other persons, for the purpose of their being carried away or removed, as or in order to their being dealt with as slaves, or shall ship, tranship, embark, receive, detain, or confine on board, or contract for the shipping, transshipping, embarking, receiving, detaining, or confining on board of any ship, vessel, or boat, slaves, or other persons, for the purpose of their being imported, or brought into any place whatsoever, as or in order to their being dealt with as slaves; or shall fit [*245 man, navigate, equip, despatch, use, employ, let, or take to freight, or hire, or contract for the fitting out, manning, navigating, equipping, despatching, employing, letting, or taking to freight or hire, any ship, vessel, or boat, in order to accomplish any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully lend or advance, or become security for the loan or advance, or contract for the lending or advancing, or becoming security for the loan or advance, or goods, or effects employed or to be employed, in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully become security, or contract for the becoming guarantee or security for agents, or to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been

note (c), *ante*, p. 243.

slavery by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

less than seven by the 9 & 10 Vict. c. 24, s. 1; and not less than three years by 21 Vict. c. 3, s. 2, *ante*, pp. 3, 4.

s. 1 & 2 of the 1 Vict. c. 91, *ante*, p. 141.

note (c), *ante*, p. 243.

declared unlawful, or in any other manner to engage, or contract to engage, directly or indirectly therein, as a partner, agent, or otherwise, or shall knowingly and wilfully ship, tranship, lade, receive, or put on board, or contract for the shipping, transshipping, lading, receiving, or putting on board of any ship, vessel, or boat, money, goods, or effects, to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall take the charge or command, or navigate, or enter and embark on board, or contract for the taking charge or command, or for the navigating, or entering and embarking on board of any ship, vessel, or boat, as captain, master, mate, surgeon, or supercargo, knowing that such ship, vessel, or boat, is actually employed, or is in the same voyage, or upon the same occasion, in respect of which they shall so take the charge or command, or navigate, or enter and embark, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall knowingly and wilfully insure, or contract for the insuring of any slaves, or any property, or other subject-matter engaged or employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; or shall wilfully and fraudulently forge or counterfeit any certificate, certificate of valuation, sentence, or decree of condemnation or restitution, copy of sentence, or decree of condemnation or restitution, or any receipt (such receipts being required by this Act), or any part of such certificate, certificate of valuation, sentence or decree of condemnation or restitution, copy of sentence, or decree of condemnation or restitution, or receipt as aforesaid; or shall knowingly and wilfully utter or publish the same, knowing it to be forged or counterfeit, with intent to defraud his Majesty, his heirs or successors, or any other person or persons whatsoever, or any body politic or corporate; then and in every such case the person or persons so offending, and their procurers, counsellors, aiders, and abettors, shall be, and are hereby declared to be felons, *and shall be transported⁽ⁱ⁾ beyond seas for a term not exceeding fourteen^(k) years, or shall be confined and kept to hard labor for a term not exceeding five years, nor less than three^(l) years, at the discretion of the Court before whom such offender or offenders shall be tried and convicted."

Sec. 11. "(Except in such special cases, or for such special purposes, as are in and by this Act expressly permitted),^(m) if any person shall enter and embark on board, or contract for the entering and embarking on board of any ship, vessel, or boat, as petty officer, seaman, marine, or servant, or in any other capacity not hereinbefore specially mentioned, knowing that such ship, vessel, or boat, is actually employed, or is in the same voyage, or upon the same occasion, in respect of which they shall so enter and embark on board, or contract so to do as aforesaid, intended to be employed in accomplishing any of the objects, or the contracts in relation to the objects, which objects and contracts have hereinbefore been declared unlawful; then and in every such case the persons so offending, and their procurers, counsellors, aiders, and abettors, shall be, and they are hereby declared to be guilty of a misdemeanor only, and shall be punished by imprisonment for a term not exceeding two years."

Sec. 12. "Nothing in this Act contained, making piracies, felonies, robberies, and misdemeanors, of the several offences aforesaid, shall be construed to repeal, annul, or alter the provisions and enactments in this Act also contained, imposing forfeitures and penalties, or either of them upon the same offences, or to repeal, annul, or alter, the remedies given for the recovery thereof: but that the said provisions and enactments, imposing forfeitures and penalties, shall in all respects be deemed and taken to be in full force; it being the true intent and meaning of this

(i) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(k) Not less than seven by the 9 & 10 Vict. c. 24, s. 1; and not less than three years by the 20 & 21 Vict. c. 3, s. 2, *ante*, pp. 3, 4. As to accessories after the fact, see *ante*, p. 69.

(l) See 9 & 10 Vict. c. 24, s. 1, *ante*, p. 3, and *semble*, that the imprisonment may be for any time less than five years.

(m) See note (c), *ante*, p. 243.

Act, that the right and privilege heretofore exercised of suing in Vice-admiralty Courts for the forfeitures or penalties, shall remain in full force and effect as before the passing of this Act; and the jurisdiction of the said Vice-Admiralty Courts in all cases of forfeitures and penalties imposed by this Act is hereby established, given, ratified, and confirmed."

Sec. 40. "If any person offending as a petty officer, seaman, marine, or servant, against any of the provisions of the Act, shall, within two years after the offence committed, give information on oath before any competent magistrate, against any owner or part-owner, or any captain, master, mate, surgeon, or supercargo, of any ship or vessel, who shall have committed any offence against this Act, and shall give evidence on oath against such owner, &c, before any magistrate or Court, before whom such offender may be tried; or if such person so offending shall give information to any of his Majesty's ambassadors, ministers, &c., or other agents, so that any person owning such ship or vessel or navigating or taking charge of the same, as captain, master, mate, surgeon, or *supercargo, may be apprehended, such persons, so giving information and evidence shall not be liable to [*247 any of the pains or penalties under the Act incurred in respect of his offence; and his Majesty's ambassadors, ministers, &c., are required to receive any such information, and to transmit the particulars thereof without delay, to one of his Majesty's principal secretaries of state, and to transmit copies of the same to the commanders of his Majesty's ships or vessels, then being in such port or place."

Sec. 48. "All offences against this Act which shall be committed in any country, territory, or place, other than the United Kingdom, or on the high seas, or in any port, sea, creek, or place, where the admiral has jurisdiction, and which shall be prosecuted as piracies, felonies, robberies, or misdemeanors, shall and may be inquired of, either according to the ordinary course of law, and the provisions of the 28 Hen. 8, c. 15, or according to the provisions of the 33 Hen. 8, c. 23 (repealed by 9 Geo. 4, c. 31), or according to the provisions of the 11 & 12 Will. 3, c. 7, or according to the provisions of the 46 Geo. 3, c. 54;(n) and that all persons convicted of any of the said offences, to be inquired of, tried, and determined, under and by virtue of any commission to be made and issued, according to the directions of the said Act of the 46 Geo. 3, shall be subject and liable to, and shall suffer all such and the same pains, penalties, and forfeitures, as by this Act, or any law or laws now in force, persons convicted of the same respectively would be subject and liable to, in case the same were respectively inquired of, tried, and determined, and adjudged, within this realm, by virtue of any commission made according to the directions of the statute 28 Hen. 8, c. 15."

Sec. 42. "All offences against this Act, which shall be committed in any place where the Admiralty has not jurisdiction, and not being within the local jurisdiction of any ordinary Court of a British colony, &c, competent to try such offence, may be inquired of, tried, &c., under and by virtue of any commission to be issued, according to the directions of the 46 Geo. 3, c. 54."

Sec. 50. "All offences committed against this Act may be inquired of, tried, determined, and dealt with, as if the same had been respectively committed within the body of the county of Middlesex."

In February 1845 the *Felicidade*, a Brazilian schooner, bound on a voyage from the Brazils to Africa for the purpose of bringing back a cargo of slaves, arrived off the African coast, and while she was hovering within sixteen miles of the shore, and within six degrees north latitude, was observed by Her Majesty's ship of war *Wasp*, stationed off the slave coast for the prevention of the slave trade, and then under the command of Captain Usher, who, upon approaching the *Felicidade*, manned two boats, and gave the command of them to Lieutenant Stupart, one of his officers, with orders to board the *Felicidade*, and if she appeared to be fitted up for the slave trade to capture her. Lieutenant Stupart, in obedience to these orders, went with the two boats to the *Felicidade*. Cerquiera, the captain, immediately surrendered, and he and all his crew, except Majavel and three others, were conveyed on board *the *Wasp*. At the time of her capture the *Felicidade* was fitted up for the reception of a cargo of slaves, and was within sixteen miles of [*248

(n) *Ante*, p. 157.

the shore. The next day Captain Usher, having removed from the *Felicidade* the three men who had been left with Majavel, sent back Cerquiera to the *Felicidade* manned her with sixteen British seamen, and placed her under the command of Lieutenant Stupart, and directed him to steer a particular course in pursuit of a vessel capable of being seen from the *Wasp*, although then invisible from the *Felicidade*. Lieutenant Stupart accordingly steered that course, and the next morning he descried the *Echo*, a Brazilian brigantine, commanded by Serva. He chased her, and on coming up with her the following night fired a pistol as a signal to bring to, got into the jolly-boat, and hoisted British colors. The captain of the *Echo* hailed the men in the boat, and asked who they were, and, upon being informed that they were English, immediately set sail. Lieutenant Stupart continued the chase, and overtook the *Echo* the next night within ten miles of the African coast, when and where she surrendered. The lieutenant had at that time under his command Mr. Palmer, a midshipman, and sixteen British seamen; he ordered Mr. Palmer and eight of the seamen to take charge of the *Echo* during the night. On Mr. Palmer going on board the *Echo*, he found in her Serva's nephew, twenty-five men, and a cargo of four hundred and thirty-four slaves, and by the direction of Lieutenant Stupart, the vessels being at that time close together, sent Serva, his nephew, and eleven of the crew to the *Felicidade* where they remained during the night in the custody of Lieutenant Stupart. During the chase and at the time of the surrender Lieutenant Stupart wore his uniform, and at the time of the surrender and capture told Serva he was going to take them to Her Majesty's ship the *Wasp*, for being engaged in the slave trade. The *Wasp* had printed instructions on board. Lieutenant Stupart had not any printed instructions on board the *Felicidade*, and did not show any other authority than his uniform and the British ensign. He had, however, boarded the *Echo* several times before, and to Serva was well known as an officer in Her Majesty's navy. The slaves had been shipped on board the *Echo* at Lagos. The next morning after the capture Lieutenant Stupart took with him Serva's nephew to the *Echo*, and placed Mr. Palmer and nine British seamen under his command on board the *Felicidade*, in order that he might take charge of her, and of Serva, Cerquiera, Majavel, and several others of the *Echo*'s crew. Within an hour afterwards Serva, Majavel, and some of the rest, conspired together to kill all the English on board the *Felicidade*, and take her; and in pursuance of that conspiracy rose upon Mr. Palmer and his men, and after a short conflict succeeded in killing them, Majavel having in the course of that conflict stabbed and thrown overboard Mr. Palmer. Cerquiera, though solicited by Serva to join in the plot, refused to do so, and endeavored to dissuade him from carrying it into execution; and on the trial of an indictment against Serva and others engaged with him in the transaction for the murder of Mr. Palmer, at Exeter Assizes, Platt, B., held that the *Felicidade* was in the lawful custody of Her Majesty's officers, that all on board *249] that vessel were within Her Majesty's Admiralty jurisdiction, and that * the prisoners plotted together to slay all the English on board and run away with the vessel, and in carrying their design into execution Majavel slew Mr. Palmer, and the others were aiding and assisting in the commission of that act; they should be found guilty of murder; and upon a case reserved it was contended on the part of the prisoners that both the *Felicidade* and *Echo* were wrongfully taken, and that the prisoners had a right to regain their freedom by any means in their power, and consequently that no felony had been committed. It was answered on the part of the prosecution, that the *Felicidade* and *Echo* were lawfully taken under the 5 Geo. 4, c. 113, and 7 & 8 Geo. 4, c. 74, and the Portuguese and Brazilian treaties as to slave trading; and that the prisoners were in lawful custody and the *Felicidade* in the lawful custody of the Queen's officers; but it was held that there was a want of jurisdiction in an English Court to try the murder committed on board the *Felicidade*; and if the lawful possession of that vessel by the British Crown, through its officers, would be sufficient to give jurisdiction, there was no evidence brought before the Court to show that the possession was lawful. (n)

(n) *Reg. v. Serva*, 2 C. & K. 53 (61 E. C. L. R.); 1 D. C. C. 104, Lord Denman, C. J. and Platt, B., *dissentientibus*. See also the *Life of Alderson*, B., p. 99.

Where some counts of an indictment on the 5 Geo. 4, c. 113, s. 10, omitted the words "knowingly and wilfully," which are used in that section in describing the offences charged in those counts, it was admitted that these counts were bad.^(o)

Where a count stated that the prisoners in the fourth year of Queen Victoria, at London, and within the jurisdiction of the Central Criminal Court, did illegally and feloniously man, navigate, equip, despatch, use and employ a certain ship called the *Augusta*, in order to accomplish a certain object, which (by the 5 Geo. 4, c. 113) was declared unlawful, viz., to deal and trade in slaves; and the three following counts only varied from the first in describing the object of the several acts charged to have been done by the prisoner differently, as in the statute; and it was objected that each count was bad as charging distinct felonies, the statute making it a felony to fit out, man, navigate, equip, despatch, use or employ any ship in order to accomplish any of the objects thereby declared unlawful, and each count charging the prisoner with having done all the acts before mentioned, each of which would have been of itself a felony, if done with the object stated in the Act; it was held that each count contained a charge of one felony only, the whole being alleged to have been done to accomplish one and the same single object, the essence of the felony consisting in using the means described in the Act to accomplish that object. It was also contended, that these counts were bad for not negating the exceptions in the act of circumstances, which might render the transaction lawful; but it was held that these exceptions are virtually repealed by the 3 & 4 Will. 4, c. 73, s. 12, and that for this purpose the 5 Geo. 4, c. 113, s. 10, must be considered as if they had never existed; and as the offences in the indictment are charged to have been committed in the reign of her present Majesty, they must necessarily have been after the passing of the repealing Act. It was further objected, that the indictment did not allege that the prisoner was a British subject, or that the offence was committed within Her Majesty's dominions; but it was held that, as the offence was stated in each count to have been committed at London, within the jurisdiction of the Central Criminal Court, and therefore *prima facie* at least within the district mentioned in the 3 & 4 Will. 4, c. 36, s. 2, the indictment did in substance allege the offence to have been committed within Her Majesty's dominions.^(p)

Upon an indictment under sec. 10 for feloniously fitting out a vessel for the purpose of dealing in slaves, it was held that the provisions of the Act are not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but apply to acts done by British subjects in furtherance of that trade in places not part of the British dominions. And in order to convict a party who is charged with having employed and loaded a vessel for the purpose of slave trading, it is not necessary to show that the vessel which carried out the goods was intended to be used for bringing back slaves in return; but it was sufficient if there was a slave adventure, and the vessel was in any way engaged in that adventure.^(q)

Where a party residing in London was charged with having chartered a vessel, and loaded goods on board, for the purpose of slave trading, it was held that slave trading papers found on board the vessel when she was seized off the coast of Africa, but not traced in any way to the knowledge of the prisoner, were not admissible in evidence against him.^(r)

The 6 & 7 Vict. c. 98, s. 1, recites sec. 2 of the 5 Geo. 4, c. 113, and enacts "that all the provisions of the said consolidated Slave Trade Act hereinbefore recited and of this present Act shall, from and after the coming into operation of this Act, be deemed to extend and apply to British subjects wheresoever residing or being, and whether within the dominions of the British Crown or of any foreign country; and all the several matters and things prohibited by the said consolidated Slave Trade Act or by this present Act, when committed by British subjects, whether within the dominions of the British Crown or in any foreign coun-

(o) Reg. v. Jennings, 1 Cox C. C. 115, Wightman and Cresswell, JJ.

(p) Reg. v. Jennings, *supra*.

(q) Reg. v. Zulueta, 1 C. & K. 215 (47 E. C. L. R.), Maule, J., and Wightman, J.

(r) *Ibid*.

try, except only as is hereinafter excepted, shall be deemed and taken to be offences committed against the said several Acts respectively, and shall be dealt with and punished accordingly: provided nevertheless, that nothing herein contained shall repeal or alter any of the provisions of the said Act.

Sec. 2. "All persons holden in servitude as pledges for debt, and commonly called 'pawns,' or by whatsoever other name they may be called or known, shall for the purposes of the said consolidated Slave Trade Act," and the 3 & 4 Will. 4, c. 73, "and of this present Act, be deemed and construed to be slaves or persons intended to be dealt with as slaves."

Sec. 3. "All offences against the consolidated Slave Trade Act or against this present Act, which shall be committed by British subjects out of this United Kingdom, whether within the dominions of the British Crown or in any foreign country, or by foreigners *within the British dominions, except in places *251] where the British admiral has jurisdiction, may be taken cognizance of, inquired into, tried, and determined according to the provisions of" the 9 Geo. 4, c. 31.(s)

Sec. 5. "In all the cases in which the holding or taking of slaves shall not be prohibited by this or any other Act of Parliament, it shall be lawful to sell or transfer such slaves, anything in this or any other Act contained notwithstanding."

Sec. 6. "Nothing in this Act contained shall be taken to subject to any forfeiture, punishment, or penalty any person for transferring or receiving any slave in any joint-stock company established before the passing of this Act in respect of any slave or slaves in the possession of such company before such time, or for selling any slave or slaves which were lawfully in his possession at the time of passing this Act, or which such person shall or may have become possessed of or entitled unto *bonâ fide* prior to such sale, by inheritance, devise, bequest, marriage, or otherwise by operation of law."

Sec. 4 provides for issuing a mandamus for the examination of witnesses, and the receiving other proofs concerning matters charged in any indictment or information in the Queen's Bench for offences against the Acts committed in any British colony, settlement, plantation, or territory.

There is nothing in the statutes to prohibit a contract by a British subject for the sale of slaves lawfully held by him in a foreign country, where the possession and sale of slaves is legal. Where therefore the defendants, British subjects, resident and domiciled in Great Britain, being possessed of certain slaves in the Brazil, where the purchase and holding of slaves is lawful, contracted with the plaintiff, Brazilian subject, domiciled in the Brazils, to sell them to him, to be used and employed there, and some of the slaves had been purchased by the defendants in the Brazils after the passing of the 5 Geo. 4, c. 113, but before the 6 & 7 Vict. c. 98 for the purpose of being employed, and they were employed, in certain mines thereof of which the defendants were the proprietors; and the rest of the slaves were the offspring, and were in the possession of the defendants before the passing of the latter Act; it was held that the contract was valid.(t)

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*CHAPTER THE NINETEENTH.

OF FORESTALLING, REGRATING, AND INGROSSING, AND OF MONOPOLIES.

EVERY practice or device by act, conspiracy, words, or news, to enhance the price of victuals or other merchandize, has been held to be unlawful; as be- ng

(s) The 9 Geo. 4, c. 31 is repealed; but there is no doubt that, for the purposes of this section, it would be held to be kept alive. See *Reg. v. Merionethshire*, 6 Q. B. 343 (5 E. C. L. R.); *Reg. v. Breconshire*, 15 Q. B. 813 (69 E. C. L. R.).

(t) *Santos v. Illidge*, 8 C. B. (N. S.) 861 (98 E. C. L. R.), in error: reversing the judgment of the Common Pleas in 6 C. B. (N. S.) 841 (95 E. C. L. R.).

prejudicial to trade and commerce, and injurious to the public in general.(a) Practices of this kind came under the notion of forestalling; which anciently comprehended, in its signification, regrating and ingrossing, and all other offences of the like nature.(b) Spreading false rumors, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market, are offences of this kind.(c) Also if a person within the realm bought any merchandize in gross, and sold the same again in gross, it was considered an offence of this nature, on the ground that the price must be thereby enhanced, as each person through whose hands it passed would endeavor to make his profit of it.(d) So the bare ingrossing of a whole commodity, with an intent to sell it at an unreasonable price, was an offence at the common law; for if such practices were allowed, a rich man might ingross into his hands a whole commodity, and then sell it at what price he should think fit.(e)

The offences of forestalling, regrating, and ingrossing were for a considerable period prohibited by statutes; but the beneficial tendency of such statutes was doubted; and at length by the 12 Geo. 3, c. 71, they were repealed, as being detrimental to the supply of the laboring and manufacturing poor of the kingdom. But forestalling, regrating, and ingrossing, continued offences at common law until the 7 & 8 Vict. c. 24, s. 1, which enacts that "the several offences of badgering, engrossing, forestalling, and regrating be utterly taken away and abolished, and that no information, indictment, suit, or prosecution, shall lie either at common law or by virtue of any statute, or be commenced or prosecuted against any person for or by reason of any of the said offences or supposed offences."

Sec. 4. "Nothing in this Act contained shall be construed to apply to the offence of knowingly and fraudulently spreading, or conspiring to spread, any false rumor, with intent to enhance or decry the price of any goods or merchandize, or to the offence *of preventing, or endeavoring to prevent, by force or threats, any [*253 goods, wares, or merchandize being brought to any fair or market, but that every such offence may be inquired of, tried, and punished as if this Act had not been made."

The attempt by false reports to enhance or abate the price of our native commodities is punishable by fine and ransom at common law.(f) And where certain persons come to Coteswold, and said in deceit of the people, that there were such wars beyond the seas that wool could not pass or be carried beyond sea, whereby the price of wools was abated; and presentment thereof being made, the defendants, having appeared, were, upon their confession, put to fine and ransom.(g) And there can be no doubt that the offences excepted by sec. 4 of the 7 & 8 Vict. c. 24 are punishable like other common law misdemeanors.(h)

Monopolies are much the same offence in other branches of trade that ingrossing is in provisions: being a license or privilege allowed by the King for the sole buying and selling, making, working, or using of anything whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before.(i) They are said to differ only in this—that monopoly is by patent from the King, ingrossing by the act of the subject, between party and party; and have been considered as both equally injurious to trades and the freedom of the subject, and therefore equally restrained by the common law.(k) By the common law, therefore, those who are guilty of this offence are subject to fine and imprisonment, the offence being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom; and it is said that there are precedents of prose-

(a) 3 Inst. 196; Bac. Abr. tit. *Forestalling* (A).

(b) 3 Inst. 195; Bac. Abr. tit. *Forestalling* (A).

(c) 1 Hawk. P. C. c. 80, s. 1.

(d) 3 Inst. 196; Bac. Abr. tit. *Forestalling* (A); 1 Hawk. P. C. c. 80, s. 3. But it was held that any merchant, whether subject or foreigner, bringing victuals or any other merchandize into the realm, may sell it in gross: 3 Inst. 196.

(e) 1 Hawk. P. C. c. 80, s. 3; 3 Inst. 196.

(f) 3 Inst. 196, referring to 23 Ed. 3, c. 6; 13 Rich. 2, c. 8, *Inter leges Ethelstani*, c. 12.

(g) 43 Ass. pl. 38; 3 Inst. 196. (h) *Ante*, p. 252.

(i) 4 Blac. Com. 158; 3 Inst. 181.

(k) *Skin*. 169.

cutions of this kind in former days.^(l) And all grants of this kind, relating to any known trade, are void by the common law.^(m)

But, notwithstanding their illegality, monopolies had been carried on to an enormous height during the reign of Queen Elizabeth; the evil was, however, in a great measure remedied by the 21 Jac. 1, c. 3, which declares them to be contrary to law, and void (except as to patents not exceeding the grant of fourteen years to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot); and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb.⁽ⁿ⁾

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*CHAPTER THE TWENTIETH.

OF MAINTENANCE AND CHAMPERTY, AND OF BUYING AND SELLING PRETENDED TITLES.

1. MAINTENANCE seems to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. This may be where a person assists another in his pretensions to lands, by taking or holding the possession of them for him by force or subtilty, or where a person stirs up quarrels and suits in relation to matters wherein he is no way concerned;^(a) or it may be where a person officiously intermeddles in a suit depending in a court of justice, and in no way belonging to him, by assisting either party with money, or otherwise, in the prosecution or defence of such suit.^(b) Where there is no contract to have part of the thing in suit, the party so intermeddling is said to be guilty of *maintenance* generally; but if the party stipulate to have part of the thing in suit, his offence is called *champerty*.^(c)

As to *maintenance*, it is laid down that whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bearing him out in the whole or part of the expense of the suit, may properly be said to be guilty of an act of maintenance.^(d) It has been said that no one can be guilty of maintenance in respect of any money given by him to another for the purposes of an intended suit, *before* any suit is actually commenced; but it should seem that this, if not strictly maintenance, must be equally criminal at common law.^(e) And a person may be as much guilty of maintenance for supporting

(l) 3 Inst. 181; 2 Inst. 47, 61; Bac. Abr. tit. *Monopoly* (A), note (b).

(m) 1 Hawk. P. C. c. 79, s. 1.

(n) Sec. 4. And see further upon the subject of monopolies, 1 Hawk. P. C. c. 79; Bac. Abr. tit. *Monopoly*.

(a) Co. Lit. 368 b.; 2 Inst. 208, 212, 213; 1 Hawk. P. C. c. 83, s. 1, 2. Bac. Abr. tit. *Maintenance*. This kind of maintenance is called in the books *ruralis*, in distinction to another sort carried on in courts of justice, and therefore called *curialis*. It is punishable at the King's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not; but is said not to be actionable.

(b) 1 Hawk. P. C. c. 83, s. 3; Bac. Abr. tit. *Maintenance*; 4 Blac. Com. 134. This kind of maintenance is called *curialis*. See *ante*, note (a).

(c) Co. Lit. 368; 1 Hawk. P. C. c. 83, s. 3. The abuse of legal proceedings by oppressive combinations to carry them into effect is observed by Mr. Hume to have speedily appeared upon the establishment of the laws in the time of Edward I. He says, "instead of their former associations for robbery and violence, men entered into formal combinations to support each other in law suits; and it was found requisite to check this iniquity by Act of Parliament:" 2 Hume 320, referring to the statute of conspirators.—Edw. I.

(d) 1 Hawk. P. C. c. 83, s. 4, and the numerous authorities cited in the margin.

(e) Bac. Abr. tit. *Maintenance* (A); 1 Hawk. P. C. c. 83, s. 12, where it is said, that if it plainly appear that the money was given merely with a design to assist in the prosecution

1 "A man is not less a maintainer, champertor, or conspirator, because the cause was just, if the motive were selfish or oppressive:" Judge Johnson, in *State v. Chitty*, Bailey 379.

*another after judgment, as for doing it while the plea is pending, because the party grieved may be thereby discouraged from bringing a writ of error or attaint (f) [*255]

It has also been said, that he who by his *friendship* or *interest* saves a person that expense in his cause which he might otherwise be put to, or gives, or but endeavors to give, any other kind of assistance to a party in the management of his suit, is guilty of maintenance. (g) And it has been said also, that he who gives any *public countenance* to another in relation to such suit will come under the like notion; as if a person of great power and interest says publicly that he will spend a sum of money on one side, or that he will give a sum of money to labor the jury, whether in truth he spend anything or not; or where such a person comes to the bar with one of the parties, and stands by him while his cause is tried, whether he says anything or not; for such practices not only tend to discourage the other party from going on with his cause, but also to intimidate juries from doing their duty. (h) But it seems that a bare promise to maintain another is not in itself maintenance, unless it be either in respect of the power of the person who makes it, or of the public manner in which it is made. (i) And it seems clear, that a man is in no danger of being guilty of an act of maintenance, by giving another friendly advice as to his proper remedy at law, or as to the counsellor or attorney likely to do his business most effectually. (k)

But there are many acts, in the nature of maintenance, which become justifiable from the circumstances under which they are done. They may be justifiable—1, in respect of an interest in the *thing in variance; 2, in respect of kin- [*256] dred or affinity; 3, in respect of other relations, as that of lord and tenant, master and servant; 4, in respect of charity; 5, in respect of the profession of the law.

It seems clear that not only those who have an actual interest in the thing in

tion or defence of an intended suit, which afterwards is actually brought, surely it cannot but be as great a misdemeanor in the nature of the thing and equally criminal at common law as if the money were given after the commencement of the suit; though perhaps it may not in strictness come under the motion of maintenance.

(f) 1 Hawk. P. C. c. 83, s. 13; Bac. Abr. tit. *Maintenance* (A). Where a declaration alleged that the defendant unlawfully, maliciously, and without reasonable or probable cause, and without having any interest in the suit therein mentioned, instigated and stirred up a pauper to commence and prosecute an action against the plaintiff; by reason whereof the pauper did commence and prosecute such action, whereby the plaintiff was put to great trouble and vexation, and obliged to lay out a large sum in the defence of such action; the Court of Exchequer held that the declaration was good: *Pechell v. Watson*, 8 M. & W. 691. But where a declaration alleged that the defendant unlawfully and maliciously did procure, instigate, and stir up one Thomas to commence and prosecute an action against the plaintiff, wherein certain issues were joined as to which the plaintiff was acquitted; the Court of Queen's Bench held that no cause of action appeared, the declaration not showing maintenance (as the action appeared not to have been commenced when the defendant interfered), and not alleging want of reasonable and probable cause for the action: *Flight v. Leman*, 4 Q. B. 883 (45 E. C. L. R.). A declaration for maintenance need not charge the maintenance to have been committed against the form of the statute—it being a wrongful act at common law, and the statutes relating to maintenance being only declaratory of the common law with additional penalties. Nor need the declaration allege that the defendant was not interested in the action maintained; for if he was, that is matter to be pleaded by him: *Pechell v. Watson*, *supra*.

(g) Bro. tit. *Maintenance*, 7, 14, 17, &c.; 1 Hawk. P. C. c. 83, s. 5. But, *quære*, how far this would be acted upon at the present day; and see the judgment of Buller, J., in *Master v. Miller*, 4 T. R. 340, where he says, "It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense that he would otherwise be put to, was held guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppressed the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be laid aside, must be expected."

(h) 1 Hawk. P. C. c. 83, s. 7; Bac. Abr. tit. *Maintenance* (A).

(i) 1 Hawk. P. C. c. 83, s. 8.

(k) *Ibid.* s. 9; Bac. Abr. tit. *Maintenance* (A).

variance, as those who have a reversion expectant on an estate-tail, or a lease for life or years, &c., but also those who have a bare contingency of an interest in the lands in question, which possibly may never come *in esse*, and even those who by the act of God have the immediate possibility of such an interest, as heirs apparent, or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands: and if a plaintiff in an action of trespass alien the lands, the alienee may produce evidence to prove that the inheritance at the time of the action was in the plaintiff, because the title is now become his own.^(l) Also he who is bound to warrant lands may lawfully maintain the tenant in the defence of his title, because he is bound to render other lands to the value of those that shall be evicted. And he who has an equitable interest in lands or goods, or even in a chose in action, as a *cestui que trust*, or a vendee of lands, &c., or an assignee of a bond for a good consideration, may lawfully maintain a suit concerning the thing in which he has such an equity.^(m) And wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit concerning such thing. And a man's bail may take care to have his appearance recorded: but, as some say, they cannot safely intermeddle further.⁽ⁿ⁾

Where, on the trial of an action brought to recover the amount of an attorney's bill, in which there was a plea of maintenance, it appeared that Jesus College, Oxford, had given notice to set out tithes in kind to all the owners of old inclosures in the parish of Tredington, who had, as far as living memory went, paid certain sums of money in lieu of tithes for the old inclosures, and that at a meeting of the owners of such old inclosures, it was agreed by them that they should defend any suit or suits, which should be instituted by Jesus College, to enforce the payment of tithes, and that the expenses of such defence should be paid by the owners in proportion to their interests, as ascertained by the poor rate; the owners considering that if Jesus College should succeed in one suit as to any part of the old inclosures, that would invalidate the payments as to all; and Jesus College afterwards filed seven bills in the Exchequer, and commissions were issued for the examination of witnesses in each suit, and depositions taken in all the suits; but in one suit a greater number of depositions than in any other, and which related to there having been no payment of any tithe for the old inclosures, and there being a distinction in this respect, as far as living memory went, between the old and the new inclosures: and these depositions by consent had been used in all the suits; and nine issues having been directed to be tried, *and the jury having retired to consider their verdict in the first, it was agreed that the verdict in the other issues should be entered according to the finding of the jury in the first; but such jury was discharged without finding any verdict, and decrees were afterwards made, establishing some of the moduses and quashing others; it was held that the agreement to defend the suits was not maintenance; for although the payments were not the same per acre, and although the interest in each payment was separate, yet all the owners of the old inclosures had an interest in supporting the moduses over all the old inclosures, and, consequently, the agreement was not *officiously* entered into in order to defend the suits.^(o)

Where a count stated that Yeoman had deposited certain money in the hands of the plaintiff, which the plaintiff had delivered to the defendant at his request, and that Yeoman threatened to bring an action against the plaintiff to recover the money, and thereupon, in consideration that the plaintiff, at the request of the defendant, would defend any action Yeoman should commence, the defendant undertook to save the plaintiff harmless; that Yeoman brought an action to recover the money, and that the plaintiff defended it with the privity and consent of the defendant; it was held that this was not maintenance.^(p)

(l) Bac. Abr. tit. *Maintenance* (B); 1 Hawk. P. C. c. 83, s. 14, 15, &c.

(m) Id. Ibid., and see the judgment of Buller, J., in *Master v. Miller*, 4 T. R. 340, *et seq.* (n) 1 Hawk. P. C. c. 83, s. 24, 25; Bac. Abr. tit. *Maintenance* (B.)

(o) *Findon v. Parker*, 11 M. & W. 675, and MSS. C. S. G.

(p) *Williamson v. Henley*, 6 Bing. 299 (19 E. C. L. R.).

Whoever is of kin, or godfather to either of the parties, or related by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, and pray another to be of counsel for him; but cannot lawfully lay out his money in the cause, unless he be either father, or son, or heir-apparent, to the party, or husband of such an heiress.^(q)

Much of the law relating to the maintenance which a lord may give to his tenant could hardly be applicable at the present time. It seems to have been the better opinion that the lord might justify laying out his own money in defence of his tenant's title, where the lands were originally derived from the lord, but that he could not maintain the tenant in respect of lands not holden of himself.^(r)

With respect to the maintenance which a master may give to his servant, it has been held that he may go along with him, or his domestic chaplain, to retain counsel; also he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in Court in favor of his cause: also it is said, that if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but he cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hands; but those, with the servant's consent, he may safely disburse.^(s) And a servant cannot lawfully lay out any of his own money to assist the master in his suit.^(t)

Any one may lawfully give money to a poor man to enable him to carry on his suit: any one may safely go with a foreigner, *who cannot speak English, [*258 to a counsellor and inform him of his case.^(u)

A counsellor, having received his fee, may lawfully set forth his client's cause to the best advantage; but can no more justify giving him money to maintain his suit, or threatening a juror, than any other person. An attorney, also, when specially retained, may lawfully prosecute or defend an action, and lay out his own money in the suit; but an attorney who maintains another is not justified by a general retainer to prosecute for him in all causes. Nor can an attorney lawfully carry on a cause for another at his own expense, with a promise never to expect repayment; and it is said to be questionable whether solicitors, who are no attorneys, can, in any case, lawfully lay out their own money in another's cause.^(v)

Where there was one attorney on the record, and another attorney became before the trial really and substantially the attorney for the client in the conduct of the suit, and the latter after verdict, but before judgment, *bonâ fide* purchased from his client the benefit of his verdict, it was held that the transaction, being a purchase of the subject-matter of the suit by the attorney, was void; for the attorney was to be considered as the attorney having the management of the cause, and the purchase was in effect a purchase by the attorney in the cause of the subject-matter of it *pendente lite*, not for the purpose of enabling them to carry on the suit, but because they wanted money; and independently of the statutes restraining the purchase of property in suit, it had been held, in several cases, that no attorney can be permitted to purchase anything in litigation, of which litigation he has the management.^(w)

A contract whereby an attorney stipulates with a client to receive, in consideration of the large advances requisite to conducting the proceedings to a successful issue, over and above his legal costs, a sum which should be commensurate with his

(q) Bac. Abr. tit. *Maintenance* (B); 1 Hawk. P. C. c. 83, s. 26.

(r) 1 Hawk. P. C. c. 83, s. 29.

(s) Bro. tit. *Maintenance*, 44, 52; 1 Hawk. P. C. c. 83, ss. 31, 32, 33.

(t) 1 Hawk. Id. s. 34.

(u) Bro. tit. *Maintenance* 14; Bac. Abr. tit. *Maintenance* (B) 4; 1 Hawk. P. C. c. 83, ss. 36, 37.

(v) 2 Inst. 564; Bac. Abr. tit. *Maintenance* (B) 5; 1 Hawk. P. C. c. 83, ss. 28, 29, 30.

(w) *Simpson v. Lamb*, 7 E. & B. 84 (90 E. C. L. R.).

¹ "If any one lay out money in the prosecution of a suit to recover a close of which his poor neighbor has been deprived, and without which he must lose it, he is no champertor (*per Maintainer*), because right, humanity, and justice, would approve it:" *Johnson, J.*, in *Stans v. Chitty*, 1 Bailey 401.

outlay and exertions and with the benefit resulting to the client, is unlawful. The contract would have been directly in violation of the laws against maintenance, if the stipulation had been that the plaintiff, as attorney in the suit, in consideration of his advancing the funds necessary for carrying on the litigation, should receive a portion of the proceeds or property to be recovered; and the only difference between the two cases is that, in the former, the party would have the security of the property; whereas here he has only the personal security of the client. But if he be a solvent man, he gets a share of the property by another mode, viz., by suing him and obtaining judgment.(x)

An agreement to be carried into effect in this country, which would be void on the ground of champerty if made here, is not the less void because it is made in a foreign country, where such a contract would be legal. Where, therefore, an attorney entered into an agreement in France with a French subject to sue for a debt due to the latter from a person residing here, whereby the attorney was to receive by way of recompense a moiety of the amount recovered; it was held that this agreement was void for champerty.(xx) If any act were done under such an agreement in England, the party doing it would be indictable here.(yy)

But there is a clear distinction between the assignment by a client to an attorney of the subject-matter of a suit by way of security, and an absolute sale of the subject-matter of the suit. In the latter case the attorney might have an opportunity of imposing on his client, from his superior knowledge of the value of that subject-matter, and might after the purchase take improper means to increase the value. But a mere assignment, by way of security, is open to no such danger, and may be very advantageous to the client.(y) Where, therefore, a client having recovered a verdict in an ejectment, by an indenture, reciting that he was indebted to his attorney in £100 for money lent and for work done as an attorney, and was unable to pay it, and had agreed to secure it, granted the crop of potatoes then growing upon the close, which was the subject of the action, and all other effects thereon, until payment of the £100 and interest, with a proviso that if the client paid the £100 and the interest on a certain day, the indenture should be void; and the indenture also contained a power to the attorney, on default of payment, to enter, carry away, and dispose of the effects assigned; provided that, if he sold the property, he should hold the surplus, after paying the expenses and reimbursing himself, in trust for the client; it was held that this deed could not be impeached on the ground of either champerty or maintenance.(z)

But no counsellor or attorney can justify using any deceitful practice in maintenance of a client's cause: and they will be liable to be punished for misdemeanor in this respect by the common law, and also by the statute of Westm. 1, c. 29. In the construction of this statute it hath been holden that all fraud and falsehood tending to impose upon or abuse the justice of the King's courts are within the purview of it; as if an attorney sue out an *habere facias seisinam*, falsely reciting recovery where there was none, and by color thereof put the supposed tenant in the action out of his freehold. Also it is an offence within the statute to bring a *procurator* against a poor man having nothing in the land, on purpose to oust the true tenant, or to procure an attorney to appear for a man, and confess a judgment without warrant; or to plead a false plea, known to be utterly groundless, and i

(x) *Earle v. Hopwood*, 9 C. B. (N. S.) 556 (99 E. C. L. R.). *Quære*, whether, if this purchase had been by a stranger, it would have been lawful.

(xx) *Grell v. Levy*, 16 C. B. (N. S.) 73 (111 E. C. L. R.).

(yy) *Rex v. Brisac*, 4 East R. 163.

(y) Per Lord Campbell, C. J., *Anderson v. Radcliffe*, E. B. & E. 806 (96 E. C. L. R.), citing *Wood v. Downes*, 18 Ves. 120.

(z) *Anderson v. Radcliffe*, *supra*, affirmed in error, E. B. & E. 819 (96 E. C. L. R.), upon the ground that the contract was confined to the payment of a debt already due for costs subject to taxation, and therefore the attorney got nothing but a security for a just debt. See also *Cook v. Field*, 15 Q. B. 460 (69 E. C. L. R.), where an agreement to sell the possibility and expectancy of an estate, in case the vendor became devisee of it, was held lawful.

(a) 2 Inst. 215; Bac. Abr. and Hawk. *supra* (v). The statute enacts that the offender shall be imprisoned for a year and a day, and shall not plead again if he be a pleader.

vented merely to delay justice and to abuse the Court.(b) In most of these cases, the Court would probably grant an attachment against the offender on motion.(c)

2. *Champerty* is a species of maintenance, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense.(d) It is defined in the old books to be, the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it.(e)

*The statute of Westminster 1 (3 Edw. 1), c. 25, enacts, that "no officers of the King, by themselves nor by others, shall maintain pleas, suits, or matters, [260 hanging in the King's courts, for lands, tenements, or other things, for to have part or profit thereof, by covenant made between them; and he that doth shall be punished at the King's pleasure. By the Courts mentioned in this statute it has been held that courts of record only are intended; and it has also been held that under the word *covenant* all kinds of promises and contracts of this kind are included; that maintenance in personal actions to have part of the debt or damages, is as much within the statute as maintenance in real actions for a part of the land; and that though a grant of rent out of other lands is not within the statute, yet the statute applies to a grant of rent out of the lands in question; but that a grant of a part of a thing in suit, made in consideration of a precedent debt, is not within its meaning.(f) The maintenance of a tenant or defendant is as much within the meaning of the statute as the maintenance of a demandant or plaintiff. And it has been holden not to be material whether he who brings a writ of champerty did in truth suffer any damage by it, or whether the plea wherein it is alleged be determined or not.(g)

The statute of Westminster 2 (13 Edw. 1), c. 49, enacts, that "the chancellor, treasurer, justices, nor any of the King's council, nor clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the King's house, clerk ne lay, shall not receive any church, nor advowson of a church, land, nor tenement in fee, by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before us, or before any of our officers; nor shall take no reward thereof. And he that doth contrary to this Act, either himself or by another, or make any bargain, shall be punished at the King's pleasure, as well he that purchaseth as he that doth sell." This statute extends only to the officers therein named, and not to any other persons.(h) But it so strictly restrains all such officers from purchasing any land, pending a plea, that they cannot be excused by a consideration of kindred or affinity, and they are within the meaning of the statute by barely making such a purchase, whether they maintain the party in his suit or not; whereas such a purchase for good consideration made by any other person, of any terre-tenant, is no offence, unless it appear that he did it to maintain the party.(i)

The 28 Edw. 1, c. 11, reciting that the King had theretofore ordained by statute that none of his ministers should take no plea for maintenance, by which statute other officers were not bounded, enacts that "the King will that no officer, nor any other (for to have part of the thing in plea) shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another; and if any do, and he be attainted thereof, the taker shall forfeit unto the King so much of his lands and goods as doth amount to the value of the part that he hath purchased for such maintenance. And for this *atteindre*, *whosoever will [261 shall be received to sue for the King before the justices before whom the plea hangeth, and the judgment shall be given by them. But it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of

(b) 2 Inst. 215; Dy. 362; 1 Hawk. P. C. c. 83, s. 33, *et seq.*

(c) Bac. Abr. tit. *Maintenance* in the margin.

(d) 4 Blac. Com. 135.

(e) Per Tindal, C. J., *Stanley v. Jones*, 7 Bing. 377 (20 E. C. L. R.); 5 M. & P. 193.

(f) See the authorities collected in 1 Hawk. P. C. c. 84, s. 3, *et seq.*; Bac. Abr. tit. *Champerty*.

(g) *Ib.* *Ibid.*

(i) 1 Hawk. P. C. c. 84, s. 12.

(h) 2 Inst. 484, 485.

learned men in the law for his fee, or of his parents or next friends." Upon this statute it seems to be agreed that champerty in any action at law is within it; and a purchase of land, pending a suit in equity concerning it, has also been holden to be within the statute; also a lease for life or years, or a voluntary gift of land, pending a plea, is as much within the statute as a purchase for money. But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain, nor any surrender by a lessee to his lessor, nor any conveyance or promise thereof made by a father to his son, or by any ancestor to his heir apparent, nor a gift of land in suit, after the end of it, to a counsellor, for his fee or wages, without any kind of precedent bargain relating to such gift, are within the meaning of the statute. (k) A bargain by a man, who has evidence in his own possession respecting a matter in dispute between third persons, and who at the time professes to have the means of procuring more evidence, to purchase from one of the contending parties, as the price of the evidence which he so possesses or can procure, an eighth part or share of the sum of money, which shall be recovered by means of the production of that evidence, is an illegal agreement; and if there be any difference between such a contract, and direct champerty, it is strongly against the legality of such contract; as besides the ordinary objection, that a stranger to the controversy has acquired an interest to carry on the litigation to the uttermost extent, by every influence and means in his power, the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct tendency to pervert the cause of justice. (l) So where a bill was filed for the purpose, among other things of declaring an agreement void, which has been made by a seaman for the sale of his chance of prize money to prize agents, who were to carry on the suit, Sir W. Grant, M. R., expressed an opinion that the agreement was void, as amounting to champerty. (m)

Where to a declaration upon an agreement the defendant pleaded that one Townley died possessed of personal property, intestate and without any known relation, and that administration had been granted to the Solicitor to the Treasury for the use of the Queen, and that the defendant was ignorant of his being related to Townley, or in any way entitled to the property, and that the plaintiff and one Rosaz represented to the defendant that they would supply and give such information and evidence, in case it should be necessary that proceedings should be taken by the defendant at law or in equity for the recovery of the property, that, by means of such information and evidence, the defendant should and might recover the property, provided the defendant would enter into an agreement with the plaintiff and Rosaz to pay each of them one-fifth of the property so recovered; and that it was thereupon unlawfully agreed between the parties that the plaintiff and Rosaz should give and supply such information and evidence in case of proceedings being taken at law or in equity for recovery of the property, that, by means of such information and evidence the defendant should successfully recover the property; and that if by means of such information and evidence the defendant should actually recover the property, he would pay each of them one-fifth of the amount; and that for the purpose of carrying this illegal agreement into effect the parties entered into the agreement set out in the declaration, and that it was under the illegal agreement that the property was actually recovered; it was held that this was maintenance in its worst aspect. The plaintiff and Rosaz, entire strangers to the property, which they say the defendant has a title to, but which is in the possession of another claiming title to it, agree with the defendant that legal proceedings shall be instituted in his name for the recovery of it, and that they will supply him, not with any specified or definite documents or information, but with evidence that shall be sufficient to enable him successfully to recover the property; each of them is to have one-fifth of the property when so recovered; and unl-

(k) Bac. Abr. tit. *Champerty*; 1 Hawk. P. C. c. 84, s. 14, *et seq.* But with respect to the counsellor, it is said that it seems dangerous for him to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty: 2 Inst. 564.

(l) *Stanley v. Jones*, 7 Bing 369 (20 E. C. L. R.); 5 M. & P. 193; *Potts v. Sparrow*, 5 C. & P. 749 (25 E. C. L. R.).

(m) *Stevens v. Bagwell*, 15 Ves. 139.

the evidence with which they supply him is sufficient for this purpose, they are to have nothing. They are not to employ the attorney or to advance money to carry on the litigation; but they are to supply that upon which the event of the suit must depend, *evidence*; and they are to supply it of such a nature and in such quantity as to secure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal, and *Stanley v. Jones*(o) is an express authority to that effect.(p)

3. Another species of maintenance appears to be the offence of *buying or selling a pretended title*; of which it is said in the books that it seems to be a high offence at common law, as plainly tending to oppression, for a man to buy or sell at an under rate a doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller does not think it worth his while to do. And it seems not to be material whether the title be good or bad; or whether the seller were in possession or not, unless the possession were lawful and uncontested.(q) Offences of this kind are also restrained by several statutes. The 1 Rich. 2, c. 9, enacts, that no gift or feoffment of lands or goods in debate under legal proceedings, as mentioned in the statute, shall be made; and that, if made, they shall be holden for none and of no value.(r) The 26 & 27 Vict. c. 125 repeals the 1 Rich. 2, c. 9. And by the 13 Edw. 1, c. 49, no person of the King's house shall buy any title whilst the thing is in dispute, on pain of both the buyer and seller being punished at *the King's pleasure. There is also a provision of the [263 32 Hen. 8, c. 9, that no one shall buy or sell, or obtain any pretended right or title to land, unless the seller, his ancestors, or they by whom he claims, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits for one whole year before, on pain that both seller and buyer shall each forfeit the value of such land, the one-half to the King, and the other to him who will sue.(s)

The offences of champerty and buying of titles, laid or alleged in any declaration or information, may be laid in any county, at the pleasure of the informer.(t)

By the common law all unlawful maintainers are not only liable to render damages in an action at the suit of the party grieved, but may also be indicted and fined, and imprisoned, &c.; and it seems that a court of record may commit a man for an act of maintenance in the face of the Court.(u)

Some pains and penalties are also attached to this offence by statute. The 1 Rich. 2, c. 4, enacts, that no person whatsoever shall take or sustain any quarrel by maintenance, in the country or elsewhere, on grievous pain; that is to say, the King's counsellors and great officers, on a pain that shall be ordained by the King himself, by the advice of the lords of this realm; and other officers of the King, on pain to lose their offices and to be imprisoned and ransomed, &c.; and all other persons, on pain of imprisonment and ransom. And by the 32 Hen. 8, c. 9, maintenance is subjected to a forfeiture of ten pounds: one moiety to the King, and the other moiety to the informer.(v)

(o) *Supra*.

(p) *Sprye v. Porter*, 7 E. & B. 58 (90 E. C. L. R.).

(q) *Bac. Abr. Maintenance* (E); 1 Hawk. P. C. c. 86, s. 1; Moore 751; Hob. 115; Plowd. 80.

(r) But as between the feoffor and feoffee, feoffments of this kind are effectual: *Co. Lit.* 369.

(s) But the statute provides that any person, being in lawful possession by taking the rents and profits, may buy or get the pretended right or title of any other person to the same. And it also provides, that no person shall be charged with these penalties unless sued within a year after the offence. For the construction of this statute, see 1 Hawk. P. C. c. 86, s. 7, *et seq.*

(t) 31 Eliz. c. 5, s. 4; 1 Hawk. P. C. c. 84, s. 20, and c. 86, s. 18.

(u) 2 Roll. Abr. 114; 2 Inst. 208; *Hetl.* 79; 1 Hawk. P. C. c. 83, s. 38; *Bac. Abr. tit. Maintenance* (C).

(v) For the construction of these statutes see 1 Hawk. P. C. c. 80, s. 43, *et seq.*

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*CHAPTER THE TWENTY-FIRST.

OF EMBRACERY, AND DISSUADING A WITNESS FROM GIVING EVIDENCE.

EMBRACERY is another species of maintenance, and consists in such practices as tend to affect the administration of justice by improperly working upon the minds of jurors. It seems clear that any attempt whatsoever to corrupt or influence, or instruct a jury in the cause beforehand, or in any way to incline them to be more favorable to the one side than to the other; by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open Court, at the trial of the cause, is a proper act of embracery, whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false.^(a) And it has been adjudged that the bare giving of money to another, to be distributed among jurors, is an offence of the nature of embracery, whether any of it be afterwards actually so distributed or not. It is also clear that it is as criminal in a juror as in any other person to endeavor to prevail with his companions to give a verdict for one side by any practices whatsoever; except only by arguments from the evidence which may have been produced, and exhortations from the general obligations of conscience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatsoever to secure a verdict are high offences of this nature; as where persons by indirect means procure themselves or others to be sworn on a tale in order to serve one side.^(b)

It is said that generally the giving of money to a juror after the verdict, without any precedent contract in relation to it, is an offence savoring of the nature of embracery; but this does not apply to the reasonable recompense usually allowed to jurors for their expenses in travelling.^(c)

The law will not suffer a mere stranger so much as to labor a juror to appear, and act according to his conscience; but it seems clear that a person who may justify any other act of maintenance,^(d) may safely labor a juror to appear and give a verdict according to his conscience; but that no other person can justify intermeddling so far. And no one whatsoever can justify the laboring a juror not to appear.^(e)

Offences of this kind subject the offender to be indicted and punished by fine and imprisonment in the same manner as all other kinds of unlawful maintenance do by the common law.^(f) They are also restrained by statutes; the 5 Edw. 3, c. 10, enacting, that any juror taking of the one party or the other and being duly attainted, shall not be put in any assizes, juries, or inquests, and shall be commanded to prison, and further ransomed at the King's will; and the 34 Edw. 3, c. 8, enacting, that a juror attainted of such offence shall be imprisoned for a year. The 38 Edw. 3, c. 12, enacts, that if any jurors, sworn in assizes and other inquests, take anything, and be thereof attainted, every such juror shall pay ten times as much as he hath taken. "And that all the embracers to bring or procure such inquest in the country, to take gain or profit, shall be punished in the same manner and form as the jurors; and if the juror or embracer so attainted have not wherewith to make gree in the manner aforesaid, he shall have the imprisonment of one year.^(g) The 32 Hen. 8, c. 9, enacts, that no person shall embrace any freeholders or jurors upon pain of forfeiting ten pounds, half to the King, and half to him that shall sue within a year.

The 6 Geo. 4, c. 50, s. 62, repeals so much of the 5 Edw. 3, c. 10, "as relates to the punishment of a corrupt juror," and so much of the 34 Edw. 3, c. 8, "as

(a) 1 Hawk. P. C. c. 86, s. 1, 5; 4 Blac. Com. 140.

(b) 1 Hawk. P. C. c. 85, s. 4; The King v. Opie, 1 Saund. 301.

(c) 1 Hawk. P. C. c. 85, s. 3.

(d) *Ante*, 256, *et seq.*

(e) 1 Hawk. P. C. c. 85, s. 6.

(f) *Id.* s. 7; 4 Bac. Com. 140.

(g) Upon the construction of these statutes, see 1 Hawk. P. C. c. 85, s. 11, *et seq.*

directs the proceedings against jurors taking a reward to give their verdict;" and so much of the 38 Edw. 3, c 12, "as ordains the penalty on corrupt jurors and embracers," and enacts and declares, by sec. 61, that "notwithstanding anything herein contained, every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and be punished by fine and imprisonment, in like manner as every such person might have been before the passing of this Act."

All who endeavor to stifle the truth, and prevent the due execution of justice, are highly punishable; and therefore the dissuading or endeavoring to dissuade a witness from giving evidence against a person indicted is an offence at common law, though the persuasion should not succeed.^(h)¹

*CHAPTER THE TWENTY-SECOND.

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OF BARRATRY, AND OF SUING IN THE NAME OF A FICTITIOUS PLAINTIFF.

A BARRATOR is defined to be a common mover, exciter, or maintainer of suits or quarrels, in courts of record, or other courts, as the county court, and the like; or in the country, by taking and keeping possession of lands in controversy, by all kinds of disturbance of the peace, or by spreading false rumors and calumnies whereby discord and disquiet may grow among neighbors.^(a) But one act of this description will not make any one a barrator, as it is necessary in an indictment for this offence to charge the defendant with being a *common barrator*, which is a term of art appropriated by law to this crime.^(b) It has been holden, that a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right;^(c) but this is doubted, in case such actions be merely groundless and vexatious, without any manner of color, and brought only with a design to oppress the defendants.^(d)²

An attorney cannot be deemed a barrator in respect of his maintaining another in a groundless action, to the commencing whereof he was in no way privy.^(e)

^(h) 1 Hawk. P. C. c. 21, s. 15; Rex v. Lawley, 2 Str. 904. See as to mere attempts to commit crimes, see *ante*, p. 83. And see an indictment for dissuading a witness from giving evidence against a person indicted, 2 Chit. Crim. L. 235; and an indictment for a conspiracy to prevent a witness from giving evidence: Rex v. Steventon, 2 East R. 362. And see Rex v. Edwards, *post*, "Perjury."

^(a) Rex v. Uryln, 2 Saund. 308, note (1); 1 Hawk. P. C. c. 81, ss. 1, 2; Co. Lit. 368; 8 Rep. 36. Barrator is said to be a forensic term taken from the Normans. The Icelandic and Scandinavian *baratta*, the Anglo-Norman *baret*, and the Italian *baratta*, are all words signifying a quarrel or contention. See the notes to Bac. Abr. tit. *Barratry* (A).

^(b) 8 Co. 36; Rex v. Hardwicke, 1 Sid. 282; Reg. v. Hannon, 6 Mod. 311.

^(c) Roll. Abr. 355.

^(d) 1 Hawk. P. C. c. 81, s. 3.

^(e) 1 Hawk. P. C. c. 81, s. 4.

¹State v. Keyes, 8 Verm. 57; State v. Carpenter, 20 Ibid. 9.

²The books are not perfectly explicit, whether three acts of barratry are absolutely, and in all cases, necessary to constitute the perpetrator of them a common barrator. The commencing of three suits, where one may serve every justifiable purpose, may be evidence of three acts of barratry, if particular directions were given to the attorney, with a malicious design to harass and oppress the debtor. But if there is no evidence of such direction, from which an inference may be drawn of an intention to oppress, the indictment cannot be supported, for without such evidence there is no barratry: Comm. v. McCulloch, 15 Mass. Rep. 227. See State v. Chitty, 1 Bailey 379; where in the opinion three acts seems considered as necessary. The moving and exciting of criminal prosecutions is barratry; and this, though a wrong may have been done, or petty offence committed, if the motive were bad. A magistrate as well as a private person, is liable to be indicted for this offence: State v. Chitty, 1 Bailey 379.

And it seems to have been holden that a feme covert cannot be indicted as common barrator ;(*f*) but this opinion is considered as questionable.(*g*)

In an indictment for this offence it seems to be unnecessary to allege it to have been committed at any certain place ; because, from the nature of the crime, consisting in the repetition of several acts, it must be intended to have happened in several places ; wherefore it is said that the trial ought to be by a jury from the body of the county.(*h*) As the indictment may be in a general form, stating the defendant to be a common barrator, without showing any particular facts, it is clearly settled that the prosecutor must, before the trial, give the defendant a note of the *particular acts* of barratry which he intends to prove against him ; and that if he omit to do so, the Court will not suffer him to proceed in the trial of the indictment.(*i*) And the prosecutor will be confined *to his note of particulars, and will not be at liberty to give evidence of any other acts of barratry than those which are therein stated.(*k*)¹

It has been adjudged that justices of peace, *as such*, have by virtue of the commission of the peace, authority to inquire and hear this offence, without an special commission of oyer and terminer.(*l*)

The punishment for this offence in common persons is by fine and imprisonment and binding them to their good behavior ; and in persons of any profession relating to the law, a further punishment by being disabled to practice for the future.(*m*) And it may be observed, that by 12 Geo. 1, c. 29, s. 4, if any person convicted of common barratry shall practice as an attorney, solicitor, or agent, in any suit or action in England, the judge or judges of the Court where such suit or action shall be brought shall, upon complaint or information, examine the matter in a summary way in open Court ; and, if it shall appear that the person complained of has offended, shall cause such offender to be transported for seven years.(*n*)

In this place may be mentioned another offence of equal malignity and audaciousness ; that of suing another in the name of a fictitious plaintiff ; either one not being at all, or one who is ignorant of the suit. This offence, if committed in any of the King's superior Courts, is left, as a high contempt, to be punished at their discretion ; but in Courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by the 8 Eliz. c. 2, s. 4, to be punished by six months' imprisonment, and treble damages to the party injured.(*o*)

(*f*) Bac. Abr. tit. *Baron and Feme* (G) in the notes, citing Roll. Rep. 39.

(*g*) 1 Hawk. P. C. c. 81, s. 6.

(*h*) Parcel's case, Cro. Eliz. 195 ; 1 Hawk. P. C. c. 81, s. 11 ; Bac. Abr. tit. *Barratry* (B)

(*i*) Rex v. Grove, 5 Mod. 18 ; J'Anson v. Stuart, 1 T. R. 748, per Buller, J. ; and per Heath, J., in Rex v. Wylie, 1 New R. 95.

(*k*) Goddard v. Smith, 6 Mod. 262.

(*l*) Barnes v. Constantine, Yelv. 46 ; Cro. Jac. 32 ; s. c. recognized in Busby v. Watson, 2 Blac. R. 1050. See Rex v. Uryln, 2 Saund. 308, note (1). In Hawk. P. C. c. 81, s. 4, there is a *quere* to this point, as having been ruled differently in Rolle's Reports.

(*m*) 34 Edw. 3, c. 1 ; 1 Hawk. P. C. c. 81, s. 14 ; Bac. Abr. tit. *Barratry* (C) ; 4 Blac. Com. 134.

(*n*) Now penal servitude for any term not exceeding seven and not less than three years by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4. This Act was revived and made perpetual by 21 Geo. 2, c. 3.

(*o*) 4 Blac. Com. 134.

¹ An indictment charging the defendant generally as a common barrator is sufficient. But the prosecutor must before the trial give the defendant a note of particulars. This note is not a matter of technical nicety. If it so identify the several legal proceedings intended to be given in evidence as acts of barratry, that the defendant by pursuing the notice could readily find the records of the several proceedings, it is sufficient : Comm. - Davis, 11 Pick. 424. This note forms no part of the record, and cannot furnish ground for a motion in arrest of judgment : State v. Chitty, 1 Bailey 379. The st. 32 H. 8, c. 1 limiting suits and prosecutions for bracerie, maintenance, champerty, &c., to one year after the offence committed, does not apply to barratry. Ibid.

*CHAPTER THE TWENTY-THIRD

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OF BIGAMY.

THE offence of having a plurality of wives at the same time is more correctly denominated *polygamy*; but, the name *bigamy* having been more frequently given to it in legal proceedings, it may perhaps be a means of more ready reference to treat of the offence under the latter title. (a) Originally this offence was considered as of ecclesiastical cognizance only; and though the 4 Edw. 1. stat. 3, c. 5, treated it as a capital crime, it appears still to have been left of doubtful temporal cognizance, until the 1 Jac. 1, c. 11, declared that such offence should be felony.

The provisions of this statute were in several respects defective. A person whose consort had been abroad for seven years, though known to be living, might have married again with impunity. And so might a person who was only divorced *a mensâ et thoro*. The 9 Geo. 4, c. 31, therefore repealed the statute of James, and that Act is repealed by the 24 & 25 Vict. c. 95; and by the 24 & 25 Vict. c. 100, s. 57, "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor. (b) and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place. Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty, or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time, or shall extend to any person who, at the time of such second marriage, shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any Court of competent jurisdiction." (c)

*It was held under the 1 Jac. 1, that if a woman married a husband in Ireland, and afterwards, such husband still living, married another husband in England, it was within the Act. But that if she married a husband in England, and afterwards, such husband still living, married another husband in Ireland, it was not within the Act: on the ground that the second marriage, which alone constituted the offence, was a fact done within another jurisdiction; and, though inquirable here for some purposes, like all transitory acts, was not cognizable as a crime by the rule of the common law; (d) but the 24 & 25 Vict. c. 100, makes the second marriage whether "in England or elsewhere," bigamy; and so did the 9 Geo. 4, c. 31; so that where the prisoner, a subject of her Majesty, usually resident at Carlisle, married in Scotland, and according to the law of Scotland, Anne Ashton, also in like manner resident in Carlisle, and afterwards, whilst the said Anne was alive, the prisoner, who continued resident at Carlisle, married in Scotland, according to the law of Scotland, Jane Lister, also usually resident in Carlisle; it was held that he was guilty of bigamy under the 9 Geo. 4, c. 31, s. 22; for at the time of his second marriage he was a person married, and the

(a) Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. According to the canonists, bigamy consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow: 4 Blac. Com. 163, note b. And see Bac. Abr. tit. *Bigamy*, in the notes.

(b) As to principals in the second degree, accessories, and hard labor, &c. See *ante*, pp. 4, &

(c) This clause is taken from the 9 Geo. 4, c. 31, s. 22, and 10 Geo. 4, c. 34, s. 26 (1).

(d) 1 Hale 692, 693; 1 East P. C. c. 12, s. 2, p. 465.

second marriage, although it took place in Scotland, was clearly an offence with the statute.^(e) In another case it was ruled, that if A. takes B. to husband in Holland, and then, in Holland, takes C. to husband living B., and then B. dies and then A. living C. marries D., this is not marrying a second husband, the former being alive; the marriage to C. living B. being simply void. But if B. had been living, it would have been felony to have married D. in England.^(f)

The proviso in the new statute contains exceptions in respect of four cases, which a second marriage is no felony within the statute.

The *first exception* is that the statute shall not extend "to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty."

The *second exception* is that it shall not extend to "any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time." Here, by the express words of the clause the party marrying again must have no knowledge of the former husband or wife having been alive; and it does away with the absurd construction put upon the first exception in the 1 Jac. 1, that if the husband or wife were abroad for seven years, it was no offence, though the party remaining in England knew that the other was living.^(g) But the obligation of a party to use reasonable diligence to inform himself of the fact, and the question whether if he neglect or refuse to avail himself of palpable means of acquiring such information, he will stand excused, are points which do not appear to be settled.^(h) Where the first marriage was in 1824, and the parties separated in 1827, and did not again live together, and the second marriage was in 1840, and there was evidence that the prisoner and his first wife were walking together in 1834; Patteson, J., held that the true construction of the proviso was, not that the party must know, at the time when he contracts the second marriage, that the first wife has been alive during the seven years, but that he must have been ignorant during the whole of those seven years that she was alive. If it had been meant that he should know "at the time of such second marriage," know that the first wife was alive, the words would have been used.⁽ⁱ⁾ And where the first wife left the prisoner six years before his second marriage, and the second wife had known the prisoner about ten years, living in service as a single man, and never knew or heard that he had had a wife, and the first wife had lived seventeen miles from the place where the prisoner lived; Cresswell, J., held that the prisoner came within the proviso, as there was no proof that the prisoner knew that his first wife was living.^(k)

Upon an indictment for bigamy the first marriage was with J. Briggs in 1818 at Altonbury; the second in 1856, at Cambridge. The prisoner on both occasions was married by her maiden name, and the second husband swore that she had presented herself to him as a single woman. Altonbury and Cambridge are about twenty-four miles apart. J. Briggs was a laboring man, considerably older than the prisoner, living in lodgings, and working at a farm about two miles from Altonbury, sometimes absent from it for a month at a time. A witness said that the prisoner left him at the end of four months from the marriage, and he had not seen her subsequently. The jury were asked whether in their opinion the prisoner knew her husband to be alive at the time she contracted the second marriage; and if not, whether she had the means of acquiring the knowledge; and were directed that, even if they thought her ignorant in fact of her husband's being alive, she

(e) Reg. v. Topping, Dears. C. C. 647.

(f) Lady Madison's case, 1 Hale 693.

(g) 1 Hale 693; 3 Inst. 88; 4 Blac. Com. 164. This is remarked upon as an extraordinary provision in 1 East P. C. c. 12, s. 3, p. 466.

(h) See 1 East P. C. c. 12, s. 4, p. 467.

(i) Reg. v. Cullen, 9 C. & P. 681 (38 E. C. L. R.). The jury found that the prisoner and his wife were walking together in 1834. If they had found otherwise, Patteson, J., would have reserved the question whether the prisoner was bound to prove that he had made due inquiries as to his first wife being alive when he was married a second time.

(k) Reg. v. Jones, C. & M. 614 (41 E. C. L. R.).

to find her guilty, if they also thought that by the exercise of reasonable diligence, in making inquiry, she might have informed herself, and neglected to use such diligence. The jury said they had no evidence of her knowledge; but were of opinion that she had the means of acquiring knowledge, if she had chosen to make use of them; and, upon a case reserved after a verdict of guilty, it was held that the conviction was wrong; for the verdict was imperfect, as the jury had not found that the prisoner knew her husband was alive.^(l)

On an indictment for bigamy a witness proved the first marriage to have taken place eleven years ago, and that the parties lived together some years, but could not say how long—it might be four years. Wightman, J., after referring to the 24 & 25 Vict. c. 100, s. 57, and the proviso, said, "How is it possible for any man to prove a negative? The prisoner cannot do that." "It seems to me that there is no evidence to take the case out of the statute. There is no evidence that the prisoner and his wife lived together within the seven years, or that he knew that she was alive."^(m)

*Where the prisoner married in 1838, and in 1843 separated from his wife, and again married in 1855, and in 1857 the prisoner produced his first wife in order to protect his second wife from a prosecution for obtaining money by false pretences, and some of the prisoner's family proved that for sixteen years prior to 1857 they had heard nothing of the prisoner's first wife; and the preceding case was cited; Cockburn, C. J., left it to the jury whether there was any reasonable doubt that there was an absence of all knowledge on the prisoner's part that his wife was alive, and if they were of that opinion he was entitled to be acquitted.⁽ⁿ⁾

Where the parties had lived together for two or three years after their marriage in 1846, and then separated on the ground of the adultery of the wife; and the prisoner married his second wife in 1857, and before he married her told her he had been married before, and had left his first wife eight years ago on the ground

^(l) Reg. v. Briggs, A. D. 1856, D. & B. C. C. 98. This case was argued only on the part of the prisoner, and the Court studiously avoided determining on which side the onus of proof as to the knowledge of the first husband being alive lay, and yet the point seems very clear. It is plain that the latter part of the section both in the 9 Geo. 4, c. 31, s. 22, and in the new Act, is in the nature of a proviso. Now no rule is better settled than that if an exception comes by way of proviso, whether it occurs in a subsequent part of the Act, or in a subsequent part of the same section containing the enactment of the offence, it must be specially pleaded as an answer where it is necessary to plead defence, or proved in evidence by the party relying upon it: *Simpson v. Ready*, M. & W. 736; *Steel v. Smith*, 1 B. & A. 94; 1 Stark. Ev. 365 (2d edit.) citing *Doe v. Bingham*, 4 B. & A. 672 (6 E. C. L. R.); *Doe v. Hawthorn*, 2 B. & A. 96. Hence it is that no indictment for bigamy ever negatives the exceptions contained in the proviso, and hence it follows that the proof of those exceptions lies on the prisoner; if it were otherwise, the prosecutor would have to prove more than he has alleged. Then the proviso in terms requires proof both of the absence of the party for seven years, and that the party shall not have been known by the prisoner to have been living within that time, and consequently it lies on the prisoner to give evidence of both; and as the Legislature has required proof of both, it never could have been intended that proof of the one should be sufficient evidence of the other. When, however, the prisoner has given evidence to negative his knowledge that the party is alive, the onus may be thrown on the prosecutor to show that he had that knowledge; and in accordance with this view is the dictum of Willes, J., in *Reg. v. Ellis*, 1 F. & F. 309, that "if the husband has been living apart from his wife for seven years, under such circumstances as to raise a probability that he supposed that she was dead when he was remarried, evidence may be necessary that he knew his first wife was alive."

As to the manner in which the case should be left to the jury; it should seem that the proper course is to ask them whether they are satisfied that the prisoner was married twice, and that the person whom he first married was alive at the time of the second marriage; and, if they are satisfied of these facts, to tell them that it then lies upon the prisoner to satisfy them that there was an absence for seven years, and also that during the whole of those seven years, he was ignorant that his first wife was alive, and that unless he has proved both those facts to their satisfaction they ought to convict him. It is perfectly clear that the question is not whether he knew that his first wife was alive at the time of the second marriage; for he may have known that she was alive within the seven years, and yet not know that she was alive at the time of the second marriage, and, if he knew that she was alive at any time within the seven years, he ought to be convicted.

^(m) Reg. v. Heaton, 3 F. & F. 819.

⁽ⁿ⁾ Reg. v. Cross, 1 F. & F. 610, A. D. 1859. See note (l).

of adultery, and that he had been told she had been drowned; and there was no evidence as to whether the prisoner knew that his first wife was alive; Bramwell, B., left it to the jury whether the prisoner, at the time of his second marriage, knew that his first wife was alive. (n)

The *third exception* provides that the Act shall not extend "to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage."¹ A divorce, therefore, *a mensâ et thoro*, which was held sufficient under the 1 Jac. 1, (o) is now no longer an exception. Nor would a judicial separation under the 20 & 21 Vict. c. 85, s. 16, suffice, for it is to have the effect of a divorce *a mensâ et thoro* (p). It was held under the 1 Jac. 1, that if there be a *272] divorce *a vinculo matrimonii*, *and an appeal by one of the parties, though this suspends the sentence, and may possibly repeal it, yet a marriage pending that appeal will be aided by the exception. (q) In a case upon the 1 Jac. 1, the question arose, whether a divorce by the Commissary or Consistorial Court of Scotland would operate so as to excuse a person, who, having been married in England, had been divorced by that Court, and had then married again in England from the penalties of bigamy. And, from the decision of the judges, it appears, that, if the first marriage has taken place in England, it will not be a defence to prove a divorce *a vinculo matrimonii* before the second marriage, if such divorce were out of England; unless the divorce were upon a ground, which, by the law of England, would warrant such a divorce: the divorces and sentences referred to in the third section of the 1 Jac. 1, being divorces and sentences of the ecclesiastical courts within the limits to which that statute applies. The prisoner was indicted for bigamy: both his marriages were in England; but before his second marriage his wife had obtained a divorce *a vinculo* from him in the Commissary Court of Scotland. It appeared that he took his wife into Scotland, that she might be induced to institute a suit against him there; and that he cohabited with a prostitute there, for the very purpose of irritating his wife, and furnishing ground for the divorce. A case being reserved and argued, the judges were unanimous that no sentence or act of any foreign country or state could dissolve an English marriage *a vinculo* for grounds on which it was not liable to be dissolved *a vinculo* in England; and that no divorce of an ecclesiastical court was within the exception in the third section of the statute, unless it was the divorce of a court within the limits to which that statute extended. (r) The judges gave no opinion upon the husband's conduct, in drawing on his wife to sue for the divorce, because the jury had not found fraud. (s)

(n) Reg. v. Danc, 1 F. & F. 323, A. D. 1858. See note (l), *supra*.

(o) 1 Hale 694; 3 Inst. 89; 1 Hawk. P. C. c. 42, s. 5; 4 Blac. Com. 164; Middleto case, Old Bailey, 14 Car. 2; Kel. 27. And see 1 East P. C. c. 12, s. 5, p. 467.

(p) See sec. 27 of the Act for the cases in which a marriage may be dissolved.

(q) 3 Inst. 89; 1 Hale 694, citing Co. P. C. c. 27, p. 89, and stating further that if sentence of divorce be repealed, a marriage afterwards is not aided by the exception though there was once a divorce.

(r) It seems to admit of some doubt whether this case be any authority upon the present Act. The words of the 1 Jac. 1, c. 11, were "divorced by any sentence in the Ecclesiastical Court." The words in the 24 & 25 Vict. c. 100, s. 57, are "divorced from the bond of the first marriage." These words are so much more general, that it may be contended that they except every case where according to the laws of the country where the divorce takes place, there is a legal divorce *a vinculo matrimonii*, and the words "any court of competent jurisdiction" in the next clause, instead of the words "the Ecclesiastical Court," the 1 Jac. 1, c. 11, seem to favor this view of the exception. C. S. G.

(s) Rex v. Lolley, MS. Bayley, J., and R. & R. 237. This case is referred to by the Lord Chancellor, and also by Mr. Brougham, in Tovey v. Lindsay, 1 Dow's Rep. 117. And: 5 Ev. Coll. Stat. 348, note (4). Upon the important subject of the dissolution of marriages, celebrated under the English law, by the Consistorial Court of Scotland, see publication of reports of some Decisions of that Court, by James Fergusson, Esq., Advocate, one of the Judges.

¹ It is no defence to an indictment for bigamy, that *subsequently* to the second marriage the first has been dissolved by the decree of a competent court for some cause other than the adultery of the defendant. Otherwise, if such a decree be obtained prior to the second marriage: Baker v. People, 2 Hill 325.

The *fourth exception* is that the Act shall not extend "to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction." It was resolved, upon the 1 Jac. 1, by all the judges, that a sentence of the spiritual court against a marriage, in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage; the sentence having decided on the invalidity of the marriage only collaterally, and not directly. *And further, admitting such sentence to be conclusive, yet that the counsel for the crown may avoid the effect of such sentence, by proving it to have been obtained by fraud or collusion.^(t) There is no exception in the new Act where marriages are within the age of consent.^(u)

If a person marrying again come within the second of these exceptions, though the second marriage is not felony, yet, as before the statute, it is null and void, and the parties will be subject to the censures and punishment of the ecclesiastical courts.^(v)

Where both marriages were proved, and seven years had not elapsed, and when before the magistrates the prisoner had said that "she believed her former husband was dead when she married again;" Martin, B., is reported to have said, "The law says seven years shall elapse before it may be presumed that the first husband is dead. In this case seven years had not elapsed, and beyond the prisoner's own statement there was the mere belief of one witness. Still the jury were to say, if upon such testimony, she had an honest belief that her first husband was dead; if they believed that she had, then the prisoner would not be guilty."^(w)

Principals in the second degree and accessories before the fact are punishable in the same manner as principals in the first degree; and accessories after the fact are liable to be imprisoned for any term not exceeding two years, with or without hard labor.^(x)

Where an indictment charged a woman with bigamy, and the man, with whom she contracted the second marriage, with inciting and counselling the woman to commit the offence of bigamy, it was held that if the man knew at the time of the marriage that she was a married woman, and her husband alive, he might be convicted of counselling her to commit the crime of bigamy.^(y)

The indictment in the preceding case did not contain any count charging the man as principal in the second degree; but there is no doubt, where a man marries a woman, knowing such woman to have a husband alive at the time of such marriage, that he is a principal in the second degree, as he is present and aids and assists the woman in committing the felony.^(z)

The 24 & 25 Vict. c. 100, s. 57, provides that the offender may be tried in the county where he shall be "apprehended or be in custody." But the provision of the statute is only cumulative, and the party may be indicted where the second marriage was, though he be never apprehended, and so may be outlawed; for in general where a statute creating a new felony directs that the offender may be tried in the county in which he is apprehended, *but contains no negative words, [*274 he may be tried in that county in which the offence was committed.^(a)

It was held, on the 1 Jac. 1, which had only the word "apprehended," that where the prisoner, having been apprehended for another offence, is detained in the

(t) *Duchess of Kingston's case*, Dom. Proc. 16 Geo. 3; 11 St. Tri. 262; 1 Leach 146; 1 Hawk. P. C. c. 42, s. 11.

(u) See *Rex v. Birmingham*, 8 B. & C. 29 (15 E. C. L. R.), *post*, p. 305.

(v) 4 Blac. Com. 164, note (3).

(w) *Reg. v. Turner*, 9 Cox C. O. 145. This is the first case in which it has ever been suggested that the belief of the death of the first husband or wife was a defence, and the case is probably misreported. The proviso that requires absence for seven years and ignorance of the first husband or wife being alive during the whole of that time, clearly shows that this case cannot be supported.

(z) 24 & 25 Vict. c. 100, s. 67. See *ante*, pp. 4, 5.

(y) *Reg. v. Brawn*, 1 C. & K. 144 (47 E. C. L. R.), Lord Denman, C. J.

(z) The Editor knows such to have been the opinion of Lord Denman, C. J., and Alderson, B., in *Reg. v. Brawn*.

(a) 1 Hale 694; 3 Inst. 87; Starkie 11.

same county for bigamy, the detainer is such an apprehension as will warrant the indictment him in that county. The prisoner was taken up in Worcestershire for larceny; and whilst in the house of correction for that offence, a bill for bigamy was found against him, which came on to be tried at the assizes for that county; the second marriage was not in Worcestershire. The judges were of opinion that as the prisoner was in custody on a criminal charge, he was liable to be tried where he was imprisoned. (b) Where the indictment is preferred in a county not where the second marriage was, but where the prisoner was apprehended or in custody, it need not state that fact; for it will appear by the caption that he was in custody of the sheriff of the county in which the indictment was found. (c)

A first marriage *de facto*, subsisting in fact at the time of the second marriage, was sufficient to bring a case within the 1 Jac. 1, though such first marriage was voidable by reason of consanguinity, affinity, or the like; for it was a marriage in judgment of law until it was avoided. (d) And now by the 5 & 6 Will. 4, c. 54, s. 1, all marriages celebrated before the 31st of August, 1835, between persons being within the prohibited degrees of *affinity*, shall not be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit depending on the 31st of August, 1835, provided that nothing hereinbefore contained shall affect marriages between persons being within the prohibited degrees of *consanguinity*; and by sec. 2, "all marriages celebrated after the said 31st of August, between persons within the prohibited degree of *consanguinity* or *affinity* shall be absolutely null and void to all intents and purposes whatsoever." Where, therefore, a marriage now takes place within the prohibited degrees of consanguinity or affinity, as such marriage is wholly void, a second marriage will not amount to the crime of bigamy. Where, therefore, on an indictment for bigamy, it appeared that the prisoner had married two sisters, one after the death of the other, and the latter marriage was alleged in the indictment as the legal marriage, it was held that he was entitled to be acquitted, as that marriage was null and void to all intents and purposes. (e) This statute extends to the illegitimate, as well as the legitimate child of a late wife's parents. Therefore a marriage with the illegitimate sister of a deceased wife is void. (f) So a marriage of a man with the daughter of the illegitimate half-sister of his deceased wife is void. (g) And the Act extends to the marriages of British subjects abroad. Where, therefore, Mr. Brook was duly married, according to the laws of Denmark, near Altona in Denmark, to the lawful sister of his deceased wife, and he and his second wife were then domiciled in England, and had merely gone over to Denmark on a temporary visit; it was held that this marriage, though valid in Denmark, was absolutely void in England. (h) But it has been ruled that though a lawful canonical marriage need not be proved.

(b) *Rex v. Gordon*, R. & R. 48. See Lord Digby's case, Hutt. 131.

(c) *Reg. v. Whiley*, rightly reported 1 C. & K. 150 (47 E. C. L. R.); erroneously reported 2 M. C. C. R. 186; *Reg. v. Smythies*, 1 Den. C. C. R. 498; 2 C. & K. 878 (61 E. C. L. R.). In *Rex v. Fraser*, R. & M. C. C. R. 407, the first marriage was laid in Kent, the second in Surrey, the venue was Middlesex, and it was alleged that the prisoner was apprehended without stating any place, and the conviction held bad, but no suggestion made that the defect was cured by the caption; this case, therefore, may now be considered no authority. See *Reg. v. O'Connor*, 5 Q. B. 34 (48 E. C. L. R.). See *Rex v. Treharne*, R. & M., C. C. R. 298. Where an indictment for bigamy alleged that the prisoner was apprehended in Gloucestershire, and this was not proved; Channel, B., allowed the indictment to be amended by stating that he was in custody in that county: *Reg. v. Smith*, 1 F. & F. 36.

(d) 3 Inst. 88.

(e) *Reg. v. Chadwick*, 11 Q. B. 173 (63 E. C. L. R.).

(f) *Reg. v. St. Giles in the Fields*, 11 Q. B. 173 (63 E. C. L. R.). Where a woman proved that she had a sister seven years older than herself, and that they were brought up together with their parents, and that she always believed that they were sisters. Erle, J., held this was sufficient evidence to prove that they were sisters. And the witness having also proved that her sister married M. in 1846 and died in 1848, and that the witness married M. in 1849, Erle, J., held that this showed the latter marriage to be void: *Reg. v. Young*, 5 Cox C. C. 296.

(g) *Reg. v. Brighton*, 1 Best & S. 447 (101 E. C. L. R.).

(h) *Brook v. Brook*, 3 Smale & G. 481; 9 H. L. C. 193. Such affinity can only be constituted by marriage, and not by sexual intercourse: *Wing v. Taylor*, 2 Swabe & T. 278.

that a marriage in fact (whether regular or not) must be shown ;⁽ⁱ⁾ which it seems must be understood where there is *prima facie* evidence of a lawful marriage.^(k) Here the first marriage, which was with a Roman Catholic woman, was by a Jewish priest in England, not according to the ritual of the Church of England, and the ceremony was performed in Latin, which the witnesses did not understand, and could not therefore swear that the ceremony of marriage according to the Church of Rome was read ; it was directed that the defendant should be acquitted.^(l) Willes, C. J., who tried him, seemed to be of opinion that a marriage by a priest of the Church of Rome was a good marriage,^(m) if the ceremony according to that church could be proved ; namely, the words of the contracting part of it.

The former *Marriage Act*, 26 Geo. 2, c. 33, required all marriages to be by banns or license : and declared that all marriages solemnized in any other place than a church or public chapel (unless by special license), or solemnized without publication of banns or license, should be null and void to all intents and purposes. It contained also special provisions as to the publication of *banns* ; and, as to marriages by *license*, it provided that all such marriages, where either of the parties, not being a widower or widow, was under the age of twenty-one years, had without the consent of the father of such of the parties so under age (if then living) not had and obtained ; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them ; and in case there was no such guardian or guardians, then of the mother (if living and unmarried) ; or if there was no mother living and unmarried, then of a guardian or guardians of the person appointed by the Court of Chancery : should be absolutely *null and void to all intents and purposes whatsoever.⁽ⁿ⁾ But these provisions [*276 as to marriages by license were repealed as to any marriages thereafter to be solemnized by the 3 Geo. 4, c. 75, s. 1, which passed on the 22d of July, 1822, and came into operation on the 1st of September following : and it was further enacted, that in all cases of marriage solemnized by license before the passing of this Act of 3 Geo. 4, without any such consent, and where the parties had continued to live together as husband and wife till the death of one of them, or till the passing of the Act, or had only discontinued their cohabitation for the purpose, or during the pending of any proceedings touching the validity of such marriage, such marriage, if not otherwise invalid, should be deemed good and valid to all intents and purposes.^(o)

(i) By Denison, J., referred to by the Court in *Morris v. Miller*, 1 Blac. R. 632.

(k) *Rex v. Brampton*, 10 East 287, note (b).

(l) *Lyon's case*, Old Bailey, 1738 ; 1 East P. C. c. 12, s. 10, p. 469, citing Serjeant Foster's MS.

(m) To this Mr. East (Id. Ibid.) subjoins a *quære*, and says that it must at least be understood of the marriage of persons of that communion.

(n) Sec. 11. By sec. 12 provision was made for a petition to the Lord Chancellor, &c., where the guardians or mother were not in a situation to consent, or to refuse to consent. By sec. 4 licenses were to be granted to solemnize matrimony in the church or chapel of such parish only where one of the parties had resided for four weeks before. But by sec. 10 proof of the actual dwelling in the parishes, &c., where a marriage was by banns, or of the usual place of abode of one of the parties, where a marriage was by license, was made unnecessary after the solemnization of the marriage, and evidence was not to be received in either of these cases to prove the contrary, in any suit touching the validity of the marriage.

(o) 3 Geo. 4, c. 75, s. 2. Sec. 3 provided that the Act should not render valid any marriage declared invalid by any court of competent jurisdiction before the passing of the Act ; nor any marriage where either party should at any time afterwards, during the life of the other party, have lawfully intermarried with any other person. Nor (by sec. 4) any marriage, the invalidity of which had been established before the passing of the Act, upon the trial of any issue touching its validity, or touching the legitimacy of any person alleged to be the descendant of the parties to such marriage. Nor (by sec. 5) any marriage, the validity of which, or the legitimacy of any person alleged to be the lawful descendant of the parties married, had been duly brought into question in proceedings in any cause, &c., in which judgments or decrees, or orders of court, had been pronounced or made before the passing of the Act, in consequence of or from the effects of proof in such causes, &c., of the validity of such marriage, or the illegitimacy of such descendant. By sec. 6, if before the Act, any property had been possessed, or any title or honor enjoyed on the ground of the invalidity of any marriage, by reason that it was

A pauper, not being a widow, and being under age, was married by license in 1808, without the consent of her father, who was then living, and continued to live with her husband till 1825, when she married another man, her first husband being still alive; it was held that the first marriage was rendered valid by 3 Geo. 4, c. 75, s. 2, because the parties had lived together till that Act passed, and was not rendered invalid by the pauper's subsequent marriage to another person. (p) But where two minors were married by license and without consent of parents, in 1816; and, after cohabiting for a few months, the owner of the house where they lodged compelled the husband to leave it for his misconduct, and he never lived with his wife afterwards, and died in 1817; and shortly after the separation he on several occasions had declared that he would never live with her again, giving as one reason that she was not his lawful wife; but some evidence was given that after the separation she had received small sums, which were ultimately allowed out of the rent of the husband's land; but whether by his direction or not did not appear; it was held that the marriage was not rendered valid by the 3 Geo. 4, c. 75, s. 2. (q)

A prisoner was married on the 30th of August, 1822, by license, and without the consent of either of her parents, she being between sixteen and seventeen years of age; it was held, on a case reserved, that the marriage was valid, for under the 3 Geo. 4, c. 75, which passed on the 22d of July, 1822, the 26 Geo. 2, c. 33, s. 11, had ceased to operate, and the provisions as to marriages by licenses in the 3 Geo. 4, c. 75, did not come into force till the 1st of September following. (r)

The 3 Geo. 4, c. 75, contained also enactments as to the granting of licenses, the consent of parents and guardians, and the publication of banns, which have been repealed by the 4 Geo. 4, c. 17, which enacted, that licenses should and might be granted by the same persons, and in the same manner and form, and, in the case of minors, with the same consent, and banns be published in the same manner and form as licenses and banns were respectively regulated by the 26 Geo. 2, c. 33; and enacted also (by sec. 2) that all marriages which had been or should be solemnized under licenses granted, or banns published, conformably to the provisions of the 3 Geo. 4, c. 75, should be good and valid; and that no marriage solemnized under any license granted in the form or manner prescribed by either the 26 Geo. 2, c. 33, or the 3 Geo. 4, c. 75, should be deemed invalid on account of want of consent of any parent or guardian. The old Marriage Act was then in a great measure revived, though only for a short period. The 4 Geo. 4, c. 5, was passed to render valid certain marriages which had been solemnized by licenses granted through error, after the passing of the 3 Geo. 4, c. 75, by or in the name of bodies corporate or persons their officers or surrogates, other than the Archbishops of Canterbury and York, and the bishops within their respective dioceses, who were alone authorized to grant such licenses by the 3 Geo. 4, c. 75; but this provision of the 4 Geo. 4, c. 5, applies only to marriages solemnized by such erroneous licenses granted after the 3 Geo. 4, and before the passing of the 4 Geo. 4, c. 5.

The 4 Geo. 4, c. 76, reciting that it is expedient to amend the laws respecting marriages in England, enacts, that, after the 1st day of November, 1823, so much of the 26 Geo. 2, c. 33, as was in force immediately before the passing of this Act, and also the 4 Geo. 4, c. 17, shall be repealed, save and except as to any acts, matters, or things, done under the provisions of either of the said Acts, before the said 1st day of November, as to which the said Acts are respectively to be of the same force and effect, as if this Act had not been made.

Sec. 2. "After the 1st day of November (1823), all banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel,

solemnized without consent, then, although no sentence had been pronounced against the validity of such marriage, the right and interest in such property or title of honor should in no manner be affected or prejudiced. And by sec. 7 nothing in the Act shall affect any act done before the passing of the Act, under the authority of any court, or in the administration of any personal estate or effects, or the execution of any will or testament, or the performance of any trust.

(p) *Rex v. St. John Delpike*, 2 B. & Ad. 226 (22 E. C. L. R.).

(v) *Poole v. Poole*, 2 Tyrw. R. 76.

(r) *Rex v. Waully*, R. & M. C. C. R. 163 -

which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry, wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the Book of Common Prayer, upon the *Sundays* preceding the solemnization of marriage, during the time of morning service, or of evening service (if there should be no morning service in such church chapel upon the *Sunday* upon which such banns shall be so published), immediately after the second lesson; and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church, or in any such chapel as aforesaid, belonging to each parish or chapelry wherein each of the said persons shall dwell; and that the rules prescribed by the said rubric concerning the publication of the same, and the solemnization of matrimony, and not hereby altered, shall be duly observed; and that in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns shall have been published, and in no other place whatsoever."

Sec. 3. "The bishop of the diocese, with the consent of the patron and the incumbent of the church of the parish in which any public chapel, having a chapelry thereto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize, by writing under his hand and seal, the publication of banns and the solemnization of marriages in such chapel for persons residing within such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese."

Sec. 4. "In every chapel in respect of which such authority shall be given as aforesaid, there shall be placed in some conspicuous part of the interior of such chapel a notice in the words following: 'Banns may be published, and marriages solemnized in this chapel.'"

Sec. 5. "All provisions now in force, or which may hereafter be established by law, relative to providing and keeping marriage registers in any parish churches, shall extend and be construed to extend to any chapel in which the publication of banns and solemnization of marriages shall be so authorized as aforesaid, in the same manner as if the same were a parish church; and everything required by law to be done relative thereto by the church wardens of any parish church, shall be done by the chapelwarden or other officer exercising analogous duties in such chapel." (s)

Sec. 6. "On or before the 1st day of November, and from time to time afterwards as there shall be occasion, the churchwardens and chapelwardens of churches and chapels, wherein marriages are solemnized, shall provide a proper book of substantial paper, marked and ruled respectively in manner directed for the register book of marriages; and the banns shall be published from the said register book by the officiating minister, and not from loose papers, and after publication shall be signed by the officiating minister, or by some person under his direction."

Sec. 7. "No parson, vicar, minister, or curate, shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns respectively, deliver, or cause to be delivered to him parson, vicar, minister, or curate, a notice in writing, dated on the day on which the same shall be so delivered, of their true Christian names and surnames, of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited, or resided, in such house or houses respectively."

Sec. 8. "No parson, minister, vicar, or curate, solemnizing marriages after the 1st day of November next, between persons, both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriages without consent of parents or guar-

(s) See as to the registration of marriages, 6 & 7 Will. 4, c. 86, ss. 1, 30, 31.

dians, unless such parson, minister, vicar, or curate, shall have notice of the dissent of such parents or guardians; and in case such parents or guardians, or one of them, shall openly and publicly declare or cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication, that he, she, or their dissent to such marriage, such publication of banns shall be absolutely void."

Sec. 9. "Whenever a marriage shall not be had within three months after the complete publication of banns, no minister shall proceed to the solemnization of the same, until the banns shall have been republished on three several *Sundays*, in the form and manner prescribed in this Act, unless by license duly obtained according to the provisions of this Act."

Sec. 10. "No license of marriage shall, from and after the said first day of November, be granted by any archbishop, bishop, or other ordinary person having authority to grant such licenses, to solemnize any marriage in any other church or chapel than in the parish church, or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such license."

Sec. 11. "If any caveat be entered against the grant of any license for a marriage, such caveat being duly signed by or on the behalf of the person who enters the same, together with his place of residence, and the ground of objection on which his caveat is founded, no license shall issue till the said caveat, or a true copy thereof, be transmitted to the judge out of whose office the license is to issue, and until the judge has certified to the register that he has examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the license for the said marriage, or until the caveat be withdrawn by the party who entered the same."

Sec. 12. "All parishes where there shall be no parish church or chapel belonging thereto, or none wherein divine service shall be usually solemnized every Sunday, and all extra-parochial places whatever, having no public chapel wherein banns may be lawfully published, shall be deemed and taken to belong to any parish or *280] chapelry next adjoining, for the purposes of this Act only; and *where banns shall be published in any church or chapel of any parish or chapelry adjoining to any such parish or chapelry where there shall be no church or chapel, or none wherein divine service shall be solemnized as aforesaid, or to any extra-parochial place as aforesaid, the parson, vicar, minister, or curate, publishing such banns, shall, in writing under his hand, certify the publication thereof in the same manner as if either of the persons to be married had dwelt in such adjoining parish or chapelry."

Sec. 13. "If the church of any parish, or chapel of any chapelry, wherein marriages have been usually solemnized, be demolished in order to be rebuilt, or be under repair, and on such account be disused for public service, it shall be lawful for the banns to be proclaimed in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, or in any place within the limits of the parish or chapelry which shall be licensed by the bishop of the diocese for the performance of divine service, during the repair or rebuilding of the church as aforesaid; and where no such place shall be so licensed, then, during such period as aforesaid, the marriage may be solemnized in the adjoining church or chapel wherein the banns have been proclaimed, and all marriages heretofore solemnized in other places within the said parishes or chapelries than the said churches or chapels, on account of their being under repair, or taken down in order to be rebuilt, shall not be liable to have their validity questioned on that account, nor shall the ministers who have so solemnized the same be liable to any ecclesiastical censure, or to any other proceeding or penalty whatsoever." This enactment being defective in not providing that marriages might be solemnized in the places licensed for the proclamation of banns; nor that marriages might be solemnized by license in an adjoining church or chapel; nor that the validity of marriages *thereafter* solemnized in other places than the churches and chapels out of repair, should not be questioned on that account; nor that the ministers who should *thereafter* solemnize

riages should not be liable to ecclesiastical censure, &c. : the 5 Geo. 4, c. 8, that "all marriages which have been heretofore solemnized, or which hereafter solemnized in any place within the limits of such parish or chapel, for the performance of divine service, during the repair or rebuilding of any church of any parish, or chapel of any chapelry, wherein marriages have usually solemnized; or if no such place shall be so licensed, then in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, by banns lawfully published in such church or chapel, or by license lawfully granted, shall not have their validity questioned on account of their having been solemnized, nor shall the ministers who have so solemnized the same be liable to any ecclesiastical censure, or to any other proceeding." And that all licenses granted by any person having authority to grant them for the solemnization of marriages in a church or chapel, wherein marriages have been usually solemnized, shall be deemed to be licenses for the solemnization of marriages in any place within the limits of such parish or chapelry, which shall be licensed by the bishop for the performance of divine service, during the repair or rebuilding of any such church or chapel, or if no place shall be so licensed, then in the church or chapel of any adjoining parish or chapelry wherein marriages have been usually solemnized. (f) And also that all banns proclaimed, and all marriages solemnized, shall be subject to the provisions of this Act in any place so licensed, within the limits of such church or chapelry, during the repair or rebuilding of the church, &c., shall be deemed as proclaimed and solemnized in the church, &c., and shall be so registered accordingly. (u)

Geo. 4, c. 76, s. 14, enacts, "for avoiding all fraud and collusion in obtaining licenses for marriage, that before any such license be granted, one of the parties shall personally swear before the surrogate, or other person having authority to grant the same, that he or she believeth that there is no impediment of blood, or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony according to the tenor of the said license; and that one of the said parties hath, in the space of fifteen days immediately preceding such license, had his or her abode within the parish or chapelry within which such marriage is to be solemnized; and, where either of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this Act has been obtained thereto: provided always, that if there shall be no such person or persons having authority to give such consent, then upon oath made to that effect by the party requiring such license, it shall be lawful to grant such license notwithstanding the want of any such consent."

5. "It shall not be required of any person applying for such license to give any caution or security, by bond or otherwise, before such license is granted, nor in any Act or canon to the contrary thereof notwithstanding."

6. "The father, if living, of any party under twenty-one years of age, shall be required to give consent to such marriage, unless he shall be dead, the mother or guardians of the person of the party so under age, lawfully appointed, shall be required to give consent; and, in case there shall be no such guardian or guardians, then the next of kin of such party, if unmarried; and if there shall be no mother unmarried, or guardian or guardians of the person appointed by the Court of Chancery, then one of them, shall have authority to give consent to the marriage of such party."

2.

3. Since the last edition of this work the following Acts have passed on this subject: The 6 Geo. 4, c. 93, to render valid marriages solemnized in certain churches and chapels, in which banns had not been usually published. The 11 Geo. 4, c. 134, to render valid marriages solemnized in certain churches and chapels during the repair or rebuilding of churches, &c., and in churches of distinct or district parishes, and under the 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, and in certain chapels, &c. Will. 4, c. 28, as to marriages in Scotland by Roman Catholic priests. The 3 & 4 Geo. 4, c. 45, as to marriages at Hamburgh since the abolition of the British factory there. Many other Acts have passed to render valid marriages in particular churches and chapels.

party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent.”(v)

*282] *Sec. 17. “In case the father or fathers of the parties to be married, or of one of them, so under age as aforesaid, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them, whose consent is made necessary as aforesaid to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably, or from undue motive refuse, or withhold his, her, or their consent, to a proper marriage, then it shall and may be lawful for any person desirous of marrying, in any of the before-mentioned cases, to apply by petition to the Lord Chancellor, Lord Keeper, or the Lords Commissioners of the Great Seal of Great Britain for the time being, Master of the Rolls, or Vice-Chancellor of England, who is and are respectively hereby empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall upon examination appear to be proper, the said Lord Chancellor, Lord Keeper, or Lord Commissioners of the Great Seal for the time being, Master of the Rolls, or Vice-Chancellor, shall judicially declare the same to be so; and such judicial declaration shall be deemed and taken to be as good and effectual, to all intents and purposes, as if the father, guardian or guardian or mother of the person so petitioning, had consented to such marriage.”

Sec. 18. “From and after the said first day of November, no surrogate, hereafter to be deputed by any ecclesiastical judge who hath power to grant licenses, shall grant any such licenses until he hath taken an oath before the said judge, or before a commissioner appointed by commission under the seal of the said judge, which commission the said judge is hereby authorized to issue, faithfully to execute his office according to law, to the best of his knowledge, and hath given security for his bond in the sum of one hundred pounds to the bishop of the diocese for the due and faithful execution of his said office.”

Sec. 19. “Whenever a marriage shall not be had within three months after the grant of a license by any archbishop, bishop, or any ordinary or person having authority to grant such license, no minister shall proceed to the solemnization of such marriage until a new license shall have been obtained, unless by banns duly published according to the provisions of this Act.”

Sec. 20. “Nothing hereinbefore contained shall be construed to extend to deprive the Archbishop of Canterbury and his successors, and his and their progeny, of the right which hath hitherto been used, in virtue of a certain statute made in the twenty-fifth year of the reign of the late King Henry the Eighth, intituled, “An Act concerning Peter-pence and Dispensations,” of granting special licenses to marry at any convenient time or place.”(w)

Sec. 22. “If any persons shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special license as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns, or license from a person or persons

*283] *having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever.”(x)

Sec. 26. “After the solemnization of any marriage under a publication of banns it shall not be necessary in support of such marriage to give any proof of the actual dwelling of the parties in the respective parishes or chapelries wherein the banns of matrimony were published: or, where the marriage is by license, it shall not be necessary to give any proof that the usual place of abode of one of the parties, at the space of fifteen days as aforesaid, was in the parish or chapelry where the marriage

(v) This section is merely directory; see *Rex v. Birmingham*, *post*, p. 305.

(w) By sec. 21, persons solemnizing marriages in any other place than a church or chapel, or without banns or license, or under pretence of being in holy orders, shall be transported for fourteen years, the prosecution to be commenced within three years.

(x) By sec. 23, where a marriage is solemnized between parties, one of whom is under age, and not a widower or widow, contrary to the provisions of the Act, by false oath or fraud, the guilty party shall forfeit all property accruing from the marriage.

riage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary, in any suit touching the validity of such marriage.”(y)

Sec. 28. “All marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same; and immediately after the celebration an entry shall be made in the register.”

Sec. 30. “This Act, or anything therein contained, shall not extend to the marriages of any of the royal family.”

Sec. 31. “Nothing in this Act contained shall extend to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion respectively.”(z)

The 6 & 7 Will. 4, c. 85, s. 1, enacts, that after the 1st of March, 1837,(a) “notwithstanding anything in this Act contained, all the rules prescribed by the rubric concerning the solemnizing of marriages shall continue to be duly observed by every person in holy orders of the Church of England who shall solemnize any marriage in England: provided always, that where by any law or canon in force before the passing of this Act it is provided that any marriage may be solemnized after publication of banns, such marriage may be solemnized in like manner on production of the registrar’s certificate as hereinafter provided;(b) provided also, that nothing in this Act contained shall affect the right of the *Archbishop [*284 of Canterbury and his successors, and his and their proper officers, to grant special licenses to marry at any convenient time and place, or the right of any surrogate or other person now having authority to grant licenses for marriages.”

Sec. 2. “The Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnize marriage according to the usages of the said society and of the said persons respectively; and every such marriage is hereby declared and confirmed good in law, provided that the parties to such marriage be both of the said society, or both persons professing the Jewish religion respectively, provided also, that notice to the registrar shall have been given, and the registrar’s certificate shall have issued in manner hereinafter provided.”(c)

(y) Upon an enactment nearly similar, it was determined, in a prosecution for bigamy, where the first marriage was proved to have been by banns, that it was no objection that the parties did not reside in the parish where the banns were published and the marriage was celebrated. The provision of the statute was considered as an express answer to the objection; and it appears not to have been adverted to when the point was reserved for the opinion of the judges: *Rex v. Hind*, R. & R. 253.

(z) See the next page. By sec. 33, the Act only extends to England.

(a) By 7 Will. 4, c. 1, the operation of this Act was suspended until after the last day of June, 1837.

(b) The 1 Vict. c. 22, s. 36, after reciting this proviso, enacts, “that the giving the notice to the superintendent registrar, and the issue of the superintendent registrar’s certificate, as in the said Act and by this Act provided, shall be used and stand instead of the publication of banns to all intents and purposes where no such publication shall have taken place; and ever parson, vicar, minister, or curate in England shall solemnize marriage after such notice and certificate as aforesaid in like manner as after due publication of banns: provided always that the church wherein any marriage according to the rites of the Church of England shall so be solemnized shall be within the district of the superintendent registrar by whom such certificate as aforesaid shall have been issued.”

(c) The 23 & 24 Vict. c. 18, recites this clause, and sec. 12 of the 7 & 8 Vict. c. 81 (1.), and enacts that after the 30th of June, 1860, “marriages may be contracted and solemnized according to the usages of the said Society of Friends, called Quakers, in England and Ireland respectively, not only in the case provided for by the said recited provisions, but also in cases where one only or where neither of the parties to the marriage shall be a member of the said society; provided that the party or parties who shall not be a member or members of the said society shall profess with or be of the persuasion of the said society; provided also that no person who is not a member of the said society shall be married according to the usages thereof, unless he or she shall be authorized thereto, under or in pursuance of some general rule or rules of the said society, in England and Ireland respectively; and a copy of such general rule or rules purporting to be signed by the recording clerk for the time being of the said society in London and in Dublin respectively, shall be admitted as evidence of such general rule or rules in all proceedings touching the validity of any such marriage.” By sec. 2, all enactments then in force relating to marriages according to the usages of the said society are extended to every

Sec. 3. "The superintendent registrar of births and deaths of every union, parish, or place shall be, in right of his office, superintendent registrar of marriages within such union, parish or place, and such union, parish, or place shall be deemed the district, of such superintendent registrar of marriages."

Sec. 4. "In every case of marriage intended to be solemnized in England after the said first day of March, ^(d) according to the rites of the Church of England (unless by license or by special license, or after publication of banns), and in every case of marriage intended to be solemnized in England after the said first day of March, according to the usages of the Quakers or Jews, or according to any form authorized by this Act, one of the parties shall give notice under his or her hand, in the form of schedule (A.) to this Act annexed, or to the like effect, to the superintendent registrar of the district within which the parties shall have dwelt for not less than seven days then next preceding, or if the parties dwell in the districts of different superintendent registrars shall give the like notice to the superintendent registrar of each district, and shall state therein the name and surname and the profession or condition of each of the parties intending marriage, the dwelling place of each of them, and the time not being less than seven days during which each has dwelt therein, and the church or other building in which the marriage is to be *285] solemnized; *provided that if either party shall have dwelt in the place stated in the notice during more than one calendar month, it may be stated therein that he or she hath dwelt there one month and upwards." ^(e)

Sec. 5. "The superintendent registrar shall file all such notices, and keep them with the records of his office, and shall also forthwith enter a true copy of all such notices fairly into a book, to be for that purpose furnished to him by the registrar general, to be called 'the marriage notice book,' the cost of providing which shall be defrayed in like manner as the cost of providing register books of births and deaths; ^(f) and the marriage notice book shall be open at all reasonable times without fee to all persons desirous of inspecting the same; and for every such entry the superintendent registrar shall be entitled to have a fee of one shilling."

Sec. 6. "If such superintendent registrar shall be clerk to the guardians of any poor-law union, or of any parish or place comprising the district for which such superintendent registrar shall act, he shall read such notices as hereinafter directed; and if he shall not be such clerk, then he shall transmit to such clerk on the day previous to each weekly meeting of such guardians all such notices of intended marriage as he shall have received on or since the day previous to the weekly meeting immediately preceding the same; and such clerk shall read such notices immediately after the minutes of the proceedings of such guardians at their last meeting shall have been read; and such notices shall be so read three several times in three successive weeks at the weekly meetings of such guardians, unless in any case license for marriage shall be sooner granted, and notice of such license being granted shall have been given to such clerk: provided also, that if it shall happen that the board of guardians of any such union, parish, or place shall not so meet, it shall be sufficient for the purposes of this Act that such notices shall be read at any meeting of such guardians which shall be held within twenty-one days from the day of such notice being entered." ^(g)

The 1 Vict. c. 22, s. 24, reciting this section, and that "it may happen in certain superintendent registrars' districts that there may be no such guardians," enacts, "that in every such case, but only until the election of such board of guardians and of a clerk to their board, every notice of marriage given according to the provisions of the said Act for marriages, or a true and exact copy thereof, under the hand of the superintendent registrar, shall be suspended in some conspicuous place

marriage contracted under this Act. All marriages solemnized in England before July 1, 1837, and in Ireland before April 1, 1845, according to the usages of the Quakers or Jews, are rendered valid by the 10 & 11 Vict. c. 58, provided the parties were both Quakers or both persons professing the Jewish religion.

^(d) See note to sec. 1, *ante*, p. 283.

^(e) By 1 Vict. c. 22, s. 10, the registrar-general may unite two or more districts, and by sec. 11 may divide districts. See the 19 & 20 Vict. c. 119, s. 3, *post*, p. 294.

^(f) Repealed as to the costs of registers by 21 & 22 Vict. c. 25, s. 6.

^(g) See the 19 & 20 Vict. c. 119, s. 1, *post*, p. 293.

in the office of the superintendent registrar during seven successive days, if the marriage is to be solemnized by license, or twenty-one successive days if the marriage is to be solemnized without license, before any marriage shall be solemnized in pursuance of such notice; and the particulars of every such notice shall be sent by the superintendent registrar to every registrar of marriages within his district, and shall be open to the inspection of every one who shall apply at reasonable times to such registrar to inspect the same."(*k*)

*By the 6 & 7 Will. 4, s. 7, "after the expiration of seven days if the marriage is to be solemnized by license, or of twenty-one days if the marriage is to be solemnized without license, after the entry of such notice, the superintendent registrar, upon being requested so to do by or on behalf of the party by whom the notice was given, shall issue under his hand a certificate in the form of schedule (B.) to this Act annexed, provided that no lawful impediment be shown to the satisfaction of the superintendent registrar why such certificate should not issue, and provided that the issue of such certificate shall not have been sooner forbidden in manner hereinafter mentioned by any person or persons authorized in that behalf as hereinafter is provided; and every such certificate shall state the particulars set forth in the notice, the day on which the notice was entered, and that the full period of seven days or of twenty-one days (as the case may be) has elapsed since the entry of such notice, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have a fee of one shilling."(*i*) [*286]

Sec. 9. "Any person authorized in that behalf may forbid the issue of the superintendent registrar's certificate by writing at any time before the issue of such certificate the word "forbidden" opposite to the entry of the notice of such intended marriage in the marriage notice book, and by subscribing thereto his or her name and place of abode, and his or her character, in respect of either of the parties, by reason of which he or she is so authorized; and in case the issue of any such certificate shall have been so forbidden the notice and all proceedings thereupon shall be utterly void."

Sec. 10. "After the said first day of March, (*k*) the like consent shall be required to any marriage in England solemnized by license as would have been required by law to marriages solemnized by license immediately before the passing of this Act; and every person whose consent to a marriage by license is required by law is hereby authorized to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by license or without license."

Sec. 11. "After the said first day of March (*k*) every superintendent registrar shall have authority to grant licenses for marriage in any building registered as hereinafter provided within any district under his superintendence, or in his office, in the form of schedule (C.) to this Act annexed, and for every such license shall be entitled to have of the party requiring the same the sum of three pounds above the value of the stamps necessary on granting such license; (*l*) and every superintendent registrar shall four times in every year, on such days as shall be appointed by the *registrar general, make a return to the registrar general of every [*287] license granted by him since his last return, and of the particulars stated concerning the parties: provided always, that no superintendent registrar shall grant any such license until he shall have given security by his bond in the sum of one hundred pounds to the registrar general for the due and faithful execution of

(*k*) See sec. 5 of the same Act, *post*, p. 294.

(*i*) It was not the intention of this Act that the registrar should have power to grant his certificate for marriages out of his own district, and, consequently, the superintendent registrar has no power to grant his certificate under this section, where it is proposed that the marriage should take place out of his district. Ex parte Brady, 8 Dow. P. C. 332, Patteson, J.

By sec. 8 the registrar-general is to furnish the superintendent registrars with forms of certificates, which are to be distinguished in certain ways where the marriage is by license, and where it is without license.

(*k*) See note to sec. 1, *ante*, p. 283.

(*l*) See the 19 & 20 Vict. c. 119, s. 10, *post*, p. 295.

his office: provided also, that nothing herein contained shall authorize any superintendent registrar to grant any license for marriage in any church or chapel in which marriages may be solemnized according to the rites of the Church of England, or in any church or chapel belonging to the Church of England or licensed for the celebration of Divine worship according to the rites and ceremonies of the Church of England, or any license for marriage in any registered building which shall not be within his district."

Sec. 12. "Before any license for marriage shall be granted by any such superintendent registrar one of the parties intending marriage shall appear personally before such superintendent registrar, and in case the notice of such intended marriage shall not have been given to such superintendent registrar, shall deliver to him the certificate of the superintendent registrar or superintendent registrars to whom such notice shall have been given, and such party shall make oath, or shall make his or her solemn affirmation or declaration instead of taking an oath, that he or she believeth that there is not any impediment of kindred or alliance or other lawful hindrance to the said marriage, and that one of the said parties hath for the space of fifteen days immediately before the day of the grant of such license had his or her usual place of abode within the district within which such marriage is to be solemnized, and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required by law has been obtained thereto, or that there is no person having authority to give such consent, as the case may be; and all such licenses and declarations shall be respectively liable to the same stamp duties as licenses for marriage granted by the ordinary of any diocese, and affidavits made in order to procure the same."

Sec. 13. "Any person, on payment of five shillings, may enter a caveat with the superintendent registrar against the grant of a certificate or a license for the marriage of any person named therein; and if any caveat be entered with the superintendent registrar, such caveat being duly signed by or on behalf of the person who enters the same, together with his or her place of residence, and the ground of objection on which his or her caveat is founded, no certificate or license shall issue or be granted until the superintendent registrar shall have examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the certificate or license for the said marriage, or until the caveat be withdrawn by the party who entered the same; provided that in cases of doubt it shall be lawful for the superintendent registrar to refer the matter of any such caveat to the registrar general, who shall decide upon the same: provided likewise, that in case of the superintendent registrar refusing the grant of the certificate or license, the person applying for the same shall have a right to appeal to the registrar general, who shall thereupon either confirm the refusal or direct the grant of the certificate or license."

Sec. 14. "After the said first day of March^(m) no marriage after such notice as aforesaid, unless by virtue of a license to be granted by the superintendent registrar, shall be solemnized or registered in England until after the expiration of twenty-one days after the day of the entry of such notice as aforesaid; and marriage shall be solemnized by the license of any superintendent registrar registered until after the expiration of seven days after the day of the entry of such notice as aforesaid."

Sec. 15. "Whenever a marriage shall not be had within three calendar months after the notice shall have been so entered by the superintendent registrar, notice and certificate, and any license which may have been granted thereupon, and all other proceedings thereupon, shall be utterly void; and no person shall proceed to solemnize the marriage, nor shall any registrar register the same, until notice shall have been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid."⁽ⁿ⁾

^(m) See note to sec. 1, ante, p. 283.

⁽ⁿ⁾ By sec. 16, the superintendent registrar's certificate or license is to be delivered to the person by or before whom the marriage is solemnized. By sec. 17, the superintendent registrar may appoint registrars of marriages.

Sec. 18. "Any proprietor or trustee of a separate building, certified according to law as a place of religious worship, may apply to the superintendent registrar of the district, in order that such building may be registered for solemnizing marriages therein, and in such case shall deliver to the superintendent registrar a certificate, signed in duplicate by twenty householders at the least, that such building has been used by them during one year at the least as their usual place of public religious worship, and that they are desirous that such place should be registered as aforesaid, each of which certificates shall be countersigned by the proprietor or trustee by whom the same shall be delivered; and the superintendent registrar shall send both certificates to the registrar general, who shall register such building accordingly in a book to be kept for that purpose at the general register office: and the registrar general shall indorse on both certificates the date of the registry; and shall keep one certificate with the other records of the general register office, and shall return the other certificate to the superintendent registrar, who shall keep the same with the other records in his office; and the superintendent registrar shall enter the date of the registry of such building in a book to be furnished to him for that purpose by the registrar general, and shall give a certificate of such registry under his hand, on parchment or vellum, to the proprietor or trustee by whom the certificates are countersigned, and shall give public notice of the registry thereof by advertisement in some newspaper circulating within the county, and in the 'London Gazette.'"(o)

Sec. 20. "After the expiration of the said period of twenty-one days, or of seven days if the marriage is by license, marriages may *be solemnized in the registered building stated as aforesaid in the notice of such marriage, between and by the parties described in the notice and certificate, according to such form and ceremony as they may see fit to adopt: provided nevertheless, that every such marriage shall be solemnized with open doors, between the hours of eight and twelve in the forenoon, in the presence of some registrar of the district in which such registered building is situate, and of two or more credible witnesses: provided also, that in some part of the ceremony, and in the presence of such registrar and witnesses, each of the parties shall declare,

"I do solemnly declare, that I know not of any lawful impediment why, I, A. B., may not be joined in matrimony to C. D."

And each of the parties shall say to the other,

"I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife [or husband]."

Provided also, that there be no lawful impediment to the marriage of such parties."

Sec. 21. "Any person who shall object to marry under the provisions of this Act in any such registered building may, after due notice and certificate issued as aforesaid, contract and solemnize marriage at the office and in the presence of the superintendent registrar and some registrar of the district, and in the presence of two witnesses, with open doors, and between the hours aforesaid, making the declaration and using the form of words hereinbefore provided in the case of marriage in any such registered building."(p)

Sec. 25. "After any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the actual dwelling of either of the parties previous to the marriage within the district wherein such marriage was solemnized for the time required by this Act, or of the consent of any person whose consent thereunto is required by law: nor shall any evidence be given to prove the contrary in any suit touching the validity of such marriage."

Sec. 26. "With the consent under the hand and seal of the patron and incumbent respectively of the church of the parish or district in which may be situated

(o) By sec. 19, on the removal of the same congregation the new place of worship may be immediately registered, instead of the one disused, and after such substitution it shall not be lawful to solemnize any marriage in such disused building.

(p) Sec. 22 regulates the marriage fees of the registrar. By sec. 23, the registrar is to register all marriages solemnized before him in books to be sent by the registrar-general, and copies of the marriage register book are to be given quarterly to the superintendent registrar.

any public chapel with or without a chapelry thereunto annexed, or any chapel duly licensed for the celebration of divine service according to the rites and ceremonies of the Church of England, or any chapel the minister whereof is duly licensed to officiate therein according to the rites and ceremonies of the Church of England, or without such consent after two calendar months' notice in writing given by the registrar of the diocese to such patron and incumbent respectively, the bishop of the diocese may, if he shall think it necessary for the due accommodation and convenience of the inhabitants, authorize by a license under his hand and seal the solemnization of marriages in any such chapel for persons residing within *290] a district the limits whereof shall *be specified in the bishop's license, and under such provisions as to the amount, appropriation, or apportionment of the dues, and as to other particulars, as to the said bishop may seem fit, and as may be specified in the said license; provided that it shall be lawful for any patron or incumbent who shall refuse or withhold consent to the grant of any such license to deliver to the bishop, under his or her hand and seal, a statement of the reasons for which such consent shall have been so refused or withholden; and no such license shall be granted by any bishop until he shall have inquired into the matter of such reasons; and every instrument of consent of the patron and incumbent, or, if such consent be refused or withholden, a copy of the notice under the hand of the registrar, and every statement of reasons alleged as aforesaid by the patron or incumbent, with the bishop's adjudication thereupon under his hand and seal, shall be registered in the registry of the diocese: and thenceforth and until the said license be revoked marriages solemnized in such chapel shall be as valid to all intents and purposes as if the same had been solemnized in the parish church, or in any chapel where marriages might heretofore have been legally solemnized."(*q*)

Sec. 29. "There shall be placed in some conspicuous part in the interior of every chapel in respect of which such license shall be given as aforesaid a notice in the words following: 'Marriages may be solemnized in this chapel.'"(*r*)

Sec. 30. "All provisions which shall from time to time be in force relative to marriages, and to providing, keeping, and transmitting register books and copies of registers of marriages solemnized in any parish church, shall extend to any chapel in which the solemnization of marriages shall be authorized as aforesaid, in the same manner as if the same were a parish church, and everything required by law to be done relating thereto by the rector, vicar, curate, or churchwardens respectively of any parish church shall be done by the officiating minister, chapelwarden, or other person exercising analogous duties in such chapel respectively."

Sec. 31. "Notwithstanding any such license as aforesaid to solemnize marriages in any such chapel, the parties may, if they think fit, have their marriage solemnized in the parish church, or in any chapel in which heretofore the marriage of such parties or either of them might have been legally solemnized."(*s*)

Sec. 42. "If any persons shall knowingly and wilfully intermarry after the said first day of March under the provisions of this Act in any place other than the *291] church, chapel, registered *building, or office or other place specified in the notice and certificate as aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without license, in

(*q*) Sec. 27 provides for the appropriation of fees on marriages performed in such chapels. By sec. 28, the patron or incumbent may appeal to the archbishop against such licenses.

(*r*) See 1 Vict. c. 22, s. 33, *post*, p. 291.

(*s*) By sec. 32, the bishop, with consent of the archbishop, may revoke such licenses; in which case, by sec. 33, the registers are to be sent to the incumbent of the parish church. By sec. 34, the registrars of the dioceses are to send to the register office, yearly, lists of the licensed chapels within their districts, and a list of all chapels and buildings registered, to be printed. By sec. 35 marriages under this Act are to be cognisable. By sec. 36, the registrar may ask certain particulars of the parties. By sec. 37 all persons vexatiously entering caveats are liable to costs and damages. By sec. 38 all persons making false declarations, &c., are guilty of perjury. By sec. 39 all persons unduly solemnizing marriage, are guilty of felony. By sec. 40 the superintendent registrars who unduly issue certificates are guilty of felony; and by sec. 41 all prosecutions are to be commenced within three years. See also 1 Vict. c. 22, s. 3.

case a license is necessary under this Act, or in the absence of a registrar or superintendent registrar where the presence of a registrar or superintendent registrar is necessary under this Act, the marriage of such persons, except in any case hereinafter excepted, shall be null and void: Provided always, that nothing herein contained shall extend to annul any marriage legally solemnized according to the provisions of an Act passed in the fourth year of his late Majesty George the Fourth, intituled 'An Act for amending the Laws respecting the Solemnization of Marriages in England.'"^(t)

The 1 Vict. c. 22, s. 23, enacts, that "the registrar general, under the direction of one of her Majesty's principal secretaries of state, shall take order that the solemn declaration and form of words provided to be used in the case of marriages under the said Act for marriages be truly and exactly translated into the Welsh tongue, and shall cause the same so translated to be furnished to every registrar of marriages throughout Wales, and in all places where the Welsh tongue is commonly used; and it shall be lawful to use the declaration and form of words so translated, and published by authority, in all places where the Welsh tongue is commonly used or preferred, in such manner and form and to the same intents and purposes as by the said Act is prescribed in the English tongue."

Sec. 33. "The banns of marriage of any persons may be published in any chapel licensed by the bishop, according to the provisions of the said Act for marriages, for the solemnization of marriages in which those persons might lawfully be married; and instead of the notice required by the said Act the words 'Banns may be published and marriages may be solemnized in this chapel' shall be placed in some conspicuous part in the interior of every such chapel."

Sec. 34, reciting that "doubts may arise whether under the said recited Acts it is lawful for the bishop to license chapels for marriages between parties one only of whom resides within the district specified in such license;" enacts that "all such licenses shall be construed to extend to and authorize marriages in such chapels between parties one or both of whom is or are resident within the said district; provided always, that where the parties to any marriage intended to be solemnized after publication of banns shall reside within different ecclesiastical districts the banns for such marriage shall be published as well in the church or chapel wherein such marriage is intended to be solemnized as in the chapel licensed under the provisions of the said recited Act for the other district within which one of the parties is resident, and if there be no such chapel then in the church or chapel in which the *banns of such last-mentioned party might be legally published if the said [292 recited Act had not been passed."

Sec. 35. "Any building which shall have been licensed and used during one year next before registration for public religious worship as a Roman Catholic chapel exclusively shall be taken to be a separate building for the purpose of being registered for the celebration of marriages, notwithstanding the same shall be under the same roof with any other building, or shall form a part only of a building."

The 3 & 4 Vict. c. 72, s. 1, reciting the 4 Geo. 4, c. 76, 6 & 7 Will. 4, c. 85, and 1 Vict. c. 22, and that it is expedient to restrain marriages under the 6 & 7 Will. 4, from being solemnized out of the district, in which one of the parties dwells, unless either of the parties dwells in a district, within which there is not any registered building, enacts, "that it is not and shall not be lawful for any superintendent registrar to give any certificate of notice of marriage where the building in which the marriage is to be solemnized, as stated in the notice, shall not be within the district wherein one of the parties shall have dwelt for the time required by the said Act of his late Majesty, except as hereinafter is enacted."

Sec. 2, "It shall be lawful for any party intending marriage under the provisions of the said Act of his late Majesty, in addition to the notice required to be given by that Act, to declare at the time of giving such notice, by indorsement

(t) By sec. 43, in cases of fraudulent marriages, the guilty party is to forfeit all property accruing from the marriage, as in 4 Geo. 4, c. 76; and by sec. 44, the provisions of the Registry Act are extended to this Act.

By sec. 45, "this Act shall extend only to England, and shall not extend to the marriage of any of the royal family."

thereon, the religious appellation of the body of Christians to which the party professeth to belong, and the form, rite, or ceremony which the parties desire to adopt in solemnizing their marriage, and that, to the best of his or her knowledge and belief, there is not within the district in which one of the parties dwells any registered building in which marriage is solemnized according to such form, rite, or ceremony, and the district nearest to the residence of that party in which a building is registered wherein marriage is so solemnized, and the registered building within such district in which it is intended to solemnize their marriage; and after the expiration of seven days or twenty-one days, as the case may require, under the said Act of his late Majesty, it shall be lawful for the superintendent registrar to whom any such notice shall have been given to issue his certificate, according to the provisions of that Act; and after the issuing of such certificate the parties shall be at liberty to solemnize their marriage in the registered building stated in such notice: Provided always, that after any marriage shall have been solemnized it shall not be necessary in support of such marriage to give any proof of the truth of the facts herein authorized to be stated in the notice, nor shall any evidence be given to prove to the contrary in any suit touching the validity of such a marriage."^(u)

Sec. 5. "Notwithstanding anything herein or in the said recited Acts or either of them contained, the Society of Friends commonly called Quakers, and also persons professing the Jewish religion, may lawfully continue to contract and solemnize marriage according to the usages of the said society and of the said *293] persons respectively, after notice for that purpose duly given, and *certificate or certificates duly issued, pursuant to the provision of the said recited Act of his late Majesty; notwithstanding the building or place wherein such marriage may be contracted or solemnized be not situate within the district or either of the districts (as the case may be) in which the parties shall respectively dwell."

The 19 & 20 Vict. c. 119, which came into force Jan. 1, 1857, recites that it is expedient to alter and amend the 6 & 7 Will. 4, c. 85, 1 Vict. c. 22, and 3 & 4 Vict. c. 72, and by sec. 1 enacts, "In case of any party intending marriage under the provisions of any of the said recited Acts or of this Act, no notice of such intended marriage shall be read or published before the guardians of any Poor-law union or parish or place, or be transmitted by any superintendent registrar to the clerk of any such guardians."

Sec. 2. "In case any party shall intend marriage, under the provisions of any of the said recited Acts or of this Act, the party so intending marriage shall, at the time of giving to the superintendent registrar or respective superintendent registrars, as the case may be, the notice required by the said recited Acts or either of them, make and sign or subscribe a solemn declaration in writing, in the body or at the foot of such notice, that he or she believes that there is no impediment of kindred or alliance or other lawful hindrance to the said marriage, and that the parties to the said marriage, in case the marriage is intended to be had without license, have, for the space of seven days immediately preceding the giving of such notice, had their usual place of abode and residence within the district of the superintendent registrar or respective superintendent registrars to whom such notice or notices, as the case may be, shall be so given; or, in case such marriage is intended to be had by license, that one of the said parties hath for the space of fifteen days immediately preceding the giving of such notice had his or her usual place of abode and residence within the district of the superintendent registrar to whom such notice shall be so given; and when either of the parties intending marriage, and not being a widower or widow, shall be under the age of twenty-one years, the party making such declaration shall further declare that the consent of the person or persons whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent to such marriage is by law required; and every declaration so made as aforesaid shall be signed and subscribed, by the party making the same, in the presence of the superintendent regi-

(u) See the 19 & 20 Vict. c. 119, ss. 13, 14, *post*, p. 296.

trar to whom the notice of marriage containing such declaration is given, or in the presence of his deputy, or of some registrar of births and deaths or of marriages for the district in which the party giving such notice resides, or of the deputy of such registrar, who shall respectively attest the same by adding thereto his name, description, and place of abode; and no certificate or license for marriage shall be issued or granted pursuant to any such notice as aforesaid unless the said notice be accompanied by such solemn declaration duly made and signed or subscribed and attested as aforesaid; and every person who shall knowingly or wilfully make and sign or subscribe any false declaration, or who shall sign any false notice for the purpose of *procuring any marriage under the provisions of any of the said recited Acts or this Act, shall suffer the penalties of perjury." [*294

Sec. 3. "Every notice of marriage which shall be given under the provisions of any of the said recited Acts or of this Act, after this Act shall have come into operation, shall be in the form of Schedule (A.) to this Act annexed, or to the like effect; and in every case where the marriage is intended to be had and solemnized under the provisions of the said recited Act of the third and fourth years of Her Majesty, chapter seventy-two, such notice shall, in addition to the several particulars comprised in the said schedule, contain the declaration required to be made by one of the parties to such intended marriage, pursuant to the second section of the said last-mentioned Act; and the superintendent registrar to whom any such notice of marriage shall be so given shall forthwith enter the particulars and the date thereof, and the name of the party giving the same, into the marriage notice book; and for every such entry the superintendent registrar shall be entitled to have a fee of one shilling."

Sec. 4. "In case any party shall intend marriage without license under the provisions of any of the said recited Acts or of this Act, the superintendent registrar to whom notice of such intended marriage has been given shall cause the notice of marriage, or a true and exact copy thereof, as entered in the marriage notice book, under the hand of such superintendent registrar, to be suspended or affixed in some conspicuous place in the office of the said superintendent registrar during twenty-one successive days next after the day of the entry of such notice in his 'Marriage notice book,' before any marriage shall be solemnized in pursuance of such notice, and after the expiration of twenty-one days next after the day of the entry of such notice in his 'Marriage notice book,' the superintendent registrar shall issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in Schedule (B.) to this Act annexed, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar, and provided the issue of such certificate shall not have been forbidden in the manner provided by either of the said firstly and secondly recited Acts by some person or persons authorized in that behalf; and every such certificate shall state the particulars set forth in the said notice, and the day on which the said notice was entered, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have and receive a fee of one shilling; and at any time within three calendar months next after the day of the entry of such notice the intended marriage may be solemnized under the authority of the said certificate; and every superintendent registrar's certificate for marriage duly issued under the provisions of this Act shall have the same force, validity, and effect as the like certificate issued under the provisions of the said recited Acts or either of them would have had in case this Act had not been passed."

Sec. 5. "In case any party shall intend marriage by license *under the provisions of any of the said recited Acts or of this Act, notice of such intended marriage shall not be suspended in the office of the superintendent registrar, but the party giving the same shall state therein that such marriage is intended to be celebrated by license." [*295

Sec. 6. "In any case of marriage intended to be solemnized by license, under the provisions of either of the said two first recited Acts or of this Act, between parties both of whom do not dwell in the same superintendent registrar's district,

it shall not be required that notice of such intended marriage shall be given to more than one superintendent registrar, but a notice to the superintendent registrar of the district in which one of the parties so intending marriage resides shall be sufficient; and it shall not be required that the said notice shall state how long each of the said parties has resided in his or her dwelling-place, but only how long the party residing in the district in which the notice is given has so resided.”(v)

Sec. 9. “Every superintendent registrar receiving notice of an intended marriage to be solemnized by license as aforesaid shall, after the expiration of one whole day next after the day of the entry of such notice in his ‘Marriage notice book,’ issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in the said Schedule (B.) to this Act annexed, and also a license to marry, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar, and provided the issue of such certificate shall not have been forbidden in the manner provided by either of the said firstly and secondly recited Acts by some person or persons authorized in that behalf; and every such certificate shall state the particulars set forth in the said notice, and the day on which the same notice was entered, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have and receive a fee of one shilling; and at any time within three calendar months next after the day of the entry of such notice the intended marriage may be solemnized under the authority of the said license; and every superintendent registrar’s certificate and license for marriage duly issued under the provisions of this Act shall have the same force, validity, and effect as the like certificate and license issued under the provisions of the said recited Acts or either of them would have had in case this Act had not been passed.”

Sec. 10. “The form of a license for marriage so to be granted as aforesaid to any party or parties, by the superintendent registrar of any district as aforesaid, shall be in the form or to the effect of the license set forth in Schedule (C) to this Act annexed; and for every such license the superintendent registrar granting the *296] same shall be entitled to have and receive of the party requiring the *same the sum of one pound ten shillings, over and above the amount paid for the stamps necessary on granting such license.”

Sec. 11. “No such marriage as aforesaid shall be solemnized in any such registered building without the consent of the minister or of one of the trustees, owners, deacons, or managers thereof, nor in any registered building of the Church of Rome without the consent of the officiating minister thereof, nor in any church or chapel of the united Church of England and Ireland without the consent of the minister thereof, nor in such latter case by any other than a duly qualified clergyman of the said united church, or with any other forms or ceremonies than those of the said united church, any statute or statutes to the contrary notwithstanding.”

Sec. 12. “If the parties to any marriage contracted at the registry office of any district conformably to the said recited Acts or any of them, or to the provisions of this Act, shall desire to add the religious ceremony ordained or used by the church or persuasion of which such parties shall be members to the marriage so contracted, it shall be competent for them to present themselves for that purpose to a clergyman or minister of the church or persuasion of which such parties shall be members, having given notice to such clergyman or minister of their intention so to do; and such clergyman or minister, upon the production of their certificate of marriage before the superintendent registrar, and upon the payment of the customary fees (if any), may, if he shall see fit, in the church or chapel whereof he is the regular minister, by himself or by some minister nominated by him, read or celebrate the marriage service of the persuasion to which such minister shall

(v) By sec. 7, notice of marriage without license may be given in Ireland if one of the parties reside there, and marriages where such notices have been given in Ireland are legalised; and by sec. 8, a certificate of proclamation of banns in Scotland as to a party resident there is made equivalent to the superintendent registrar’s certificate.

belong: provided always, that no minister of religion who is not in holy orders of the united Church of England and Ireland shall under the provisions of this Act officiate in any church or chapel of the united Church of England and Ireland; but nothing in the reading or celebration of such service shall be held to supersede or invalidate any marriage so previously contracted, nor shall such reading or celebration be entered as a marriage among the marriages in the parish register: provided also, that at no marriage solemnized at the registry office of any district shall any religious service be used at such registry office."

Sec. 13. "When any marriage is intended to be solemnized between parties not of the Society of Friends commonly called Quakers, or not professing the Jewish religion, by license under the provisions of the before-recited Act of the third and fourth years of Her Majesty, chapter seventy-two, in a registered building situated in a district within which neither of the parties resides, it shall be lawful for the superintendent registrar to whom notice of such intended marriage shall have been given to grant to the party applying for the same a license for such marriage to be solemnized in the registered building stated in such notice; and every license and certificate granted in pursuance of this enactment shall be as valid and effectual to all intents and purposes as if the same had been granted by the superintendent registrar of the district in which the registered building wherein the marriage is intended to be solemnized is situated."

Sec. 14. "When a marriage is intended to be solemnized, *under the provisions of any of the before-recited Acts or of this Act, in the usual [*297 place of worship of the parties so intending marriage, or one of them, and such place of worship shall be a registered building situated out of the district of their, his, or her residence, it shall be lawful for the superintendent registrar or respective superintendent registrars to whom notice of such marriage shall have been given to grant to the party applying for the same a license or certificate, as the case may be, for such marriage to be solemnized in the registered building stated in such notice, provided such building be situated not more than two miles beyond the limits of the district in which the notice of such marriage has been given, and the party giving notice of such marriage shall, at the time of giving the same, state therein, in addition to the description of the building in which the marriage is to be solemnized, that it is the usual place of worship of one of the parties, and shall also state the name of the party whose usual place of worship it is; and every license and certificate granted in pursuance of this enactment shall be as valid and effectual, to all intents and purposes, as if the same had been granted by the superintendent registrar of the district in which the registered building wherein the marriage is intended to be solemnized is situated."(w)

Sec. 17. "After any marriage shall have been solemnized, under the authority of any of the said recited Acts or of this Act, it shall not be necessary in support of such marriage to give any proof of the actual dwelling or of the period of dwelling of either of the parties previous to the marriage within the district stated in any notice of marriage to be that of his or her residence, or of the consent to any marriage having been given by any person whose consent thereto is required by law, or that the registered building in which any marriage may have been solemnized had been certified according to law as a place of religious worship, or that such building was the usual place of worship of either of the parties, nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage; and all marriages which heretofore have been or which hereafter may be had or solemnized, under the authority of any of the said recited Acts or of this Act, in any building or place of worship which has been registered pursuant to the provisions of the said Act passed in the sixth and seventh years of his late Majesty King William the Fourth, chapter eighty-five, but which may not

(w) By sec. 15, the registrar-general may appoint registrars of marriages; and the appointments of registrars of marriages by superintendent registrars are to be subject to his approval. By sec. 16, the registrar of marriages may appoint a deputy, and where such registrar dies or ceases to hold the office, his deputy is to be registrar until a new registrar is appointed.

have been certified as required by law, shall be as valid in all respects as if such place of worship had been so certified."(*x*)

Sec. 21. "Any marriage according to the usages of the Society of Friends commonly called Quakers, or to the usages of persons professing the Jewish religion respectively, where the parties *thereto are both members of the said Society or both persons professing the Jewish religion respectively, may be solemnized by license (which license the superintendent registrar to whom notice of the intended marriage shall have been given is hereby authorized to grant, in the form or to the effect set forth in the said Schedule (C.) to this Act annexed), as effectually in all respects as if such marriage were solemnized after the issue of a certificate by such superintendent registrar in the manner provided by the said recited Acts or any of them; and the provisions in this present Act contained in relation to the solemn declaration to be made by the party intending marriage, and to the statement to be contained in the notice of such intended marriage that such marriage is intended to be celebrated by license, and to the notice to be given of any such intended marriage by license, and to the giving of certificates in the form or to the effect set forth in Schedule (B.) to this Act annexed, and to the fee and stamp to be paid for such license, shall be applicable in all respects to every such marriage to be solemnized by license according to the usages of the said Society or to the usages of persons professing the Jewish religion respectively."(*y*)

Sec. 23. "Every marriage solemnized under any of the said recited Acts or of this Act shall be good and cognizable in like manner as marriages before the passing of the first-recited Act according to the rites of the Church of England."(*z*)

The 20 & 21 Vict. c. 19, provides for the turning of certain extra-parochial places into parishes, and where any such place has a church or chapel of the Church of England within it, the bishop of the diocese may authorize the publication of banns and the solemnization of marriages by banns or license in it.(*a*) And all the provisions as to keeping of marriage registers are extended to such church or chapel.(*b*)

The 23 & 24 Vict. c. 24, renders marriages celebrated in any such church or chapel valid where both or either of the parties reside in such district, provided the banns are published in both districts where the parties reside in different districts

The marriage Acts do not specify what shall be necessary to be observed in the publication of banns, or that the banns shall be published in the *true names* of the parties; but it must be understood as the clear intention of the legislature that the banns shall be published in the true names, because it requires that notice in writing shall be delivered to the minister of the true Christian names and surnames of the parties seven days before the publication; and, unless such notice be given, he is not obliged to publish the banns. But a publication in the name which the party has assumed, and by which he is known in the parish, appears to be sufficient, and would, indeed, be the proper publication where the party is not known by his real name. Thus, where a person, whose baptismal and surname was *299] Abraham Langley, was married by banns by the name of George Smith, having been known in the parish where he resided and was married by that name only from his first coming into the parish till his marriage, which was about three years, the marriage was held valid.(*c*) And a marriage by license, not in the party's real name, but in the name which he had assumed, because he

(*z*) By sec. 18, persons making false declarations, or giving false notices, or forbidding the granting of a certificate by falsely representing their consent to be required by law, are liable to the penalties of perjury. By sec. 19, in the case of fraudulent marriages, the guilty party is to forfeit all the property accruing from the marriage. By sec. 20, nothing in the Act is to alter the provisions of the existing Acts, except when they are at variance with this Act.

(*y*) By sec. 22, the registrar-general is to furnish marriage registrar books and forms to each certified secretary of a synagogue of British Jews.

(*z*) Sec. 24 recites the 15 & 16 Vict. c. 36, and enacts that the registrar-general shall allow searches, and give extracts from the returns of certified places of worship. By sec. 25, the Act does not extend to Scotland or Ireland.

(*a*) Sec. 9.

(*b*) Sec. 10.

(*c*) *Rex v. Billingham*, 3 M. & S. 250.

had deserted, he being known by that name only in the place where he lodged and was married, and where he had resided sixteen weeks, was also held valid. Lord Ellenborough, C. J., said, "If this name had been assumed for the purpose of fraud in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the Marriage Act and the rights of marriage, and the Court would not have given effect to any such corrupt purpose. But where a name has been previously assumed, so as to have become the name which the party has acquired by reputation, that is, within the meaning of the Marriage Act, the party's true name.^(d)

Under the 26 Geo. 2, c. 33, if there was a total variation of a name or names, that is, if the banns were published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever known, the marriage in pursuance of that publication was invalid; and it was immaterial in such cases, whether the misdescription had arisen from accident or design, or whether such design were fraudulent or not. The pauper and her husband were married in 1817, by banns, by the names of Mary White and Joseph Betts. The husband had been baptized as the son of J. and M. Betts. M. Betts was the daughter of S. Wilson, and her husband having absconded shortly after their marriage, the pauper's husband was brought up by S. Wilson, and always called by the name of Wilson, and never called or known by any other name either before or after his marriage. The pauper was the daughter of J. and M. Hodgkinson, and was never called or known by any name except Hodgkinson till after her marriage, but in the register of her baptism she was described as "Mary, the daughter of S. White and his wife," which entry was believed to have been a mistake of the clergyman who baptized her. It was held that the marriage was void. Whether the husband was sufficiently designated by the name of Betts it was unnecessary to inquire, as the Court were clearly of opinion that the woman was never known by, and never used the surname of "White," so as to make that, in any latitude of construction, "a true name" within the meaning of the 26 Geo. 2, c. 33, s. 2.^(e)

But under the 26 Geo. 2, c. 33, if there were a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one Christian name, or the names had been such as the parties had used, and been known by, at one time, and not at another; in such cases the publication might, or might not be void; the supposed misdescription might be explained, and it became a most important part of the inquiry, whether it was consistent with honesty of purpose, or arose from a fraudulent intention.^(f)

*But the words of the 4 Geo. 4, c. 76, s. 22, are wholly different from those of the 26 Geo. 2, c. 33, s. 8, and it has been held that in order to [300] invalidate a marriage under the 4 Geo. 4, c. 76, s. 22, it must be contracted with knowledge by both parties that no due publication of the banns has taken place. Here, therefore, J. C. told Susannah Spencer that he would see the banns properly published, and she took no steps in the matter, and he told her that they had been published, but procured the banns to be published in the name of Agnes, which name she had never borne; and in performing the service, the clergyman applied to her the name of Agnes, till which time she believed she was about to be married by her own name, and she did not know, until after the marriage, the banns had been published in a wrong name; it was held that the marriage was void.^(g) But where both the man and the woman were aware that the banns had been published in a manner to conceal the identity of one of them, it was held the marriage was void.^(h)

Edward Croxall Tongue, a minor, of the age of seventeen years, and Mary Ann

ex v. Burton-upon-Trent, 3 M. & S. 537.

ex v. Tibshelf, 1 B. & Ad. 190 (20 E. C. L. R.).

ex v. Lord Tenterden, C. J., *ibid.* See *Sullivan v. Sullivan*, 2 Hagg. C. R. 254;

ex v. Nicholson, 3 M. & S. 261; 1 Phill. R. 147; *Pougett v. Tomkins*, 3 M. & S. 263; *ex v.* Ney, 3 M. & S. 265.

ex v. Wroxtton, 4 B. & Ad. 640 (24 E. C. L. R.); 1 N. & M. 712.

ex v. Wiltshire, 3 Hagg. Ecc. R. 332.

Allen, a widow, of the age of thirty-five years, were married in 1833 by banns, which were published in the names of Edward Tongue, bachelor, and Mary Ann Allen, spinster; the entry in the register was in the same names and descriptions, and was signed Edward Tongue. The marriage was clandestine and without the knowledge or consent of the parents of Tongue, who was baptized by the names of Edward Croxall Tongue, and though known to some persons by the name of Croxall Tongue or Tongue only, was never known by the name of Edward Tongue. It was admitted that the woman was cognizant of the fraud and intended it; and it was held that as the entry in the register was, Edward Tongue and Mary Ann Allen were married by banns, it was impossible for him not to have known of the publication of the banns; and the signature of only one of his Christian names showed that he must have known that the banns had been published in that name only; and, therefore, he, with the woman, knowingly and wilfully intermarried without due publication of banns.⁽ⁱ⁾

One Wood was baptized and had always been known by the name of Bower Wood, and never by the name of John Wood, and his banns were published in the names of Margaret Midgley and John Wood; after the first publication the wife told Wood that the name John Wood was wrong. He said it was one of his names, though he had never been called by it; she asked him why he used the name John? He said it was for fear any of his relations should know of his marrying her. She wished him to use the name of Bower; he said he should be disinherited if he did; she asked him if the marriage would be legal under the *301] *name of John; he said it would. It was a long time before she would consent to being married to him in the name of John. She did so, because he said if she loved him she would marry him in that name, and would trust to him afterwards. On the 12th of April, 1852, they were married in the names of Margaret Midgley and John Wood. Cresswell, J. O., held that there was not a due publication of banns, as Wood was described in them as John Wood, and both parties were aware of this misdescription when the marriage was solemnized, and therefore the marriage was invalid.^(k)

It seems that the assuming a fictitious name, upon the second marriage, will not prevent the offence from being complete.^(l) And it was decided to be no ground of defence, that upon the second marriage (which was by banns) the parties passed by false Christian names when the banns were published, and when the marriage took place; and it was further holden that the prisoner, having written down the names for the publication of the banns, was precluded thereby from saying that the woman was not known by the name he delivered in, and that she was not rightly described by that name in the indictment. The indictment was against the prisoner for marrying Anna Timson whilst he had a wife living: the second marriage was by banns; and, it appeared that the prisoner wrote the note for the publication of the banns, in which the woman was called Anna, and that she was married by that name, but that her real name was Susannah. Upon a case reserved two questions were made: one, whether this marriage was not void, because there was no publication of banns by the woman's right name, and that, if the second marriage were void, it created no offence: and the other question was whether the charge of the prisoner's marrying Anna was proved. But the judges held, unanimously, that the second marriage was sufficient to constitute the offence; and that, after having called the woman "Anna" in the note he gave in for the publication of banns, it did not lie in the prisoner's mouth to say, that she was not known as well by the name of Anna as by that of Susannah, or that she was not rightly called by the name of Anna in the indictment.^(m)

So where the prisoner contracted the second marriage in the maiden name of his

(i) *Tongue v. Tongue*, 1 Moore P. C. 90. There was also evidence that it was the regular course to make the parties examine the entry in the banns book before a marriage, and see that their names and descriptions were right, and the witness added that she should not have been present at the marriage as a witness, unless the banns had been regularly published.

(k) *Midgley v. Wood*, 30 Law J., D. & M. 57.

(l) *Rex v. Allison*, *post*, p. 317.

(m) *Rex v. Edwards*, MS. Bayley, J., and R. & R. 283.

mother, and the woman he married had also made use of her mother's maiden name, it was unanimously resolved by all the judges that the prisoner was rightly convicted.⁽ⁿ⁾ So where the second wife had never gone or been known by the name of Thick, but had assumed it when the banns were published, that her neighbors might not know she was the person intended, it was held that the parties could not be allowed to evade the punishment for their offence, by contracting a concertedly invalid marriage.^(o) But where it was proved, by a person present at the prisoner's second marriage, that the woman was married to him by the name of Hannah Wilkinson (the name laid in the indictment), but there was no other proof that the *woman was in fact Hannah Wilkinson; it was held that the proof was insufficient, and that to make it sufficient, there should have been proof that [*302 the prisoner was married to a certain woman by the name of, and who called herself, H. Wilkinson, whereas, in fact, there was no proof that such was her name, or that she had ever before gone by that name: and if the banns had been published in a name which was not her own, and which she had never gone by, the marriage would be invalid.^(p)

A marriage celebrated under a license, in which one of the parties is described by a name wholly different from his own, is not therefore void. George Rudman was taken into custody as the reputed father of a child, of which a woman was pregnant, and married her by license. He gave his name as George Neate at the times of the apprehension and marriage, and was named so in the license, but had never gone by that name before; and the Court of Queen's Bench held this marriage valid.^(q)

Where a marriage was solemnized by license, in which the woman's name was Margaret Bevan; her baptismal name and that by which she was commonly called being "Margaret Lea Bevan": the license was obtained in the altered name by the man, who knowingly, and by direction of the woman, suppressed the name of "Lea," and gave false places of residence, in order that the surrogate might not know who the woman was, and that the intended marriage might be kept secret from her friends; it was held that the question was whether the woman was married without a "license from a person or persons having authority to grant the same." There was no doubt that the person who granted the license had authority to grant it, and it came therefore to the question whether this was a license for the woman. It was clear that an altered name might represent a person; therefore the name "Margaret Bevan" might represent her, and as the license was obtained for her and by her direction from a person who had authority to grant it, the marriage was not void.^(r)

On the trial of an ejectment in 1842, a marriage was said to have taken place in August, 1784, at a private house under a special license from the Archbishop of Canterbury. There was some evidence of cohabitation and reception; but the plaintiff's counsel offered in evidence an affidavit made for the purpose of obtaining a special license to be married at a private house, and a fiat signed by the Archbishop directing a license to be made out, as prayed, for a marriage between the parties; both which documents were produced from the Office of Faculties, the proper ecclesiastical office. No search had been made for the original license; and there was proof that such licenses were not kept in any regular custody, but were generally handed over to the officiating clergyman and not taken back from him. A copy of the register of the parish of St. Pancras, which stated the marriage to have been at a private house, by special license, and professed to be signed by the parties, was also offered in evidence. *Objection was taken to the fiat as [*303 being secondary evidence of the contents of the license, for which no search

(n) Palmer's case, 1 Deac. Dig. Cr. L. 147; Rose. C. E. 280.

(o) Rex v. Penson, 5 C. & P. 412, Gurney, B. See Reg. v. Orgill, *post*, p. 314.

(p) Drake's case, 1 Lewin 25, Park, J. No point was suggested as to this being the second marriage.

(q) Lane v. Goodwin, 4 Q. B. 361 (45 E. C. L. R.). But if a license were obtained for one person with the intention that it should be used for another, such a license might not be valid: Per Patteson, J., *Ibid*.

(r) Bevan v. M'Mahon, 30 Law J., D. & M. 61.

had been made; but the evidence was admitted; and the Court of Queen's Bench held that it was properly received, as the fiat was an act done in the course of official duty, showing that two persons bearing the names of the lessor of the plaintiff's parents were at that time engaged in taking measures for contracting a marriage; and that it might probably be taken into consideration by the jury as confirming the evidence of their union, which arose from cohabitation and reception. The affidavit and register were proofs of the same general fact.(s)

It has been seen that the 4 Geo. 4, c. 76, s. 16, makes the consent of the father, guardians, or mother, necessary to the validity of a marriage by license, where the party is a minor. And it appears to have been held, upon the former marriage Act, that the party prosecuting must show such consent.

Upon an indictment for bigamy, the first marriage imported by the register to have been by license, and the prisoner proved that at that time he was under age. A question was raised, whether this threw it upon the prosecutor to prove consent; and, it appearing that by the Marriage Act the register ought to state consent, if either party was under twenty-one, Wilson, J., held it did; and he directed an acquittal.(t) So, after a conviction, the judges, upon much discussion, were of opinion that the form of the register of the first marriage, then in question, which expressed the marriage to have been by license generally, without saying by consent of parents or guardians, together with the fact of the parents never having been known to have been in England, was *prima facie* evidence that the first marriage was had without the consent of parents or guardians, upon which the jury might have found the prisoner not guilty.(u)

If the prisoner prove that his first marriage took place while he was a minor, and while the 26 Geo. 2, c. 33, was in force, it must be shown on the part of the prosecution, that such marriage, if by license, was with the proper consent. The prisoner was indicted for bigamy, in marrying Elizabeth Field, his first wife Lydia being still living; and it was proved that on the 12th of Feb. 1791, he was married to Lydia Blackwell by license, and that she was living on the 8th of June last: and that on the 14th of December, 1800, he married Elizabeth Field. On behalf of the prisoner it was proved that he was born on the 2d of January, 1771, and that his father was then alive: and it was then contended that the first marriage *304] was void, as it was not proved to have been by the consent of his father. *Lawrence, J., told the jury that he thought the marriage was to be presumed valid, unless the prisoner proved that he had not that consent, and under his direction the prisoner was found guilty. But the point being saved for the consideration of the judges, they held the conviction wrong; as it was clearly proved that the prisoner was under age at the time of the first marriage, and as there were no circumstances from which consent could be presumed.(v)

Though illegitimate children are regarded by the law as not having any father, yet they were held to be within the Marriage Act of 26 Geo. 2; and a marriage by license between two illegitimate children, who were minors, without consent of parents or guardians, was therefore held to be void.(w) And formerly it was the opinion of the Court of King's Bench, that the power of consent given by the Act

(s) Doe dem. Earl of Egremont v. Grazebrook, 4 Q. B. 406 (45 E. C. L. R.). In the argument it is said that "the performance of a ceremony was proved;" "but the ceremony was shown to have been performed in a private house." "The same parties went through a ceremony which, at any rate, was professedly a marriage." See Doe dem. France v. Andrews, 15 Q. B. 756 (69 E. C. L. R.), as to the entry in the register.

(t) Rex v. Morton, cor. Wilson, J., Newcastle, 1789. MS. of Bailey, J., and R. & R. 19, note (a).

(u) James's Case, R. & R. 17. And the judges directed the prisoner to be discharged on his own recognizance. Lord Kenyon at the first meeting seemed to be of opinion that it was sufficient for the prisoner to prove himself under age at the time of the first marriage; and that it then rested with the prosecutor to show that the marriage was with the consent of parents or guardians, but that the prisoner ought not to be called upon to prove a negative.

(v) Rex v. Butler, Mich. T. 1803, MS., Bayley, J., and R. & R. 61. It seems that subsequent countenance from parents or guardians, or other circumstances of a similar kind, might afford ground for presuming the necessary consent.

(w) Rex v. Hodnett, 1 T. R. 96.

to the *father* and mother was intended to include reputed parents, as being interested in their children's welfare, and bound to provide for them by the laws of nature: (x) but in a case which came before the Consistorial Court in London, in 1799, a different doctrine was held by the very learned judge of that Court, who was of opinion that the reputed parents were not enabled to consent, and that the consent could be lawfully given only by a guardian appointed by the Court of Chancery. (y) And in a more recent case three of the judges of the Court of King's Bench adopted the latter opinion; and, after much argument and consideration, certified to the Master of the Rolls that all marriages, whether of legitimate or illegitimate persons, were within the general provision of the Marriage Act 26 Geo. 2, c. 33, which required all marriages to be by banns or license; and that the consent of the natural mother to the marriage, by license, of an illegitimate minor, was not a sufficient consent within the eleventh section of that Act; and that consequently the marriage in question was void by the said statute. (z)

But a marriage solemnized by license since the 4 Geo. 4, c. 76, without consent of parents, where one of the parties is a minor is valid: for the section, which requires such consent, is only directory. The pauper, being under the age of twenty-one years, was married in 1826, by license, without the consent of his father, who was then living; it was objected that this marriage was void under the 4 Geo. 4, c. 76, for want of the father's consent; but it was held that the marriage was valid. The language of sec. 16(a) is merely to *require* consent; it does not proceed to make the marriage void, if solemnized without consent. Sec. 22, declares that certain marriages shall be null and void, and a marriage by license without consent is not specified; and if there were any doubt, it is removed by sec. 23, which in such a case enacts, not that the *marriage shall be void, but that all the [*305 property accruing from the marriage shall be forfeited. (b)

As the marriage of a minor, under the 4 Geo. 4, c. 76, without the necessary consent of parents is now valid, it seems that it is not necessary for the prosecutor to prove such consent, and that the absence of such consent would furnish no defence if proved on the part of the prisoner. The 6 & 7 Will. 4, c. 85, s. 25, expressly provides, that after any marriage shall have been solemnized, it shall not be necessary, in support of such marriage, to give any proof of the consent of any person, whose consent thereunto is required by law; nor shall any evidence be given to prove the contrary in any suit touching the validity of any marriage. (c)

Unless a clergyman in holy orders was present at the marriage ceremony, the marriage was null and void at common law before the marriage Act. Where, therefore, A, a member of the established Church in Ireland, went, in 1829, accompanied by B, a Presbyterian, to the house of C, a regularly placed minister of the Presbyterians of the parish where C resided, and there entered into a present contract of marriage with the said B, the minister performing a religious ceremony between them, according to the rites of the Presbyterian church, and A and B lived together as man and wife for some time afterwards; but A, afterwards during B's life, married another person in a parish church in England; it was held, on an indictment for bigamy, that the first contract thus entered into was not sufficient to support the indictment. (d)

(z) *Rex v. Edmonton*, Cald. 435.

(y) *Horner v. Liddiard*, Rep. by Dr. Croke.

(z) *Priestly v. Hughes*, 11 East 1, Grose, J., differed, and sent a separate certificate. The question was afterwards brought before the House of Lords in an appeal from the decree in this case.

(a) See the section, *ante*, p. 281.

(b) *Rex v. Birmingham*, 8 B. & C. 29 (15 E. C. L. R.), s. c., 2 M. & R. 230; *Reg. v. Clark*, 2 Cox C. C. 183.

(c) See the section, *ante*, p. 289.

(d) *Reg. v. Millis*, 10 Cl. & F. 534, March, 1843. In the Queen's Bench in Ireland, Perrin and Crampton, JJ., held the first marriage good: but Pennefather, C. J., and Burton, J., held it to be void. In order that error might be brought in the House of Lords, Perrin, J., withdrew his opinion, and judgment was given for the prisoner. In the House of Lords, Lords Brougham, Denman, and Campbell held the first marriage good; but the Lord Chancellor (Lyndhurst), Lord Cottenham, and Lord Abinger held it void; whereupon, according to the ancient rule in law, *semper præsuntur pro negante*, judgment was

But the preceding case must not be taken to decide that marriages of British subjects in the colonies, or on board ship or elsewhere, where a clergyman cannot be obtained, are invalid. Indeed in a case in India where no clergyman could be obtained, it was held that the preceding decision did not apply.^(e)

The law does not admit of any difference, as to the manner in which a marriage is to be celebrated, between the marriage of a clergyman and a layman, and consequently if the bridegroom be a clergyman in holy orders, and perform the ceremony himself, no other clergyman being present, the marriage is invalid.^(f)

Where, on an indictment for bigamy, it appeared that the first marriage professed to be under the provisions of the 6 & 7 Will. 4, c. 85, and the superintendent registrar produced the register *returned to him by the registrar, who *306] proved that he was present at the marriage, that it was registered, that the parties signed their names, and he witnessed it; and the superintendent registrar produced the register of the place where the marriage was celebrated, and the certificate he issued was produced and proved by him. A witness stated that he was present at the marriage, and that notice of it was duly given to the superintendent registrar, but the latter did not produce it, and said, if he had received it, he had left it at home; it was contended, on behalf of the prisoner, that it was incumbent on the prosecution to show that the first marriage was celebrated in the registered building specified in the notice and certificate, to prove that due notice had been given to the superintendent register, and that the certificate of the notice had been duly issued. But, on a case reserved, all the judges present held the evidence sufficient.^(g)

Upon an indictment for bigamy, which alleged that the prisoner, in July, 1848, married Eliza Goodman in a Wesleyan chapel duly licensed for marriages, and afterwards in her lifetime married E. Outley, a witness proved that he was present at the first marriage at the Wesleyan chapel at Dunstable, in the presence of the registrar, and signed the register as a witness, and that the parties lived together as man and wife for two or three years. A witness proved that a certificate of this marriage was examined by him with the register book, kept at the office of the superintendent registrar of the district of Luton, within which Dunstable was, and that it was correct, and that it was signed by the superintendent registrar. This certificate contained a copy of the register, which the registrar certified to be correct. The witness also proved that he examined another certificate with the register book at the office of the superintendent registrar, and that it was correctly extracted, and was signed by the superintendent registrar in his presence.^(h) The witness also proved that another document was signed in his presence by the superintendent registrar, and that he examined it with the register at his office, and found it was correctly extracted.⁽ⁱ⁾ The reception of these documents was objected to, on the ground that certificates were not admissible to prove a marriage in a

given for the defendant; and in *Beamish v. Beamish*, *infra*, it was held that this judgment was as much binding as if it had been pronounced *nemine dissentiente*. On the authority of this case, it was held that a marriage solemnized at the consulate office at Beyrout in Syria, according to the rites of the Church of England, between two British subjects who were members of that church, by an American missionary, who was not a priest in holy orders, was void: *Catherwood v. Caslon*, 13 M. & W. 261, 1844. See the 12 & 13 Vict. c. 68, *post*, p. 315.

^(e) *Maclean v. Cristall*, Per. Oriental Cas. 75. And the Lords, in *Beamish v. Beamish*, *infra*, expressly declared that this question was not decided by the preceding case.

^(f) *Beamish v. Beamish*, 9 H. L. C. 274.

^(g) *Reg. v. Hawes*, 1 Den. C. C. 270. As the production of the original register of marriages cannot be enforced, a witness, who has seen the register, may prove the handwriting of a party to a marriage therein registered, although such register be not produced: *Sayer v. Glossop*, 2 Exch. R. 409.

^(h) This certificate was, "I, the undersigned, T. E. Austin, Superintendent Registrar for the district of Luton, &c., do hereby certify that the Wesleyan chapel, situate at Dunstable, in the county of Bedford, was duly registered for the solemnization of marriages, pursuant to the Act 6 & 7 Will. 4, c. 85, on the twenty-eighth day of November, 1845. Given under my hand, &c., Thos. Erskine Austin."

⁽ⁱ⁾ This document was, "Henry Manwaring and Eliza Goodman were married after notice, read at the Board of Guardians of the Luton Union, without license. Thos. Erskine Austin, Superintendent Registrar."

Wesleyan chapel, or that it was a place in which a marriage could be legally solemnized, or that, if admissible, they must be authenticated by the official seal of the registrar, and not under hand only. But the documents were admitted, and the prisoner convicted; and it was held that the conviction was right, upon the ground that, independently of the two last-mentioned documents, there was *primâ facie* evidence that the chapel was duly *registered, and was therefore a place [307 in which marriages might be legally solemnized. The presence of the registrar at the marriage, the fact of the ceremony taking place, and the entry in the registrar's book, aided, as they were, by the presumption *omnia rite esse acta*, afforded *primâ facie* evidence that the chapel was a duly registered place, in which marriages might be legally celebrated. (k) So where on an indictment for bigamy the prisoner was shown to have been secondly married at a Wesleyan chapel not registered under the 15 & 16 Vict. c. 36, in June 1857, and this marriage was proved by the registrar, who produced the certificate; it was objected that there was no proof of the second marriage, or that it was invalid, having taken place in an unlicensed chapel; but Wightman, J., overruled the objections. (l)

Upon an indictment for bigamy it was proved that the first marriage was performed in an Independent chapel by a Wesleyan Methodist minister, in the presence of the registrar of the district and two witnesses, and a certificate of the marriage was produced, it was held that there was sufficient proof of the marriage without proving that the chapel had been duly registered. (m)

So where in an action for goods sold there was a plea of coverture, and the defendant stated that she was married to J. Lambert in 1844, at a Roman Catholic chapel in George Street, Portman Square; that she and Lambert were both Roman Catholics, and were married by a priest in the way in which Roman Catholic marriages are ordinarily celebrated, and that they lived together for some years, and she produced a certificate of the marriage from the priest who performed the ceremony, and a certificate showing that the civil contract of marriage had been performed before the French Consul; but there was no proof that the person who performed the ceremony was a priest, or that the chapel was a place licensed for marriages, or that the registrar was present at the time; the Court of Common Pleas held that it might be presumed that the chapel was licensed and the registrar present, as well because the 6 & 7 Will. 4, c. 85, s. 39, declares, any person who wilfully solemnizes a marriage in any other place than a registered building or in the absence of the registrar, guilty of felony, as because the ordinary rule *omnia præsumuntur rite esse acta* ought to prevail in such a case. (nn)

Where a woman in the lifetime of her first husband married a widower, who had been her sister's husband, which would have been a void marriage under the 5 & 6 Will. 4, c. 52, s. 2, (m) even had the woman's first husband been dead, it was held that the validity of the second marriage did not affect the question. It is the appearing to contract a second marriage, and the going through the ceremony, which constitute the crime of bigamy, otherwise it could never exist in ordinary cases; as a previous marriage always renders null and void a marriage that is celebrated afterwards by either of the parties during the lifetime of the other. Whether, therefore, the marriage of the two prisoners was or was not in itself prohibited, and therefore null and void, does not signify; for the woman having a husband then alive, has committed the crime of bigamy by doing all that in her lay by entering into marriage with another man. (n)

(k) *Reg. v. Manwaring*, D. & B. C. C. 132, Pollock, C. B. and Willes, J., thought that the certificate that the chapel had been duly registered was admissible and evidence of the fact. The 6 & 7 Will. 4, cc. 85, 86; 1 Vict. c. 22; 3 & 4 Vict. c. 92; 8 & 9 Vict. c. 113; 9 & 10 Vict. c. 119; and 14 & 15 Vict. c. 99, were referred to on the trial. Willes, J., said, "It is a mistake to suppose that the provisions of the 14 & 15 Vict. c. 99, s. 14, are anything more than cumulative, or that they give a rule and the only rule of evidence."

(l) *Reg. v. Tilson*, 1 F. & F. 54.

(m) *Reg. v. Craddock*, 3 F. & F. 837, Willes, J., and Pollock, C. B.

(nn) *Sichel v. Lambert*, 15 C. B. (N. S.) 781 (109 E. C. L. R.).

(n) *Ando*, p. 274.

(n) *Reg. v. Brawn*, 1 C. & K. 144 (47 E. C. L. R.), Lord Denman, C. J. See the cases, *ante*, p. 274.

A marriage celebrated by banns, in a chapel erected after the 26 Geo. 2, c. 33, was passed, and not upon the site of any ancient church or chapel, was held to be void, although marriages had been *de facto* frequently celebrated there; the words of the statute "in which chapel banns have been usually published" being held clearly to mean chapels existing at the time it was passed.^(o) But as soon as this determination was known, the 21 Geo. 3, c. 53, was passed, making valid all marriages which *had been* celebrated in any parish church or public chapel, erected since the passing of the 26 Geo. 2, c. 33, and consecrated, and providing that the registers of such marriages should be received as evidence. The fourth section enacted, that the registers of marriages thereby made valid should, within twenty days after the 1st of August, 1781, be removed to the church of the parish in which such chapel should be situated; or, if it should be situated in an extra-parochial place, to the parish church next adjoining, to be kept with the registers of such parish. These provisions were extended by the 44 Geo. 3, c. 77, and the *308] 48 Geo. 3, c. 127, to marriages celebrated in such *chapels before the 23d August, 1808; and the registers of such marriages are in like manner to be removed to parish churches, and transmitted to the bishop. The 6 Geo. 4, c. 92, recites, that since the 26 Geo. 2, c. 33, and the 44 Geo. 3, c. 77. divers churches and chapels had been erected in England, Wales, and Berwick-upon-Tweed, which had been duly consecrated, and divers marriages had been solemnized therein since the passing of the 44 Geo. 3, c. 77; but by reason that in such churches and chapels banns of matrimony had not usually been published, before or at the time of passing the 26 Geo. 2, c. 33, nor any authority obtained for solemnizing marriages therein, under the provisions of the 4 Geo. 4, c. 76, such marriages had been or might be deemed to be void; and then enacts, that all marriages already solemnized in any church or public chapel in England, Wales, and Berwick-upon-Tweed, erected since the 26 Geo. 2, c. 33, and consecrated, shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels, having chapelries annexed, and wherein banns had usually been published before or at the time of passing the 26 Geo. 2. By sec. 2, it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the 26 Geo. 2, c. 33, and consecrated, "in which churches and chapels it has been customary and usual, before the passing of this Act, to solemnize marriages;" and that all marriages hereinafter^(p) solemnized therein shall be as good and valid as if they had been solemnized in parish churches, &c., wherein banns had usually been published before or at the time of passing the 26 Geo. 2. And the registers of marriages solemnized in the churches or chapels, by the 6 Geo. 4, enacted to be valid in law, or copies thereof, are to be received as evidence, in the same manner as the registers of marriages in parish churches, &c., in which banns were usually published before or at the time of the 26 Geo. 2, c. 33, or copies thereof, are received; but liable to the same objections as would be available to exclude the latter from being received.^(q) But such registers of marriages, solemnized in any public chapel, and made valid by the 6 Geo. 4, c. 92, are, within three months from the passing of the Act, to be removed to the parish church of the parish in which such chapel is situated; and if it be situated in an extra-parochial place, then to the parish church next adjoining, to be kept with the marriage registers of such parish, and in like manner as parish registers are directed to be kept by the 26 Geo. 2.^(r)

Where a marriage was solemnized in a chapel, there must be some evidence given that banns were usually published there before the passing of the 26 Geo. 2, c. 33; but it was *prima facie* sufficient for that purpose to produce an old register of marriages solemnized in the chapel before that Act, and a regular register of banns published there since, and to prove that within the recollection of witnesses banns had been published and marriages solemnized in it from time to time of late years.^(s) But where on an indictment for bigamy it appeared that the first marriage was celebrated at the chapel of Great Barr, which was a chapel

(o) *Rex v. Northfield*, Dougl. 659.

(q) 6 Geo. 4, c. 92, s. 3.

(s) *Taunton v. Wyborn*, 2 Camp. R. 297.

(p) *Sic*, it should be "hereafter."

(r) *Id.* sec. 4.

in the parish of Aldridge, in the year 1843, and that marriages *had been solemnized there for the last twenty years, but no register was produced, [*309 nor any further evidence given as to the celebration of marriages or publication of banns there; Platt, B., held the evidence insufficient, as it was necessary to show either that the chapel was one in which banns had been usually published before the 26 Geo. 3, c. 33, or that the chapel was built and consecrated after that Act, and before the 6 Geo. 4, c. 92.(t)

By the 6 & 7 Vict. c. 37, s. 15, an Act to make better provision for the spiritual care of populous parishes, where any church or chapel has been consecrated as the church or chapel of any district constituted under the Act, such district is to be a new parish for ecclesiastical purposes, and "it shall be lawful to publish banns of matrimony in such church, and according to the laws and canons in force in this realm to solemnize therein marriages;" and the several laws relating to the publication of banns and the performance of marriages and the registering thereof, shall apply to the church of such new parish, and to the perpetual curate thereof. And by the 8 & 9 Vict. c. 70, s. 10, an Act for amending the Church Building Acts, banns of marriage may be published and marriages performed in the church of every consolidated chapelry formed in the manner therein mentioned.

The 7 & 8 Vict. c. 56, s. 3, reciting that by error banns have been published and marriages solemnized in chapels with districts assigned to them under the 59 Geo. 3, c. 134, 1 & 2 Will. 4, c. 38, 1 & 2 Vict. c. 107, and 3 & 4 Vict. c. 60, or some of them, but in which chapels banns could not be legally published nor marriages by law be solemnized, enacts that "banns *already* (29th July, 1844) published and marriages *already* solemnized in such chapels as aforesaid, shall not hereafter be questioned on account of the said banns having been published, or the said marriages solemnized in any such chapel as aforesaid, and the registers of all marriages so solemnized as aforesaid, or copies of such registers, shall be received in all courts of law and equity as evidence of such marriages respectively."(u)

The 14 & 15 Vict. c. 97, s. 25, enacts that, where by error and without fraud banns had been published or marriages solemnized, in the church of any parish or district in which they could not lawfully be published or solemnized, the banns *already* (7th August, 1851) published and marriages *already* solemnized, shall not be questioned by reason thereof, except where some suit was pending.

The 24 & 25 Vict. c. 16, s. 4, rendered valid all banns published and all marriages solemnized before the 17th of May, 1861, in churches and chapels which had been duly consecrated, but in which banns could not legally be published nor marriages by law be solemnized; but the Act is not prospective.(v)

The 18 & 19 Vict. c. 81, s. 13, renders valid marriages had before the 30th July, 1855, in any building registered under *the 6 & 7 Will. 4, c. 85, [*310 but not certified as required by any Act.

The 4 Geo. 4, c. 76, and 6 & 7 Will. 4, c. 85, only extend to that part of the United Kingdom called England.(w) With respect to marriages in Scotland, though the point was formerly much doubted,(x) it appears to have been afterwards settled that where minors domiciled in England withdrew themselves into Scotland, or places beyond the seas, for the purpose of evading the Marriage Act, their marriage under such circumstances was nevertheless valid.(y) In a late

(t) Reg. v. Bowen, 2 C & K. 227 (61 E. C. L. R.), tried March 18, 1846. The 6 Geo. 4, c. 92, received the Royal Assent 5th July, 1825.

(u) Sec. 1 provides that where a district has been or shall be assigned to any church or chapel under the 3 & 4 Vict. c. 60, the Church Building Commissioners or the bishop may determine as to banns and marriages in any such church or chapel; and sec. 2 points out the proceedings where such decision is made; and sec. 4 provides that omissions to authorize marriages in chapels may be supplied by a supplemental order, &c.

(v) The Act also indemnifies ministers who had solemnized any marriages in such churches and chapels, and makes the registers and copies of them admissible in evidence.

(w) See *ante*, pp. 283, 291.

(x) See Burn's Just. tit. *Marriage*, and the observations of Lord Mansfield in Robinson v. Bland, 2 Burr 1079.

(y) Crompton v. Bearcroft, Bull. N. P. 113; and see the opinion of Eyre, C. J., in reasoning upon the case of Phillips v. Hunter, 2 H. Blac. 412. And in Ilderton v. Ilderton

case, a writer to the signet proved that, according to the law of Scotland, marriage is a civil contract solemnly and deliberately entered into, and as if the parties had a serious intention of living together as a man and wife. The assent of both parties must, therefore, be very distinctly and clearly proved to have been given, in order to render the contract a valid one. It is not necessary to the validity of such contract, that the parties should afterwards live together as man and wife; but the fact of their afterwards living together as man and wife will operate to explain ambiguous words, if there be such in the contract itself. Where, therefore, the second marriage took place at Gretna Green, and upon the whole evidence the assent of the second wife was not "distinctly and clearly proved," and, though the parties had lived together afterwards, the evidence tended rather to show that they were living together in a state of concubinage, inasmuch as the prisoner still continued to address her by her maiden name, Alderson, B., directed the jury to find the prisoner not guilty.^(z) And where, on an indictment for bigamy, to prove the second marriage in Scotland, a witness stated that she (being the sister of the second wife) was present at a ceremony performed by a minister of a congregation, but whether of the Kirk she did not know, in her private house in Edinburgh; that she herself was married in the same way, and that parties were always married in Scotland in private houses; that the prisoner and her sister lived together in her house as man and wife for a few days after the ceremony; and the jury found the prisoner guilty; upon the question being reserved whether the evidence was sufficient to justify the verdict, or whether some witness, conversant with the law of Scotland, should not have been called upon to say whether the facts proved constituted a valid marriage according to that law; it was held that some such witness ought to have been called, and that, even supposing that the witness had been a competent witness for such a matter, her evidence did not prove a marriage in fact.^(a)

*In the case of a marriage in a very distant place, it appears to be sufficient to
 *311] show that it was performed according to the rites and custom of the country in which it was celebrated. Where a soldier on service with the British army in St. Domingo, in 1796, being desirous of marrying the widow of another soldier who had died there in the service, the parties went to a chapel in the town, and the ceremony was there performed by a person appearing and officiating as a priest; the service being in French, but interpreted into English by a person who officiated as clerk, and understood at the time by the woman to be the marriage service of the Church of England. This was held sufficient evidence, after eleven years' cohabitation, that the marriage was properly celebrated, although the woman stated that she did not know that the person officiating was a priest. Lord Ellenborough, C. J., in delivering his opinion, considered the case, first, as a marriage celebrated in a place where the law of England prevailed (supposing, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them), and held that it would be a good marriage by that law; for it would have been a good marriage in this country before the Marriage Act, and consequently would be so now in a foreign colony, to which that Act does not extend. In the second place, he considered it upon the supposition that the law of England had not been carried to St. Domingo by the king's forces, nor was obligatory upon them in this particular; and held that the facts stated would be evidence of a good marriage according to the law of that

ton, 2 H. Blac. 145, it was taken to be clear that a marriage, celebrated in Scotland, is such a marriage as would entitle the woman to her dower in England.

(z) Graham's case, 2 Lew. 97. In the same case the same learned judge refused to admit the certificate as evidence of the marriage.

(a) Reg. v. Povey, Dears. C. C. 32. The Court said that the Sussex Peerage Case, 11 Cl. & F. 85, had settled the point that a person not *peritus virtute officii* or *virtute professionis*, was inadmissible to prove the law of a foreign country, and had overruled Reg. v. Dent, 1 C. & K. 97 (47 E. C. L. R.). See Lapsley v. Grierson, 1 H. L. C. 498, that illicit cohabitation in Scotland begun in the lifetime of a husband, and continued after his death, continues to bear an illicit character, unless there be a clear change in its character after the death of the husband is known to the parties.

country, whatever it might be; and upon such facts every presumption was to be made in favor of the validity of the marriage. (b)

Where a person was married at her father's house, in Ireland, in 1799, in the presence of the friends of both families, by a clergyman of the Church of England, who had been curate of the parish for eighteen years; the parish church was standing, but persons of respectability were usually married at their own houses; the parties lived together for several years following as man and wife. Upon objection to the validity of this marriage, Best, C. J., said, I know of no law which says that celebration in a church is essential to the validity of a marriage in Ireland. The English Marriage Act does not apply, and I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this before the passing of that Act. *Dalrymple v. Dalrymple* (c) has placed it beyond a doubt that a marriage so celebrated as this has been would have been held valid in this country before the existence of that statute. (d) So *where in support of a plea of coverture it was proved that Mrs. Quicke married Mr. Quicke [312 at the house of the Rev. F. M'Guire, near Dublin, in 1842, and Mr. M'Guire's widow produced his letters of orders showing that he had been ordained deacon and priest by bishops of the Established Church, and also proved that when persons were married at their house, her husband always made an entry in a register book, which she produced, and also gave a certificate of the marriage to the persons married; and the register contained an entry of the marriage of Mr. and Mrs. Quicke, and Mrs. Quicke proved that she married Mr. Quicke as before mentioned, and produced the certificate given to her by Mr. M'Guire; Parke, B., held that the certificate was admissible as a part of the transaction; but not the register; and that the marriage was valid: for although it was not celebrated in a church, it was a valid marriage at common law before the 7 & 8 Vict. c. 81. (e)

Where a woman, being a Roman Catholic, and a man, being a Protestant, went in 1826 before Mr. Wood, a clergyman residing in Dublin, who, in his private house, read to them the marriage ceremony, and in the course of it asked her whether she would be the wife of the man, and asked him whether he would be her husband, to which question both of them answered, "I will:" Wood was reputed to be a clergyman of the Established Church, and a document purporting to be letters of orders signed and sealed by W. late Archbishop of Tuam, dated in 1799, whereby the archbishop certified that he had ordained Wood a priest, and which letters were found among Wood's papers at the time of his death in July 1829, was admitted without proof of the handwriting or seal of the archbishop as being more than thirty years old. It was held that this document was properly received in evidence, being above thirty years old: if it had been only signed there could have been no question as to its admissibility, but it was, in fact, also sealed; but although an archbishop is a corporation sole for many purposes, yet such a certificate has no relation to his corporate character, and the seal must be considered as the seal of the natural person, and not of the corporation; and consequently that there was sufficient evidence of the marriage. (f)

In a case at the Old Bailey, a question was made, whether a marriage of a dissenter in Ireland, when performed by a dissenting minister in a private room, was valid. It was contended, on behalf of the prisoner, who was indicted for bigamy,

(b) *Rex v. Brampton*, 10 East 282.

(c) 2 Hagg. 54.

(d) *Smith v. Maxwell*, R. & M. N. P. R. 80. His lordship added, that in one case Bayley, J., had held a marriage in Ireland invalid, because it had been performed in a private house, but that he was afterwards satisfied of the validity of the marriage. The case was *Rex v. Reilly*, 2 Burn's E. Law, 8 Ed. 491, n. (7); 3 Burn's, J., D. & W. Ed. 680. There the marriage was solemnized in Ireland, under a license from the Archbishop of Dublin, authorizing the clergyman to whom it was directed to marry the parties, at the usual canonical time and place; the ceremony was performed by the curate of the clergyman to whom the license was directed, in a private house, and after the canonical hour. Bayley, J., after consulting Holroyd, J., thought that the non-compliance with the license, in respect of the place in which the ceremony was performed, rendered the marriage void.

(e) *Stockbridge v. Quicke*, 3 C. & K. 305.

(f) *Rex v. Bathwick*, 2 B. & Ad. 639 (22 E. C. L. R.). See this case, *post*, vol. 2, as to the competency of the wife.

that the marriage was illegal from the clandestine manner in which it was celebrated; and several Irish statutes were cited, from which it was argued that the marriage of dissenters in Ireland ought at least to be in the face of the congregation, and not in a private room. But the recorder is said to have been clearly of opinion that this marriage was valid, on the ground that as, before the Marriage Act, a marriage might have been celebrated in England in a house, and it was only *313] made necessary, by the enactment of *positive law to celebrate it in a church, some law should be shown requiring dissenters to be married in a church, or in the face of the congregation, in Ireland, before this marriage could be pronounced to be illegal: whereas one of the Irish Statutes, 21 & 22 Geo. 3, c. 25, (g) enacted, that all marriages between Protestant dissenters, celebrated by a Protestant dissenting teacher should be good without saying at what place they should be celebrated. (h)

We have seen that a marriage by a Presbyterian minister in Ireland was held void. (i) But the 5 & 6 Vict. c. 113, s. 1, renders all marriages celebrated in Ireland before the 12th August, 1842, by Presbyterian or other Protestant ministers or teachers, or those who at the time of such marriages had been such, of the same force as if they had been celebrated by clergymen of the United Church of England and Ireland. (k) The 6 & 7 Vict. c. 39, renders all similar marriages after the passing of the preceding Act, and before the passing of that Act, 28th July, 1843, valid. And the 7 & 8 Vict. c. 81, s. 83, contains a similar provision as to such marriages between the passing of the preceding Act and that Act, and by sec. 4 provides that marriages between parties both or either of whom are Presbyterians, may be solemnized, according to the forms used by Presbyterians, in certified meeting-houses.

A marriage celebrated in Ireland between a Roman Catholic and a Protestant, by a Roman Catholic priest is void. The prisoner was charged with bigamy, and the first marriage was proved to have been in Ireland, by a Roman Catholic priest, but the prisoner insisted that it was void in point of law, as he was a Protestant at the time of the marriage, and the woman a Roman Catholic; the only evidence to prove that he was a Catholic was, that on several occasions prior to the first marriage, he had attended mass: Patteson, J., told the jury, that if they should be of opinion that the prisoner was a Roman Catholic when the first marriage took place, they must find him guilty; but that if they should be of opinion that he was a Protestant, they must acquit him. (l) But where the first marriage took place at Burton-on-Trent, and the second in Ireland, at the house of the Rev. W. O'Sullivan, *314] a Roman Catholic priest, as was usual with the marriages *of Roman Catholics in Ireland: the woman was a Roman Catholic, and before the commencement of the marriage service, Mr. O'Sullivan asked the prisoner if he was a Roman Catholic, and he said he was: a part of the ceremony was in Latin, and the remainder in English: the priest having asked the prisoner if he would take the woman as

(g) And see 11 Geo. 2, c. 10. By 32 Geo. 3, c. 21, s. 12, Protestants may be married to Roman Catholics by clergymen of the Established Church; but sec. 13 contains a proviso that the Act shall not authorize Protestant dissenting ministers or Popish priests to celebrate marriage between Protestants of the *Established Church* and Roman Catholics. The clause, however, does not enact that such a marriage celebrated by a Protestant dissenting teacher shall be void. Such a marriage, celebrated by a *Popish priest*, would be void by 19 Geo. 2, c. 13 (Irish); and the 33 Geo. 3, c. 21, s. 12, only authorizes Popish priests to celebrate marriage between a Protestant and a Papist, where such Protestant and Papist have been first married by a Protestant clergyman. See the 3 & 4 Will. 4, c. 103, which repeals the penal enactments made by 6 Ann. (I.), 12 Geo. 1 (I.), 23 Geo. 2 (I.), 12 Geo. 3 (I.), 33 Geo. 3 (I.), against Catholic clergymen celebrating marriages between Protestants in Ireland.

(h) *Rex v. —*, Old Bailey, Jan. Sess. 1815, *cor.* Sir J. Silvester, Recorder, MS. The prisoner was an officer in the army; and his first marriage, upon which this question was raised, took place in 1787, at Londonderry. The second marriage was celebrated in London, according to the ceremonies of the Church of England.

(i) *Reg v. Mills*, *ante*, p. 305.

(k) Sec. 2 excepts marriages previously adjudged invalid; marriages where either of the parties had contracted another lawful marriage; and marriages respecting which prosecutions were pending when the Act passed, 12th Aug. 1842.

(l) *Sunderland's case*, 2 Lew. 109.

his wife, and having asked the woman if she would take the prisoner as her husband, and each of them having answered in the affirmative, he pronounced them married; it was held that the prisoner having at the time of the marriage held himself out to be a Roman Catholic, it was a good marriage as against him, and that he could not set up his protestantism as a defence to an indictment for bigamy, and that there was sufficient evidence of the marriage in Ireland.(m)

With respect to the marriage of *minors* in Ireland, the statute 9 Geo. 2, c. 11 (Irish), contains some provisions.

A marriage by license, in Ireland, where one of the parties was under age at the time, and there was no consent of the father, was not absolutely void, but only voidable within one year, under the 9 Geo. 2, c. 11, and if no proceedings were taken within the year to avoid the marriage, it was binding, and the party, if he married again (during the life of his wife) might be properly convicted of bigamy.(n)

The 7 & 8 Vict. c. 81, which passed on the 9th August, 1844, and 9 & 10 Vict. c. 72, contains numerous provisions for the celebration and registration of marriages in Ireland.

A marriage, however, celebrated by a Roman Catholic priest between two Protestants is still illegal, and renders the person celebrating it liable to be indicted for felony. The 7 & 8 Vict. c. 81, leaves untouched the rights of the Roman Catholic clergy where the marriage would have been previously legal, and the exemption in that Act from penalties is only in relation to marriage which may now be lawfully celebrated.(o)

The 4 Geo. 4, c. 91, recites the expediency of relieving the minds of all his Majesty's subjects from any doubt concerning the validity of marriages, solemnized by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any *chaplain or officer, or other person, officiating under the orders of the commanding officer of a British army serving abroad: and then enacts [*315 that "all such marriages shall be deemed and held to be as valid in law as if the same had been solemnized within his Majesty's dominions, with a due observance of all forms required by law." But there is a proviso that this Act shall not confirm, or impair, or affect the validity of any marriage solemnized beyond the seas, save and except such as are solemnized as herein specified and recited.(q)

The 12 & 13 Vict. c. 68, which passed on the 28th of July, 1849, renders valid "all marriages (both or one of the parties thereto being subjects or a subject of this realm) which shall be solemnized in the manner in that Act provided in any foreign country or place where there shall be a British consul duly authorized to act in such foreign country or place under that Act," and contains many provisions as to the manner of performing such marriages before British consuls.(r)

Certain marriages of British subjects are legalized in Mexico by the 17 & 18

(m) *Reg. v. Orgill*, 9 C. & P. 80 (38 E. C. L. R.), Alderson, B., who said the law on this subject had been much discussed by the Privy Council in *Swift v. Swift*, 3 Knapp 303. *Reg. v. Orgill* was much doubted by Lord Wensleydale in *Yelverton v. Yelverton* in the House of Lords.

(n) *Rex v. Jacobs*, R. & M. C. C. R. 140. But since the 7 & 8 Vict. c. 81, s. 32, proof of the consent of parents, &c., is unnecessary.

(o) *Reg. v. Taggart*, 2 Cox C. C. 50. In delivering judgment, Blackburne, C. J., said, originally a marriage celebrated by a Roman Catholic priest between two Protestants, or between a Protestant and a Roman Catholic was valid; then came the Acts 12 Geo. 1, c. 3 (I.), 23 Geo. 2, c. 10 (I.), and 33 Geo. 2, c. 21 (I.), under which a party celebrating such a marriage was made liable to the penalty of death, and by the latter statute to a fine of £500; and besides the 19 Geo. 2, c. 13 (I.), made the marriage itself absolutely void. Then came the 3 & 4 Will. 4, c. 102; by it all the Acts imposing penalties (*i. e.*, the three first Acts) were repealed, but the ceremony remained an invalid marriage, as it was before; *i. e.*, by the 19 Geo. 2, c. 13. See 2 Hayes Dig. C. L. 552, and the cases there mentioned.

(q) Sec. 2.

(r) This Act, probably passed in consequence of *Catherwood v. Caslon*, *ante*, p. 305.

Vict. c. 88; in Moscow, Tahiti, and Ningpo by the 21 & 22 Vict. c. 46; at Lisbon, by the 22 & 23 Vict. c. 64; and in the Ionian Islands by the 23 & 24 Vict. c. 86; and provision is made for the transmission to the registrar general of certificates of these marriages, &c.

The 58 Geo. 4, c. 84, renders marriages solemnized in India by ministers of the Church of Scotland before the 31st December, 1818, valid; and the 14 & 15 Vict. c. 40, regulates marriages in India, after the 1st January, 1852, or such other day as the Governor General shall direct, where one or both of the parties is or are a person or persons professing the Christian religion.

Marriages in the colony and dependencies of Newfoundland are especially regulated by the statute 5 Geo. 4, c. 68, which repeals a former statute, 57 Geo. 3, c. 51, upon the same subject.

In an action for criminal conversation the marriage of the plaintiff and his wife, who were both Quakers, had been performed according to the ceremonies of the sect, by a public declaration of the parties at a monthly meeting of the society, of their becoming man and wife, and a certificate to that effect entered in a register, signed by the parties and by several subscribing witnesses. The register was produced and proved by one of the witnesses, and a member of the society proved the forms observed to be those usually considered as necessary to marriage among Quakers.^(s)

It seems that in order to prove a Jewish marriage, the marriage contract must be proved. Where two witnesses were called, who swore that they were present in the Jewish synagogue when a marriage took place, it was insisted that what took place in the synagogue was merely a ratification of a previous written contract, and as that contract was essential to the validity of the marriage it ought to be produced and proved; and the contract, in the Hebrew tongue, was accordingly *316] put in and proved.^(t) So a Jewish divorce can only be proved by producing the document of divorce delivered by the husband to the wife.^(u)

The law of France as to marriage may be proved by the production of a book purporting to contain the code of France, and proved by oral testimony of a witness acquainted with the law of France, to contain the law of France. The articles of the law of France, which prescribe the forms essential to marriage, do not declare a marriage void for nonobservance of those forms, but parol evidence is admissible to show that, by the law of France, a marriage in fact, without observance of the requisites prescribed by the articles, is void.^(v)

It was formerly held that if an idiot contracted matrimony, it was good and should bind him: but modern resolutions appear to have proceeded upon the more reasonable doctrine of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, is absolutely void. And as it might be difficult to prove the exact state of the mind of the party at the actual celebration of the nuptials, the 15 Geo. 2, c. 30, has provided that if persons found lunatics under a commission, or committed to the care of trustees by any Act of Parliament, marry before they are declared of sound mind by the Lord Chancellor, or the majority of such trustees, the marriage shall be totally void.^(w)

Upon indictments for bigamy it is not sufficient to prove a marriage by acknowledgment, cohabitation, and reputation; but it is necessary to prove what the courts call a marriage in fact, that is an actual marriage.^(x)¹ Therefore either

^(s) Deane v. Thomas, M. & M. 361. See the 11 & 12 Vict. c. 58, and 23 & 24 Vict. c. 18, ante, p. 284, note (c).

^(t) Horn v. Noel, 1 Camp. 61.

^(u) Moss v. Smith, 1 Man. & Gr. 228 (39 E. C. L. R.), and, *qu.*, whether such a divorce would be any defence to an indictment for bigamy. See the learned note of the report, *ibid.* See the Acts cited in note (s).

^(v) Lacon v. Higgins, 3 Stark. N. P. 178 (14 E. C. L. R.).

^(w) 1 Blac. Com. 438, 432.

^(x) Catherwood v. Caslon, 13 M. & W. 261.

¹ The general current of American decisions is in accord with the text: *Gahagan v. People*, 1 Parker C. R. 378; *State v. Timmins*, 4 Minn. 325; *Hayes v. People*, 25 N. Y. 399. There are some cases, however, which hold that the first marriage may be proved by ad-

some person present at the marriage must be called, or the original register, or an examined copy of it, be produced.(y) The 4 Geo. 4, c. 76, s. 28, requires that marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and the 6 & 7 Will. 4, c. 86, s. 31, that it shall be registered in duplicate according to the form in the schedule, and that each entry shall be signed by the minister and parties married, and attested by two witnesses. But, upon a provision nearly similar in the former Marriage Act, it was held not to be necessary to call one of the subscribing witnesses to the register in order to prove the identity of the persons married; but that the register, or the copy of it, being produced, any evidence which satisfied the jury as to the identity of the parties was sufficient: as if their handwriting to the register were proved; or that bell-ringers were paid by them for ringing for the wedding, or the like.(z) And it was held that if the marriage were proved by a person present at it, it was not necessary to prove the registration, or license, or banns. The prisoner was indicted for marrying Ann Epton, whilst Jane his former wife, was living; each marriage was proved by a witness who was present at the ceremony; and it appeared that at the first marriage the prisoner went by the name of Allison, and at the second by the name of Wilkinson. *Chambre, J.*, *doubted whether the evidence was sufficient without proof of the registration of either marriage, or of any license or publication of banns; but the [317 judges held that it was.(a)

Upon an indictment for bigamy it was proved on the part of the prisoner that her first husband, before he married her, had been in Canada, and that he was absent for about two years, and when he returned he said he had brought his wife with him, and a lady accompanied him, whom he treated as his wife, and every one else regarded her in that capacity; she had been heard of as being alive after the prisoner's first marriage; and thereupon *Crompton, J.*, interposed, and said that there was evidence of a prior marriage, and, although there might be some technical difficulty in proving the marriage in Canada, still if there was reasonable doubt of the fact, the prisoner ought to be acquitted, and the jury said it was unnecessary to hear any more evidence.(b)

The second wife must be properly described in the indictment, and if she be described as a widow, when, in fact, she was not so, and had never been represented or reputed to be so, the variance will be fatal. The prisoner was indicted for marrying *E. Chant*, widow, *E. Rowe*, his wife, being then alive; it appeared that *E. Chant* was, in fact and by reputation, a single woman; it was objected that she was improperly described in the indictment as a widow, and upon a case reserved the judges were unanimously of opinion that the misdescription was fatal, though it was not necessary to have stated more than the name of the party.(c) So

(y) *Morris v. Miller*, 4 Burr. 2057; *Birt. v. Barlow*, Dougl. 162.

(z) 1 East P. C. c. 12, s. 11, p. 472; Bull. N. P. 27.

(a) *Rex v. Allison*, MS., Bayley, J., and R. & R. 109.

(b) *Reg. v. Wilson*, 3 F. & F. 119. See *Hamblin v. Shelton*, 3 F. & F. 133, and *Doe d. Fleming v. Fleming*, 4 Bing. R. 266, for similar evidence in civil cases.

(c) *Rex v. Deeley*, R. & M. C. C. R. 303; s. c. 4 C. & P. 579. But such a variance may be amended under the 14 & 15 Vict. c. 100, s. 1.

Omissions—reputation and cohabitation: *Comm. v. Murtagh*, 1 Ashm. 272; *State v. Hilton*, 3 Rich. 434; *State v. Seals*, 16 Ind. 352; *Langtry v. State*, 30 Ala. 536; *Cook v. State*, 11 Geo. 53. See also on this point *Gaines v. Hennen*, 24 How. (S. C.) 553; *Carmichael v. State*, 12 Ohio (N. S.) 553; *McReynolds v. State*, 5 Cald. 18; *Stangleer v. State*, 17 Ohio St. 453; *Ouale v. Comm.*, 17 Gratt. 582; *Ham's case*, 11 Maine 391; *Robinson v. Comm.*, 6 Bush 369; *King v. State*, 40 Geo. 244; *Williams v. State*, 44 Ala. 24; *Bird v. State*, 21 Gratt. 800; *People v. Humphry*, 7 Johns. 314.

At common law, no formal ceremony is requisite to give validity to a marriage, but a contract between the parties *per verba de presenti* is enough: *Star et al. v. Peck*, 1 Hill 270. So semblance of such a contract, though *executory* in form, if followed by cohabitation: for the acts of the parties may be taken as giving a construction to their words, and rendering them personally operative: *Ibid.*; *Hantz v. Sealy*, 6 Binn. 405; *Jackson v. Winne*, 7 Wend. 47. When the first marriage was celebrated abroad, the prosecution must show not only a marriage in fact, but a marriage valid by the foreign law: *People v. Lambert*, 5 Mich. 349.

where, on an indictment for bigamy describing the first wife as Ann Gooding an examined copy of the certificate(*d*) of the marriage of the prisoner and Sara Ann Gooding was put in, and there was no evidence to explain the difference in the names: Maule, J., directed an acquittal.(*e*)

The 6 & 7 Will. 4, c. 86 (an Act for registering births, marriages, and death in England), by sec. 38, enacts that all certified copies of entries purporting to be sealed or stamped with the seal of the register-office, shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry; and no certified copy purporting to be given in the said office shall be of any force or effect, which is not sealed or stamped as aforesaid.(*f*)

How far the acknowledgment of the defendant upon the subject of his marriage is sufficient evidence of the fact may admit of some doubt. In one case it was held, that proof of the prisoner's cohabiting with and acknowledging himself married to a former wife then living, such assertion being backed by his producing to the witness a copy of a proceeding in a Scotch court against him and his wife for having contracted the marriage improperly (the *marriage, however, being still good according to that law) was sufficient evidence of the first marriage. The point being reserved, all the judges who were present held the conviction proper. Two of them observed that this did not rest upon cohabitation and bare acknowledgment, for the defendant had backed his assertion by the production of the copy of the proceeding; but some of the judges thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment.(*g*) So where it was proved that the prisoner being charged with bigamy made a statement before a justice, in which he expressly declared that he had married his first wife, who was then present; Erskine, J., left the case to the jury, observing, that this was not an incriminating statement made without due attention, but that the prisoner's mind was directed to the very point by the charge made against him.(*h*)

So where upon an indictment for bigamy it appeared that the prisoner returned from America with a woman described in the indictment as Mary Carlisle, with whom he lived as his wife for some years afterwards; and that soon after his return he told her sister that he had been married to Mary Carlisle at New York by a Presbyterian minister, and he subsequently caused the bellman at Oldham to give public notice, which he did, that no one was to give credit to "Mary, the wife of John Newton;" and some time afterwards Mary Newton, describing herself as his wife, complained to a magistrate of his having ill-treated her, and the prisoner attended before the magistrate, and did not deny the alleged marriage, but said he

(*d*) *Quere*, Register.

(*e*) *Reg. v. Gooding*, C. & M. 297. Maule, J., thought that "evidence might perhaps be offered to explain the circumstance of this difference in the name of the prisoner's first wife, as she is described in the indictment, and as described in the marriage certificate and even in the absence of such evidence, proof might be supplied that the woman was known by both names."

(*f*) See also the 3 & 4 Vict. c. 92.

(*g*) *Truman's case*, Nottingham Spr. Assizes 1795, decided upon by the judges in East T. 1795, MS. Jud.; 1 East P. C. c. 12, s. 10, pp. 470, 471; where see some remarks as to the admission of a bare acknowledgment in evidence in a case of this nature. That may be difficult to say that it is not evidence to go to a jury; but that it must be admitted that it may under circumstances be entitled to little or no weight; for such acknowledgments made without consideration of the consequences, and palpably for other purposes at the time, are scarcely deserving of that name in the sense in which acknowledgments are received as evidence; more especially if made before the second marriage or upon occasions when in truth they cannot be said to be to the party's own prejudice nor so conceived by him at the time.

(*h*) *Rex v. Dennis Upton*, Gloucester Spr. Ass. 1839. It seems quite clear that this is the proper course on the general principle that everything which a prisoner says against himself is proper for the consideration of the jury, who are to ascribe such weight to it as it may appear to them to deserve. C. S. G. In *Dickinson v. Coward*, 1 B. & A. 67 Lord Ellenborough, C. J., said, "I take it to be quite clear that any recognition of a person standing in a given relation to others is *prima facie* evidence against the person making such recognition that such relation exists. If, indeed, it were made in a loose conversation, I should consider the evidence but very slight." See also 2 Stark. Evi.

1 edit.

could no longer live with her on account of her jealousy, and consented to allow her eight shillings a week; Wightman, J., after consulting Cresswell, J., told the jury that the question was, whether they were satisfied by the statements made by the prisoner on the various occasions referred to that he had been married to Mary Carlisle in America, and that such marriage was a valid one according to the law of that country. The jury were to say whether, as against the prisoner, it might not be taken, on the faith of his own repeated declarations, that the marriage had been a valid one according to the law in force at New York. That declarations lightly or hastily made were entitled *to very little weight in such a case; [*319 but what the prisoner said deliberately, and when it was obviously his interest to deny the marriage, if he did not know it to be a valid one, was undoubtedly evidence entitled to the very serious consideration of the jury. (i)

But where, on an indictment for bigamy, it appeared that the prisoner went to a policeman, stating that he wanted to give himself up on a charge of felony, and that he had married two wives, both of whom were then with him, and that he could have no peace or quiet with them, so he went to the police office as a refuge; he said that he had been married to the first wife thirty-two years ago by the parish priest of Leitrim, in the county of Galway, and had subsequently, in 1837, married Catherine O'Bryan, at the parish of Ashton-upon-Lyne; and after he was in custody he signed a written statement in which he asserted the same facts: Pollock, C. B., said there must be some evidence of the first marriage beyond the mere admission of the prisoner, who might for a purpose have stated an untruth. There was some evidence of the first marriage, but it was not enough. (k)

After proof of the first marriage the second wife may be a witness; but it is clear that the first and true wife cannot be admitted to give evidence against her husband. (l)

The prisoner was indicted for having married A. Walker, his first wife, A. Armstrong, being alive: the prisoner's first marriage with A. Armstrong was proved. The prisoner's defence was, that the first marriage was void, as A. Armstrong had a husband living at the time, and he proposed to call A. Armstrong to prove that fact; it was objected to her competency, that the fact of her marriage with the prisoner having been proved, she must be taken to be his lawful wife. Alderson, B., was at first inclined to think that she might be examined simply to the fact of her being the wife or not of the prisoner; but after conferring with Williams, J., he determined not to receive her evidence, but to reserve the point. (m) But where a woman, called as a witness against a *prisoner, proved on the *voir dire* that she married the prisoner in 1849, Erle, J., held that she [*320

(i) Reg. v. Newton, 2 M. & Rob. 503; s. c. as Reg. v. Simmonsto, 1 C. & K. 164 (47 E. C. L. R.). According to the latter report the difficulty felt by Wightman, J., was that it was not a simple admission of a marriage, but of a marriage by a Presbyterian minister in New York, which would not have been a good marriage in England before the marriage Act; and there was no evidence that it was a good marriage by the law of New York.

(k) Reg. v. Flaherty, 2 C. & K. 782 (61 E. C. L. R.).

(l) 1 Hale 693; 1 East P. C. c. 12, s. 9, p. 469, and 1 Hawk. c. 42, s. 8, where it is said that this rule has been so strictly taken that even an affidavit to postpone the trial made by the first wife has been rejected, and Old Bailey, Feb. Sess. 1786, is cited.

(m) Peat's case, 2 Lewin 288. The prisoner was acquitted. The first impression of the very learned Baron seems to have been the correct one. The only ground on which the witness could be rejected was, that she was the lawful wife of the prisoner; for "the general rule does not extend to a wife *de facto*, but not *de jure*:" 2 Stark. Evid. 402, (2d edit.). In Wells v. Fletcher, 5 C. & P. 12 (24 E. C. L. R.); s. c., 1 M. & Rob. 99, a woman called for the defendant, on examination on the *voir dire*, said she had been married to the plaintiff, and on re-examination that she was married to another person previously; but, not seeing him for thirty years, she thought he was dead, and therefore married the plaintiff, but afterwards found that her first husband was living; and Patteson, J., held that the witness was competent, as the second marriage was a nullity. If Peat's case had been an indictment for larceny, and the witness called for the prisoner had proved her marriage to him on the *voir dire*, Wells v. Fletcher shows that she might have been rendered competent by proving her previous marriage, and it is difficult to see how proof by other evidence that she had married the prisoner, whether such evidence were given before or after she was called, could render her incompetent; for her evidence would not be inconsistent with such evidence, as it would admit the marriage with the prisoner,

might also prove on the *voire dire* that she had a sister seven years older than herself, and that they had been brought up together with their parents, and that she always believed that they were sisters, and that her sister had married the prisoner in 1846, and died in 1848; for if a person is questioned on the *voire dire* with the view to raise an objection to her competency, she may also be examined to remove that *prima facie* ground of objection.⁽ⁿ⁾

There is no presumption of law as to the death of a party, without reference to the accompanying circumstance, such, for instance, as the age or the health of the party, and the only question is, what inference may be fairly drawn from the evidence. The presumption of innocence cannot shut out the presumption arising from the fact, that the party was alive within a short time of the second marriage. A pauper married E. Meadows, in 1821, who afterwards went abroad, and several letters had been received from her dated from Van Dieman's Land, and one in her handwriting, dated Hobart Town, 17th March, 1831; the pauper married again on the 11th of April, 1831; it was held that the sessions were warranted in presuming that E. Meadows was alive at the time when the second marriage took place.^(o)¹

The fact of a letter being in the handwriting of a party and dated at a particular time, is evidence that the party was alive at that time. A daughter wrote to her father in America, and in about two months afterwards received a letter in reply in his handwriting, dated the 1st of May, 1836, it was held that this was evidence that he was then alive.^(p)

An indictment for bigamy under the 35 Geo. 3, c. 57, s. 1 (now repealed), alleging that the prisoner married A., and afterwards feloniously married C., "the said A., his former wife, being then alive," sufficiently charged the offence, without also alleging that the prisoner was still married to A., when he married C.; for a divorce from A. was not to be presumed.^(q)²

but show that it was void. *Rex v. Bathwick*, 2 B. & Ad. 639 (22 E. C. L. R.), shows that the competency of the wife does not depend upon the marshalling of the evidence, or the particular stage of the case in which she may be called; if, therefore, in *Peat's case* the witness had been called before her marriage with the prisoner had been proved, and she would have been competent to prove her previous marriage, it is difficult to see how her marriage with the prisoner having been proved before she was called could render her incompetent, and it certainly would operate hardly on a prisoner, if such were the case for the prosecutor might in the course of his case prove the marriage of the witness with the prisoner, and the prisoner might have no one except the witness to prove the former marriage. It may be added that Lord Hale, vol. 1, p. 693, says, that a second wife is as much as a wife *de facto*. C. S. G.

⁽ⁿ⁾ *Reg. v. Young*, 5 Cox C. C. 296.

^(o) *Rex v. Harborne*, 2 Ad. & E. 540 (29 E. C. L. R.); 4 N. & M. 341. Recognized in *Lapsley v. Grierson*, 1 H. L. C. 498.

^(p) *Reed v. Norman*, 8 C. & P. 65 (34 E. C. L. R.), Lord Denman, C. J.: His lordship held in the same case, that the post mark was evidence that the letter was put into the post, but that the letter might have been written at any time, and therefore proof was given that it was in reply to the daughter's letter; but this seems to have been unnecessary, for the date is *prima facie* evidence of the time when an instrument is written: *R. v. Harborne*; *Sinclair v. Baggaley*, 4 M. & W. 313; *Hunt v. Massey*, 5 B. & Ad. 903; (E. C. L. R.); *Potez v. Glossop*, 2 Exch. R. 191; *Anderson v. Weston*, 6 B. N. C. 296 (E. C. L. R.); *Morgan v. Whitmore*, 6 Exch. 716.

^(q) *Murray v. The Queen*, 7 Q. B. 700 (53 E. C. L. R.). In *Reg. v. Apley*, 1 Cox C. 71, this point was doubted by Alderson, B.

¹ *Gorman v. State*, 23 Texas 646.

² An indictment for bigamy is insufficient that does not directly allege the time and place of the first marriage: *State v. La Bore*, 26 Verm. 765. Bigamy is not punishable as an offence when the second marriage took place out of the State, though the husband brought his second wife here and lived with her: *People v. Mosher*, 2 Parker C. R. 195.

*CHAPTER THE TWENTY-FOURTH.

[*321]

OF LIBEL AND INDICTABLE SLANDER.

It appears to be well settled that publications blaspheming God, or turning the doctrines of the Christian religion into contempt and ridicule, may be made the subject of indictment; and it is now fully established, though some doubt seems formerly to have been entertained upon the subject, that such immodest and immoral publications as tend to corrupt the mind, and to destroy the love of decency, morality, and good order, are also offences at common law.^(a) It is also a misdemeanor wantonly to defame or indecorously to calumniate that economy, order and constitution of things which make up the general system of the law and government of the country.^(b) And it is especially criminal to degrade or calumniate the person and character of the sovereign, and the administration of his government by his officers and ministers of state,^(c) or the administration of justice by his judges.^(d) And the same policy which prohibits seditious comments on the King's conduct and government extends, on the same grounds, to similar reflections on the proceedings of the two houses of parliament.^(e) Such publications also as tend to cause animosities between this country and any foreign state, by the personal abuse of the sovereign of such state, his ambassadors, or other public ministers, may be treated as libels.^(f) With respect to libels upon individuals, they have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule.^(g)¹

Upon some of these subjects a publication by slander, or words spoken only, though not properly a libel,^(h) may be the subject of criminal proceeding, as will be shown in the course of the chapter.

*A libel may be as well by descriptions and circumlocutions as in express terms, therefore scandal conveyed by way of allegory or irony amounts to a libel. As where a writing, in a taunting manner, reckoning up several acts of public charity done by a person, said, "*You will not play the Jew, nor the hypocrite,*" and then proceeded, in a strain of ridicule, to insinuate that what the person did was owing to his vain glory. Or where a publication, pretending to recommend to a person the characters of several great men for his imitation, instead of taking notice of what great men are generally esteemed famous for, selected such qualities as their enemies accuse them of not possessing (as by proposing such a one to be imitated for his courage who was known to be a great statesman, but no soldier; and another to be imitated for his learning who was known to be a great

(a) See the cases collected in 2 Starkie on Libel 155.

(b) Holt on Libel 82.

(c) *Rex v. Lambert and Perry*, 2 Campb. 398.

(d) 2 Starkie on Libel 194.

(e) 2 Starkie on Libel 202.

(f) *Rex v. Peltier*, Holt on Libel 78; *Rex v. D'Eon*, 1 Blac. R. 517.

(g) 1 Hawk. P. C. c. 73, ss. 1, 2, 3, 7; Bac. Abr. tit. *Libel*; and see as to libel by a picture, *Du Bost v. Beresford*, 2 Campb. 511.

(h) A libel is termed *Libellus famosus seu infamatoria scriptura* and has been usually treated of as a scandal, written or expressed by symbols; Lamb. Sax. Law, 64; Bract. lib. 3, c. 38; 3 Inst. 174; 5 Co. 125; 1 Lord Raym. 416; 2 Salk. 417, 418. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology. "There is no other name but that of *libel* applicable to the offence of libelling; and we know the offence specifically by that name, as we know the offences of horse-stealing, forgery, &c., by the names which the law has annexed to them." By Lord Camden in *Rex v. Wilkes*, 2 Wils. 121.

¹ *Comm. v. Clap*, 4 Mass. 163; *Comm. v. Kneeland*, 20 Pick. 206; *People v. Crosswell*, 3 Johns. Cas. 337; 2 Wheel. C. C. 330; *Sharff v. Comm.*, 2 Binn. 214; *State v. Cooper*, 2 Denio 293.

general, but no scholar); such a publication being as well understood to mean on to upbraid the parties with the want of these qualities as if it had done so direct and expressly.⁽ⁱ⁾ And, upon the same ground, not only an allegory, but a publication in hieroglyphics, or a rebus or anagram, which are still more difficult to understand, may be a libel; and a court, notwithstanding its obscurity and perplexity, shall be allowed to judge of its meaning, as well as other persons.^(k) A libel may be by asking questions; for if a man insinuates a fact in asking question, meaning thereby to assert it, it is the same thing as if he asserted it terms.^(l) And it is now well established that slanderous words must be understood by the Court in the same sense as the rest of mankind would ordinarily understand them.^(m) Formerly it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are to be taken in the more lenient or more severe sense, but in the sense which fair belongs to them, and which they were intended to convey.⁽ⁿ⁾

Upon the same principles it has been resolved that a defamatory writing, expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to signify a particular person in the plain, obvious, and natural construction of the whole, and would be no sense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say that a writing which is understood by every one of the meanest capacities cannot possibly be understood by a judge or jury.^(o)

*An indictment lies for general imputation on a body of men, though individuals be pointed out, because such writings have a tendency to inflame and disorder society, and are therefore within the cognizance of the law.^(p) A scandal published of three or four persons is punishable at the complaint of one more, or all of them.^(q)

It appears to have been considered that the remedies by action and indictment for libels are co-extensive, and may be regarded as upon the same footing.^(r)

(i) 1 Hawk. P. C. c. 73, s. 4; Bac. Abr. tit. *Libel* (A) 3.

(k) Holt on Libel 235, 236.

(l) Gathercole's case, 2 Lewin 255, per Alderson, B.

(m) Woolnoth v. Meadows, 5 East 463. In this case the defendant had said of the plaintiff, "that his character was infamous—that he would be disgraceful to any society—the delicacy forbade him from bringing a direct charge—but it was a male child who complained to him;" and these words were understood to mean a charge of unnatural practices.

(n) By Lord Ellenborough, C. J., in *Rex v. Lambert and Perry*, 2 Campb. 403. And a case of libel, *Rex v. Watson and others*, 2 T. R. 206, Buller, J., said, "Upon occasions of this sort I have never adopted any other rule than that which has been frequently repeated by Lord Mansfield to juries, desiring them to read the paper stated to be a libel, men of common understanding, and say whether in their minds it conveys the idea imputed."

(o) 1 Hawk. P. C. c. 73, s. 5; Bac. Abr. tit. *Libel* (A) 3, where it is said in the margin note that if an application is made for an information in a case of this kind, some friend to the party complaining should, by affidavit, state the having read the libel, and understood and believing it to mean the party. In one case Lord Ellenborough, C. J., held upon argument, that the declarations of spectators, while they looked at a libello picture in an exhibition room, were evidence to show that the figures portrayed were meant to represent the parties stated to be libelled: *Du Bost v. Beresford*, 2 Campb. 51.

(p) Holt on Libel 237. See *Le Fanu v. Malcomson*, 1 H. L. C. 637.

(q) *Id. Ibid.* In *Rex v. Benfield*, 2 Burr. 980, it was held that an information lay against two for singing a libellous song on A. and B., which first abused A. and then B. And it was said that if the defendants had sung separate stanzas, the one reflecting on A. and the other on B., the offence would still have been entire. A libel upon one of a body of persons, without naming him, is a libel upon the whole, and may be so described; and where a paper is published equally reflecting upon a number of people, it reflects upon all; and readers, according to their different opinions, may apply it so: *Rex v. Jenott*, 1 Mod. 400.

(r) Starkie on Libel 150, 165, 550, 1st edit.; Holt on Libel 215, 216; *Bradley v. Methuen*, 2 Ford's MS. 78. This must be understood, however, of cases where the libel, from its nature and subject, inflicts a private injury, and not of those cases in which the public only can be said to be affected by the libel.

Formerly, upon an indictment or criminal prosecution for a libel the party could not justify that its contents were true, or that the person upon whom it is made had a bad reputation.¹ But the 6 & 7 Vict. c. 96, permits a defendant to plead to any indictment or information for a defamatory libel that the libellous matters are true, provided it was for the public benefit that such matters should be published.^(s) The ground of the former rule, which still exists where no such plea is pleaded, is the *public mischief*, which libels are calculated to create in alienating the minds of the people from religion and good morals, rendering them hostile to the government and magistracy of the country; and, where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the public peace. The law, therefore, does not permit the defendant to give the truth of the libellous matter in justification; any attempt at which in the instances of libels against religion, morality, or the constitution, would be attended with consequences of the greatest absurdity; and, in the case of libels upon individuals, might be extremely unjust, and could never afford a substantial defence to the charge. A libel against an individual may consist in the exposure of some personal deformity, the actual existence of which would only show the greater malice in the defendant; and even if it contain charges of misconduct founded in fact, the publication will not be the less likely to produce a violation of the public tranquillity. It has been observed, that the greater the appearance of truth there may be in any malicious invective, it is so much the more provoking; and that, in a settled state of government, the party grieved ought to complain, for every injury done to him, in the ordinary course of law, and not *by any means to revenge himself by the odious proceeding of a libel.^(t) [*324

If a libel contain matters imputing to another a crime capable of being tried, evidence of the truth of those imputations is not admissible under a plea of not guilty.^(u) But in one case, where evidence of the falsehood of the libel was adduced by the prosecutor as necessary to support the charge, and no objection was made to it, Lord Tenterden, C. J., although not free from doubts in his own mind, yet adverting to the particular nature of the libel, which was little more than a narrative of certain facts supposed to have taken place in one of the West India Islands, did not think himself warranted in interposing under the very peculiar circumstances of that case; and, having received evidence of the falsehood, he would have received evidence of the truth, if any such had been offered, on the part of the defendant.^(v)

A party will not be excused by showing that the libel with which he is charged was copied from some other work, even though he may have stated it to be merely a copy, and disclosed the name of the original author at the time of its publication.

(s) See the Act, *post*, p. 374.

(t) 1 Hawk. P. C. c. 73, s. 6; Bac. Abr. tit. *Libel* (A.) 5; 4 Blac. Com. 150, 151; 2 Starkie on Libel 251, *et seq.*; Holt on Libel 275, *et seq.* But whilst the truth was no justification in a criminal prosecution, yet in many instances it was considered as an extenuation of the offence; and the Court of King's Bench has laid down this general rule, that it will not grant an information for a libel unless the prosecutor who applies for it makes an affidavit asserting directly and pointedly that he is innocent of the charge imputed to him. This rule, however, may be dispensed with if the person libelled resides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in Parliament: 4 Blac. Com. 151, note (6); Dougl. 271, 372.

(u) Rex v. Burdett, 4 B. & Ald. 95 (6 E. C. L. R.). "In some cases, indeed, it is possible that the falsehood may be of the very essence of the libel. As for instance, suppose a paper were to state that A. was on a given day tried at a given place, and convicted of perjury; if that be true it may be no libel, but if false, it is from beginning to end calumnious, and may no doubt be the subject of a criminal prosecution. Possibly, therefore, in such a case, evidence of the truth of such a statement by the production of the record, might afford an answer to a prosecution for libel." Ibid., per Bayley, J., p. 147.

(v) Case mentioned by Lord Tenterden, C. J., in Rex v. Burdett, 4 B. & Ald. 182 (6 E. C. L. R.); but see Rex v. Grant, *post*, 371.

¹ *Barthelemy et al. v. People*, 2 Hill 248; *State v. Lehre*, 2 Brevard 446. In an indictment for a libel, charging that the prosecutor "was called a murderer and forsworn," it is not competent for the defendant to justify by proving that there was and long had been a general report to that effect: *State v. White*, 7 Ired. N. C. 180.

Thus, where to a declaration for a libel the defendant pleaded that he had the libellous statement from another person, and at the time of publishing the libel he stated that the libel had been published to him by such other person, it was held that the plea was bad; for wrong is not to be justified, or even excused, by wrong: if a man receives a letter with authority from the author to publish it, the person receiving it will not be justified, if it contains libellous matter, in inserting it in a newspaper; no authority from a third person will defend a man against an action brought by a person who has suffered from an unlawful act. If the receiver of a letter publish it without authority, he is, from his own motion, the wilful circulator of slander.^(w) So it is no defence to an action for oral slander for the defendant to show that he heard the slander from another, and named the person at the time, unless he also show that he believed it to be true, and uttered the slander on a justifiable occasion.^(x)

*325] But there are some circumstances which will protect a *publication from being deemed libellous. A petition to the King to be relieved from doing what the King has directed the party to do, if *bonâ fide* and in respectful terms is no libel, though it call in question the legality of the King's direction. James II. published a declaration of liberty of conscience and worship to all his subjects, dispensing with the oaths and tests prescribed by statutes 25 & 30 Car. II., and directed that it should be read two days in every church and chapel in the realm, and that the bishops should distribute it in their dioceses that it might be so read. The Archbishop of Canterbury and six bishops presented a petition to the King, praying that he would not insist upon their distributing and reading it, principally because it was founded on such a dispensing power as had often been declared illegal in Parliament, and that they could not in prudence, honor, or conscience, so far make themselves parties to it as to distribute and publish it. This petition was treated as a libel: they were taken up and tried for it. The publication was proved; and Wright, C. J., and Allibone, J., thought it a libel; but Holloway and Powell, JJ., thought otherwise, there not being any ill-intention of sedition in the bishops, and the object of their petition being to free themselves from blame in not complying with the King's command. The jury found them not guilty.^(y)

It has been resolved that no false or scandalous matter contained in a petition to a committee of Parliament, or in articles of the peace exhibited to justices of the peace, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecution in respect of their applications to a court of justice.^(z) Thus where the defendant, in a certain affidavit before the Court, had said that the plaintiff in a former affidavit against the defendant had sworn false, the Court held that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood.^(a) No present-

^(w) *De Dresigny v. Wellesley*, 5 Bing. 392; 2 M. & P. 695. See *Reg. v. Newman*, *post*, p. 375.

^(x) *M'Pherson v. Daniels*, 10 B. & C. 263 (21 E. C. L. R.).

^(y) *Case of the Seven Bishops*, 12 St. Tri. 183; and see *post*, as to communications made *bonâ fide*, and in the proper course of proceeding.

^(z) 1 Hawk. P. C. c. 73, s. 8; Bac. Abr. tit. *Libel* (A.) 4. And see the judgment of Holt, J., in *Hodgson v. Scarlett*, 1 B. & A. 232. It is holden by some that no want of jurisdiction in the court to which the complaint shall be exhibited will make it a libel; because the mistake of the court is not imputable to the party, but to his counsel; but Hawkins says (1 Hawk. P. C. c. 73, s. 8), that if it manifestly appears that a prosecution is entirely false, malicious, and groundless, and commenced, not with a design to go through with it, but only to expose the defendant's character under the show of a legal proceeding, he cannot see any reason why such a mockery of public justice should not rather aggravate the offence than make it cease to be one. Upon this point Mr. Starkie, after referring to the several authorities, says, that it may be collected generally that no action can be maintained for anything said or otherwise published in the course of a judicial proceeding, whether criminal or civil; though for a malicious and groundless prosecution, an action, and perhaps an indictment, may be supported, founded on the whole proceeding: 1 Starkie on Libel 254, 2d edit.

^(a) *Astley v. Younge*, 2 Burr. 817; *Revis v. Smith*, 18 C. B. 126 (86 E. C. L. R.);

ment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be *presumed to have proper evidence for what they do, but also because it [*326 would be of the utmost ill consequence in any way to discourage them from making their inquiries with that freedom and readiness which the public good requires. (b) Where an action was brought against the president of a military court of inquiry for a libel contained in the minutes of such Court, which had been delivered by the defendant to the commander-in-chief and deposited in his office, it was held that these minutes were a privileged communication, and properly rejected when tendered at the trial in proof of the alleged libel; and also that a copy of them had been properly rejected. (c) And where a court-martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor in falsely calumniating the accused was highly injurious to the service, it was held that the president of the court-martial was not liable to an action for a libel for having delivered such sentence and declaration to the judge-advocate; and Mansfield, C. J., in delivering his opinion, said: "If it appear that the charges are absolutely without foundation, is the president of the court-martial to remain perfectly silent on the conduct of the prosecutor, or can it be any offence for him to state that the charge is groundless and malicious?" (d)

The members of the two houses of Parliament, by reason of their privilege, are not answerable at law for any personal reflections on individuals contained in speeches in their respective houses; for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public should, in the execution of their high functions, be wholly uninfluenced by private considerations. (e)

Thus the actual proceedings in courts of justice and in Parliament are exempted from being deemed libellous; it becomes important to inquire in the next place how far the same privilege will be extended to communications of those proceedings to the public, made with impartiality and correctness.

It has always been held that a publication of the proceedings in a court of justice will not be protected unless it be a *true and honest* statement of those proceedings. (f) But provided it were of that character, the doctrine seems at one time to have been that it might be made to the full extent of stating what had actually taken place. (g) More recently, however, it has been said that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is under all circumstances and with whatever motive published, justifiable; and that such doctrine must be taken with *grains of allowance. (h) And Lord Ellenborough, C. J., said, "It often happens that [*327 circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of individuals on whom they reflect: and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous merely because the matter had been given in evidence in a court of justice." (i) In a

Henderson v. Broomhead, 4 H. & N. 569, cases of malicious and false affidavits. See *Fitzjohn v. Mackinder*, 9 C. B. (N. S.) 505 (99 E. C. L. R.); *Doyle v. O'Doherty*, C. & M. 418.

(b) 1 Hawk. P. C. c. 73, s. 8; Bac. Abr. tit. *Libel* (A.) 4.

(c) *Horne v. Lord F. C. Bentick*, 4 Moore 563.

(d) *Jekyl v. Sir John Moore*, 2 N. R. 341.

(e) *Holt on Libel* 190; 1 Starkie on Libel 239; *Rex v. Lord Abingdon*, 1 Esp. Rep. 238. By 4 Hen. 8, c. 3, members of Parliament are protected from all charges against them for anything said in either House; and this is further declared in the Bill of Rights, 1 Will. & M. st. 2, c. 2.

(f) *Waterfield v. The Bishop of Chichester*, 2 Mod. 118; *Rex v. Wright*, 8 T. Rep. 297, 238, per Lawrence, J.; *Stiles v. Nokes*, 7 East 493.

(g) *Curry v. Walter*, 1 Bos. & Pull. 523, referred to by Lawrence, J., in *Rex v. Wright*, 8 T. R. 298.

(h) By Lord Ellenborough, C. J., and Grose, J., in *Stiles v. Nokes*, 7 East 503.

(i) *Ibid.* And see *Rex v. Salisbury*, 1 Lord Raym. 341, that it is indictable to

subsequent case, not relating directly to this point, but to the publication of proceedings in Parliament, Bayley, J., said, "It has been argued that the proceedings of courts of justice are open to publication. Against that, as an unqualified proposition, I enter my protest. Suppose an indictment for blasphemy, or a trial where indecent evidence was necessarily introduced; would every one be at liberty to poison the minds of the public, by circulating that which for the purposes of justice the Court is bound to hear? I should think not: and it is not true, therefore, that in all instances the proceedings of a court of justice may be published. Again, it may be said that counsel have a right, in pursuance of their instructions, and whilst the cause is going on, to endeavor to produce an effect by making such observations on the credit and character of parties and their witnesses as sometimes, when the cause is over, perhaps they are sorry for. But have they, therefore, or any person who hears them, a right afterwards to publish those observations? I have no hesitation in saying that, when the occasion ceased, the right also would cease; and that it would be no justification to plead that such a publication was a transcript of the counsel's speech."^(k) This doctrine was recognized and acted upon in a recent case. The defendant's husband had been convicted of publishing a blasphemous libel, after having in his defence at the trial used arguments and statements of a blasphemous and indecent description. His wife published the trial; and, upon showing cause against a rule for a criminal information, it was urged that she had a right to publish what actually took place in a court of justice: but the Court were clear she had not, if that statement contained anything defamatory, seditious, blasphemous, or indecent: and the rule was made absolute.^(l) And where it is allowable to publish what passes in a court of justice, the party must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. Thus, where the libel stated in the declaration purported to be a speech of counsel at a trial of the plaintiff on a criminal charge, and, after setting out the speech, said that a witness was called who proved all that had been stated by counsel, and that the defendant was immediately afterwards acquitted upon a defect in proving some matter of form; and the plea stated that in fact such a speech was made, *and that the witness called proved a

*328] that had been so stated, but it did not set out the evidence or justify the truth of the charges made in the counsel's speech; it was holden that such plea was bad, inasmuch as a party could not be justified in publishing the result of evidence given in a court of justice, but must state the evidence itself.^(m) And the party making the publication will not be justified, unless he confines himself to what actually passed in court. In a case where an action was brought for a libel concerning the plaintiff in his profession as an attorney, and the libel, as stated in the declaration, began, "shameful conduct of an attorney," and then proceeded to give an account of proceedings in a court of law which contained matter injurious to the plaintiff's professional character, and the defendant had pleaded that the supposed libel contained a true account of the proceedings in the court of law; it was holden (after verdict for the defendant) that the plea was bad, inasmuch as the words "shameful conduct of an attorney" formed no part of the proceedings in the court of law, and that the plaintiff was therefore entitled to judgment.⁽ⁿ⁾ It is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly con-

publish a scandalous petition to the House of Lords, or a scandalous affidavit made in a court of justice.

(k) *Rex v. Creevey*, 1 M. & S. 281. In the same case Lord Ellenborough, C. J., said, "As to *Curry v. Walter*, [*ante*, note (g),] it is not necessary for the present purpose to discuss that case; whenever it becomes necessary, I shall say that the doctrine there laid down must be understood with very great limitations; and shall never fully assent to the unqualified terms attributed in the report of that case to Eyre, C. J."

(l) *Rex v. Carlisle*, 3 B. & A. 167 (5 E. C. L. R.).

(m) *Lewis v. Walter*, 4 B. & A. 605 (6 E. C. L. R.).

(n) *Lewis v. Clement*, 3 B. & A. 702 (5 E. C. L. R.). In this case the question was raised whether it be lawful to publish proceedings of a court of law containing matter defamatory of a person neither a party to the suit nor present at the time of the inquiry; but it became unnecessary to decide this point.

finned to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings.(o) A report of a charge made against the plaintiff at the Mansion-house, added, "Mr. Hobler, the chief clerk, observed that it was exceedingly improper under any circumstances to obtain the signature of the complainant, a mere boy, to bills of exchange;" it was held that this was a substantive reflection on the character and conduct of the plaintiff, which was altogether unwarranted: it was not made in the course of any judicial proceeding by any one whose duty called upon him to make it; but was uttered by a person who, for this purpose, must be considered as an entire stranger.(p) If the report of what takes place in a court of justice contains only a fair account, the person who publishes it has only to prove that fact under the general issue, and he is entitled to entire impunity. It is not essential that every word of the evidence, of the speeches, and of what was said by the judge, should be inserted, if the report is substantially a fair and correct report of what took place in a court of justice.(q) The subsequent publication of a speech made by a counsel in the course of a cause containing observations injurious to the character of a party, attorney, or witness in the cause, is not lawful, because such publication is not required for the due administration of justice;(r) but no action will lie against a barrister for words spoken by him in a cause, which are *pertinent to the matter in issue.(s) And an attorney [*329 acting as an advocate has the same privilege.(t) And a party is at liberty to publish a history of a trial, viz., of the facts of the case, and of the law of the case as applied to those facts.(u)

Proceedings before magistrates, under the 11 & 12 Vict. c. 43, with respect to summary convictions and orders, in which, after both parties are heard, a final judgment is given, are strictly of a judicial nature, and the trial and the judgment may lawfully be made the subject of a printed report, if that report be impartial and correct;(v) and the like privilege extends to the publication of proceedings taking place publicly before a magistrate on the preliminary investigation of a charge of an indictable offence, terminating in the discharge of the party charged, although there were several hearings, and separate publications as to each hearing;(w) but it has not yet been decided that the publication of such preliminary inquiries is lawful where they end in the case being sent for trial.(x) On the contrary, the publication of preliminary examinations before a magistrate, taken *ex parte*, have been held not to come within the principle by which the fair reports of proceedings in courts of justice are privileged. Such publications have a tendency to cause great mischief by perverting the public mind, and disturbing the course of justice; and, if they contain libellous matter, will be considered as highly criminal.(y) And the Court of King's Bench has granted a criminal information for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments; although the statement was correct, and the party had no malicious motive in the publication.(z) So the publication of proceedings before a commissioner of inquiry respecting corporations cannot be

(o) Per Tindal, C. J., *Delegal v. Highley*, 3 B. N. C. 950 (32 E. C. L. R.).

(p) *Delegal v. Highley*, *supra*.

(q) *Andrews v. Chapman*, 3 C. & K. 286, Lord Campbell, C. J. See *Smith v. Scott*, 2 C. & K. 580 (61 E. C. L. R.); *Hoare v. Silverlock*, 9 C. B. 20 (67 E. C. L. R.).

(r) Per Bayley, J., *Flint v. Pike*, 4 B. & C. 473 (10 E. C. L. R.); 6 D. & R. 528. See also per Holroyd, J., *Ibid.* and per Tindal, C. J., *Roberts v. Brown*, 10 Bing. 519 (25 E. C. L. R.); see *Saunders v. Mills*, 6 Bing. 213 (19 E. C. L. R.); s. c., 3 M. & P. 520.

(s) *Hodgson v. Scarlett*, 1 B. & Ald. 232. (t) *Mackay v. Ford*, 5 H. & N. 792.

(u) Per Bayley, J., *Flint v. Pike*, *supra*. (v) *Lewis v. Levy*, E. B. & E. 537 (96 E. C. L. R.).

(w) *Ibid.*

(x) *Ibid.*

(y) *Rex v. Lee*, 5 Esp. 123; *Rex v. Fisher*, 2 Camp. 563; *Duncan v. Thwaites*, 3 B. & C. 556 (10 E. C. L. R.); 5 D. & R. 447; *Delegal v. Highley*, 3 B. N. C. 950 (32 E. C. L. R.); but see the remarks in *Lewis v. Levy*, *supra*. And still less can the defendant justify the publication of a matter which was not brought before the magistrate in his judicial character, or in the regular discharge of his magisterial functions: *M-Gregor v. Thwaites and Another*, 3 B. & C. 24 (10 E. C. L. R.); 4 D. & R. 695.

(z) *Rex v. Fleet*, 1 Barn. & Ald. 379. See *East v. Chapman*, M. & M. 46 (22 E. C. L. R.); 2 C. & P. 570 (12 E. C. L. R.).

justified by showing that it is a true report of what occurred before the commissioner. (a)

So, a fair report in a newspaper of what takes place at a public meeting, if it contain matter defamatory of an individual, is not privileged. Therefore a fair report of what took place at a public meeting of the West Hartlepool Commissioners, acting under the powers of an Act of Parliament, and which contained injurious expressions concerning an individual, is not privileged. (b)

If a report made by a medical officer of health to a vestry board, in pursuance of the Metropolitan Local Management Act (18 & 19 Vict. c. 120) contains libellous matter, a newspaper proprietor is not justified in publishing it, though without comment; and it is doubtful whether, after publication of such a report by the vestry board, it is competent to others to re-publish it, with or without reasonable comment. (c)

*330] Though the publication of a proceeding in Parliament will, in general, be considered as privileged and protected from being deemed libellous; (d) and the printing and delivering a petition to members of a committee of the House of Commons, being according to the order of proceedings of Parliament and their committees, has been held to be justifiable: (e) yet it may be doubted how far the circulation of a copy of a writing containing matter of an injurious tendency to the character of an individual, though published for the use of the members, is legitimate and exempted from prosecution. (f) And it is clear that the publication of the speech of a member of Parliament, if it contain matter of libel, is not protected, even though such publication be made by the member himself. In a case upon this subject, Lord Kenyon, C. J., observed, that if the words in question had been spoken in the House of Lords, and confined to its walls, the Court of King's Bench would have had no jurisdiction to call a member of that house before them, to answer for such words as an offence; but that the offence was the publication of them in the public papers, under the authority of the member, with his sanction, and at his expense: that a member of Parliament had certainly a right to publish his speech, but that his speech should not be made the vehicle of slander against any individual; if it were, it would be a libel. (g) And in a more recent case it was held, that a member of the House of Commons may be convicted upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, if it contain libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect publication having appeared in that and other newspapers. (h) But a publication of a report of his speech by a member of the House of Commons, *bonâ fide*, addressed to his constituents, would be privileged. (i)

It has recently been decided in a case, which underwent the most profound consideration, that it is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the House, and thereupon became part of the proceedings of the House, and which was afterwards, by orders of the House, printed and published by the defendant; and that the House of Commons had theretofore resolved, "that the power of publishing such of its reports, votes, and proceedings, as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the Commons' House of Parliament, as the representative portion of it." (k)

(a) *Charlton v. Watton*, 6 C. & P. 835 (25 E. C. L. R.).

(b) *Davis v. Duncan*, 7 E. & B. 229 (90 E. C. L. R.).

(c) *Popham v. Pickburn*, 7 H. & N. 891.

(d) *Rex v. Wright*, 8 T. R. 293. In this case a former case of *Rex v. Williams*, 2 Show. 471; Comb. 18, was animadverted upon by Lord Kenyon, C. J., and Grose, J., as having happened in the worst of times.

(e) *Lake v. King*, 1 Saund. 131.

(f) See the judgment of Lord Ellenborough, C. J., in *Rex v. Creevey*, 1 M. & S. 278.

(g) *Rex v. Lord Abingdon*, 1 Esp. 226.

(h) *Rex v. Creevey*, 1 M. & S. 273.

(i) Per Lord Campbell, *Davison v. Duncan*, 7 E. & B. 229 (90 E. C. L. R.).

(k) *Stockdale v. Hansard*, 9 A. & E. 1 (36 E. C. L. R.); 2 P. & D. 1.

In consequence of this decision the 3 & 4 Vict. c. 9, was passed, which by sec. 1, reciting, "whereas it is essential to the due and effectual exercise and discharge of the functions and duties of Parliament, and to the promotion of wise legislation, that no obstructions or impediments should exist to the publication of such *of the reports, papers, votes, or proceedings of either House of Parlia- [*331 ment as such House of Parliament may deem fit or necessary to be published: And whereas obstructions or impediments to such publication have arisen, and hereafter may arise, by means of civil or criminal proceedings being taken against persons employed by or acting under the authority of the Houses of Parliament, or one of them, in the publication of such reports, papers, votes, or proceedings; by reason and for remedy whereof it is expedient that more speedy protection should be afforded to all persons acting under the authority aforesaid, and that all such civil or criminal proceedings should be summarily put an end to and determined in manner hereinafter mentioned:" enacts, "that it shall and may be lawful for any person or persons who now is or are, or hereafter shall be, a defendant or defendants in any civil or criminal proceeding commenced or prosecuted in any manner soever, for or on account or in respect of the publication of any such report, paper, votes or proceedings by such person or persons, or by his, her, or their servant or servants, by or under the authority of either House of Parliament, to bring before the court in which such proceeding shall have been or shall be so commenced or prosecuted, or before any judge of the same (if one of the superior courts at Westminster), first giving twenty-four hours' notice of his intention so to do to the prosecutor or plaintiff in such proceeding, a certificate under the hand of the Lord High Chancellor of Great Britain, or the Lord Keeper of the Great Seal, or of the Speaker of the House of Lords, for the time being, or of the clerk of the Parliaments, or of the Speaker of the House of Commons, or of the clerk of the same House, stating that the report, paper, votes, or proceedings, as the case may be, in respect whereof such civil or criminal proceeding shall have been commenced or prosecuted, was published by such person or persons, or by his, her, or their servant or servants, by order or under the authority of the House of Lords or of the House of Commons, as the case may be, together with an affidavit verifying such certificate; and such court or judge shall thereupon immediately stay such civil or criminal proceeding, and the same, and every writ or process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act." (1)

Sec. 2. "In case of any civil or criminal proceeding hereafter to be commenced or prosecuted for or on account or in respect of the publication of any copy of such report, paper, votes, or proceedings, it shall be lawful for the defendant or defendants at any stage of the proceedings to lay before the court or judge such report, paper, votes, or proceedings, and such copy, with an affidavit verifying such report, paper, votes, or proceedings, and the correctness of such copy, and the court or judge shall immediately stay such civil or criminal proceeding, and the same, and every writ of process issued therein, shall be and shall be deemed and taken to be finally put an end to, determined, and superseded by virtue of this Act."

Sec. 3. "It shall be lawful in any civil or criminal proceeding to be commenced or prosecuted for printing any extract from or *an abstract of such report, [*332 paper, votes, or proceedings, to give in evidence under the general issue such report, paper, votes, or proceedings, and to show that such extract or abstract was published *bonâ fide* and without malice; and if such shall be the opinion of the jury a verdict of not guilty shall be entered for the defendant or defendants."

Sec. 4. "Nothing herein contained shall be deemed or taken, or held or construed, directly or indirectly, by implication or otherwise, to affect the privileges of Parliament in any manner whatsoever."

Having treated generally of the publications which may be considered as libellous, it may be useful to refer to some of the particular points which have been holden, respecting publications:—1. Against the Christian religion. 2. Against morality. 3. Against the constitution. 4. Against the King. 5. Against the

(1) The Act is imperative upon the Court to stay proceedings: *Stockdale v. Hansard*, 11 A. & E. 297 (39 E. C. L. R.); 3 P. & D. 346.

two Houses of Parliament. 6. Against the Government. 7. Against the magistrates and the administration of justice. 8. Against private individuals. And 9. Against foreigners of distinction.

1. It has heretofore been observed,^(m) that blaspheming God, or turning the doctrines of the Christian religion into contempt and ridicule, is an indictable offence. At common law, all blasphemies against God, as denying His being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the Holy Scripture, or exposing any part thereof to contempt or ridicule; and also seditious words in derogation of the established religion; are considered as offences tending to subvert all religion and morality, and punishable by the temporal courts with fine and imprisonment, and also infamous corporal punishment, in the discretion of the court.⁽ⁿ⁾

Some provisions have also been made upon this subject by statutes. The 1 Edw. 6, c. 1,^(o) enacts, that persons reviling the Sacrament of the Lord's Supper, by contemptuous words or otherwise, shall suffer imprisonment. The 1 Eliz. c. 2,^(p) enacts, that if any *minister* shall speak anything in derogation of the Book of Common Prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second; and if he be beneficed, shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second shall be deprived and suffer one year's imprisonment; and for the third, shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak anything in derogation depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks; for the second 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. The 1 Will. 3, c. 18, s. 17, enacts

*333] that, *whosoever should deny in his preaching or writing the doctrine of the Blessed Trinity, should lose all benefit of the Act for granting toleration. This section is now repealed by 53 Geo. 3, c. 160: but while it was in existence was considered as operating to deprive the offender of the benefit therein mentioned, leaving the punishment of the offence as for a misdemeanor at common law.^(q) The 9 & 10 Will. 3, c. 32, enacted, that if any person, educated in or having made profession of the Christian religion, should, by writing, printing, teaching, or advised speaking, deny any one of the Persons in the Holy Trinity to be God,^(r) or should assert or maintain there are more gods than one, or should deny the Christian religion to be true, or the Holy Scriptures to be of divine authority, he should upon the first offence be rendered incapable to hold any office or place of trust; and for the second be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and should suffer three years imprisonment without bail.^(s) A person offending under this statute was held to be also indictable at common law.^(t) And where a motion was made in arrest of judgment on an information for a blasphemous libel, on the ground that this statute had put an end to the common law offence: the Court were clear that it had no considering that the provisions of the statute were cumulative.^(u)

Upon the trial of an information against the defendant for uttering expressions grossly blasphemous, Hale, C. J., observed, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the law

^(m) *Ante*, p. 322.

⁽ⁿ⁾ See *ante*, p. 92, and the cases collected in 1 Hawk. P. C. c. 5; Gathercole's case, Lewin 287.

^(o) Repealed by 1 Mary, c. 2, and revived by 1 Eliz. c. 1.

^(p) Partly repealed by the 7 & 8 Vict. c. 102, and 9 & 10 Vict. c. 59, but not so as to affect the provisions here mentioned.

^(q) By Lord Kenyon in *Rex v. Williams*, 1797; Holt on Libel 66.

^(r) Repealed by the 53 Geo. 3, c. 160, s. 2, "so far as the same relates to persons denying as therein mentioned respecting the Holy Trinity."

^(s) But the delinquent publicly renouncing his error in open court, within four months after the first conviction, is to be discharged for that once from all disabilities,

^(t) *Barnard* 162; 2 Str. 834; *Fitzgib.* 64; *Rex v. Williams*, 1797; *Rex v. Caton*, 1812

^(u) *Rex v. Carlisle*, 3 B. & A. 161 (5 E. C. L. R.).

state, and government, and therefore punishable in the Court of King's Bench. That to say religion is a cheat is to dissolve all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law.^(r) In a case where a libel stated that Jesus Christ was an impostor, a murderer in principle, and a fanatic, a juryman asked whether a work denying the divinity of our Saviour was a libel; and Abbott, C. J., answered that a work speaking of Jesus Christ in the language here used was a libel; and on a motion for a new trial, on the ground that this was a wrong answer, the Court without difficulty held that the answer was right.^(u)

Where the defendant had been convicted for publishing several blasphemous libels, in which the miracles of our Saviour were turned into ridicule and contempt, and his life and conversation calumniated, it was moved in arrest of judgment that this was not an offence within the cognizance of the temporal courts at common law; but the Court would not suffer the point to be argued, saying that the Christian religion, as established in this kingdom, is part of the law; and, therefore, that whatever derided *Christianity derided the law, and consequently must be an offence against the law.^(x) It was also moved in arrest of judgment, [*334 that as the intent of the book was only to show that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking Christianity in general, but only as striking against one received proof of His being the Messiah; to which the Court said, that the attacking Christianity in the way in which it was attacked in this publication was destroying the very foundation of it; and that, though there were professions in the book that its design was to establish Christianity upon a true bottom by considering these narrations in Scripture as emblematical and prophetic, yet that such professions were not to be credited, and that the rule is *allegatio contra factum non est admittenda*. But the Court also said, that though to write against Christianity in general is clearly an offence at common law, they laid stress upon the word *general*, and did not intend to include disputes between learned men upon particular controverted points; and, in delivering the judgment of the Court, Raymond, C. J., said, "I would have it taken notice of that we do not meddle with any differences of opinion, and that we interpose only where the very root of Christianity itself is struck at."^(y)

The doctrine of the Christian religion constituting part of the law of the land was recognized in a later case, where the judgment of the Court of King's Bench was pronounced upon a person convicted of having published a very impious and blasphemous libel, called *Paine's Age of Reason*.^(z) Ashhurst, J., said, that although the Almighty did not require the aid of human tribunals to vindicate His precepts, it was, nevertheless, fit to show our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that it was upon this ground that the Christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and His holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments.^(a)

Contumely and contempt are what no establishment can tolerate: but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussion of the rectitude and propriety of the established mode of worship.^(b) A sensible writer upon the subject of libel says, as to this point—"that

(r) *Rex v. Taylor*, Vent. 293; 3 Keb. 607.

(u) *Rex v. Waddington*, 1 B. & C. 26 (8 E. C. L. R.).

(x) *Rex v. Woolston*, Barnard 162; 2 Str. 834; Fitzgib. 64.

(y) *Rex v. Woolston*, Fitzgib. 66.

(z) This libel was of the worst kind, attacking the truth of the Old and New Testaments; arguing that there was no genuine revelation of the will of God existing in the world; and that reason was the only true faith which laid any obligations on the conduct of mankind. In other respects also it ridiculed and vilified the prophets, our Saviour, His disciples, and the Sacred Scriptures.

(a) *Rex v. Williams*, 1797; Holt on Libel 69, note (e); 2 Starkie on Libel 141.

(b) 4 Blac. Com. 51.

it may not be going too far to infer, from the principles and decisions, that no author or preacher who fairly and conscientiously *promulgates the opinions *335] with whose truth he is impressed, for the benefit of others, is, for so doing, amenable as a criminal; but a malicious and mischievous intention is in such case the broad boundary between right and wrong; and that if it can be collected, from the offensive levity with which so serious a subject is treated, or from other circumstances, that the act of the party was malicious, then, since the law has no means of distinguishing between different degrees of evil tendency, if the matter published contain any such tendency, the publisher becomes amenable to justice."(c)

Where a defendant was charged with publishing a libel upon a religious order, consisting of females, professing the Roman Catholic faith, called the Scorton Nunnery, Alderson, B., observed, a person may, without being liable to prosecution for it, attack Judaism or Mahomedanism, or even any sect of the Christian religion, save the established religion of the country; and the only reason why the latter is in a different situation from the other is, because it is the form established by law, and is therefore a part of the constitution of the country. For the same reason any general attack on Christianity is the subject of a criminal prosecution, because Christianity is the established religion of the country. Any person has a right to entertain his opinions, to express them, to discuss the subject of the Roman Catholic religion, and its institutions; but *he has no right in so doing to attack the characters of individuals.*(d)

As to the extent of this offence and the nature and certainty of the words, it appears to be immaterial whether the publication is oral or written; though the committing mischievous matter to print or writing, and thereby affording it a wider circulation, would undoubtedly be considered as an aggravation, and affect the measure of punishment.(e)

2. When the Star Chamber had been abolished, it appears that the Court of King's Bench came to be considered as the *custos morum*, having cognizance of all offences against the public morals;(f) under which head may be comprehended representations whether by writing, picture, sign, or substitute, tending to vitiate and corrupt the minds and morals of the people.(g) Formerly, indeed, it appears to have been holden that publications of this kind were not punishable in the temporal courts:(h) but a different doctrine has since been established.(i) And in late times indictments for obscene writings and prints have frequently been preferred, without any objection having been made to the jurisdiction of the temporal courts.

The principle of the cases upon this subject seems to comprehend oral communications, when made before a large assembly, and when there is a clear *tendency* to produce immorality, as in the case of the performance of an obscene play.(k)

*3. Libels against the constitution, abstracted from all personal allusions, *336] do not appear, either in ancient or modern times, to have been often made the subject of legal inquiry. In general, publications upon the constitution, avoiding all discussions of personal rights and privileges, are speculative in their nature, and not calculated to generate popular heat. But if they should be of a different description, tending to degrade and vilify the constitution, to promote insurrection, and circulate discontent through its members, they would, without doubt, be considered as seditious and criminal.(l)

Thus it appears to have been adjudged, that though no indictment lay for saying that the laws of the realm were not the laws of God, because true it is that they

(c) Starkie on Libel, 1st edit. 496, 497. See 2d edit., vol. 2, 146-7.

(d) Gathercole's case, 2 Lewin 237.

(e) 2 Starkie on Libel 144, 2d edit.

(f) Sir Ch. Sedley's case, 1663; Keb. 720; 2 Str. 790; Sid. 168.

(g) Holt on Libel 73.

(h) *Rex v. Read*, 11 Mod. 142; 1 Hawk. P. C. c. 73, s. 9.

(i) *Rex v. Curl*, 2 Str. 788; *Rex v. Wilks*, 4 Burr. 2527.

(k) 2 Starkie on Libel 159. In *Rex v. Curl*, 2 Str. 790, it was stated that there had been many prosecutions against the players for obscene plays, but that they had interest enough to get the proceedings stayed before judgment.

(l) Holt on Libel 86.

are not the laws of God ; yet that it would be otherwise to say that the laws of the realm are contrary to the laws of God.(m) And a defendant was convicted on an information charging him with having published, concerning the government of England and the traitors who adjudged King Charles the First to death, that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion.(n) In another case a person was convicted for publishing a libel, in which it was suggested that the revolution was an unjust and unconstitutional proceeding, and the limitation established by the Act of Settlement was represented as illegal, and that the revolution and settlement of the crown as by law established had been attended with fatal and pernicious consequences to the subjects of this kingdom (o)

4. Though a different construction may have prevailed in more arbitrary times, it is now settled that bare words, not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not in themselves overt acts of high treason ; but only a misprision, punishable at common law by fine and imprisonment, or other corporal punishment : (p) though words may expound an overt act, and show with what intent it was done.(q) And, generally speaking, any words, acts, or writing tending to vilify or disgrace the King, or to lessen him in the esteem of his subjects, or any denial of his right to the crown, even in common and unadvised discourse, amount at common law to a misprision punishable by fine and imprisonment.(r)

There are also some legislative provisions upon this subject. The 3 Edw. 1, c. 34, enacts, that none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander, may grow between the King and his people, and the great men of the realm.(s) And with a view to the security of the succession of the house of Hanover, according to *the Act of Settlement, a [*337 law was passed declaring it to be treason to write or print against it.(t)

The nature of the offence of libel against the monarch personally has been ably explained and illustrated, according to the more mild and liberal doctrines of the present time, in a case of recent occurrence.

The defendant was charged with having published a libel to the following effect: "What a crowd of blessings rush upon one's mind, that might be bestowed upon the country in the event of a total change of system ! Of all monarchs, indeed, since the Revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular." Lord Ellenborough, C. J., in addressing the jury, stated, that the first sentence of this passage would easily admit of an innocent interpretation ; that the fair meaning of the expression "change of system" was a change of political system—not a change in the frame of the established government—but in the measures of policy which had been for some time pursued ; and that by total change of system was certainly not meant *subversion* or *demolition*, the descent of the crown to the successor of his Majesty being mentioned immediately after. His lordship then proceeded :—"If a person who admits the wisdom and virtues of his Majesty, laments that in the exercise of these he has taken an unfortunate and erroneous view of the interests of his dominions, I am not prepared to say that this tends to degrade his Majesty, or to alienate the affections of his subjects. I am not prepared to say that this is libellous. But it must be with

(m) 2 Roll. Abr. 78.

(n) *Rex v. Harrison*, 1677 ; 3 Keb. 841 ; Vent. 324. And a treatise upon hereditary right was holden to be a libel, though it contained no reflection upon any part of the then government : *Reg. v. Bedford*, 1711 ; 2 Str. 789 ; Gilb. 297.

(o) *Rex v. Nutt*, 1754 ; Dig. L. L. 126, and see Dr. Shebbeare's case, and *Rex v. Paine*, Holt on Libel 88, 89, and 2 Starkie on Libel 164.

(p) 1 East P. C. c. 2, s. 55, p. 117. See *ante*, p. 92.

(q) *Crohagan's case*, Cro. Car. 332.

(r) 4 Blac. Com. 123.

(s) It is said to have been resolved by all the judges that all writers of false news are indictable and punishable (4 Read. St. L. Dig. L. L. 23) ; and probably at this day the fabrication of news likely to produce any public detriment would be considered as criminal : Starkie on Libel 546, 1st edit.

(t) 6 Anne c. 7 ; and see other statutes which were passed for the purpose of guarding the King's character and title, cited in 2 Starkie on Libel 171, 2d edit.

perfect decency and respect, and without any imputation of bad motives. Go one step further, and say or insinuate that his Majesty acts from any partial or corrupt view or with an intention to favor or oppress any individual or class of men, and it would become most libellous." Upon the second sentence, after stating that it was more equivocal, and telling the jury that they must determine what was the fair import of the words employed, not in the more lenient or severe sense, but in the sense fairly belonging to them, and which they were intended to convey, Lord Ellenborough proceeded: "Now do these words mean, that his Majesty is actuated by improper motives, or that his successor may render himself nobly popular by taking a more lively interest in the welfare of his subjects? Such sentiments, as it would be most mischievous, so it would be most criminal to propagate. But in the passage only means that his Majesty, during his reign, or any length of time may have taken an imperfect view of the interests of the country, either respecting our foreign relations, or the system of our internal policy; if it imputes nothing but honest error, without moral blame, I am not prepared to say that it is a libel." And again, towards the conclusion of his address his lordship said, "The question of intention is for your consideration. You will not distort the words, but give them their application and meaning as they impress your minds. What appears *338] to be most material is the substantive *paragraph itself;(u) and if you consider it as meant to represent that the reign of his Majesty is the only thing interposed between the subjects of this country and the possession of great blessings which are likely to be enjoyed in the reign of his successor, and thus to render his Majesty's administration of his government odious, it is a calumnious paragraph, and to be dealt with as a libel. If on the contrary you do not see that it means distinctly, according to your reasoning, to impute any proposed maladministration to his Majesty, or those acting under him, but may be fairly construed as an expression of regret, that an erroneous view has been taken of public affairs I am not prepared to say that it is a libel. There have been errors in the administration of the most enlightened men."(v)

Falsely publishing that the King is laboring under mental derangement is libel: it tends to unsettle and agitate the public mind, and to lower the respect due to the King.(w)

The two Houses of Parliament are an essential part of the constitution, and entitled to reverence and respect, on account of the important public duties which they have to discharge. But as they have the power of treating libels against themselves as breaches of their privileges, and vindicating them in the nature of contempt more cases of such libels are to be met with in their journals than in the proceedings of the courts of law. The common law, however, is fully capable of taking cognizance of any publications reflecting in a libellous manner upon the members or proceedings of the Houses of Parliament;(x) and it seems rather to have been the inclination of Parliament in modern times to direct prosecutions for such offences in the courts of common law, and to waive the exercise of their own extensive privileges. In the case of the *King v. Stockdale*,(y) the attorney-general

(u) The libel was published in a newspaper; and it had been allowed to the defendant to have read in evidence an extract from the same paper connected with the subject of the passage charged as libellous, although disjoined from it by extraneous matter, as printed in a different character.

(v) *Rex v. Lambert*, 2 Campb. 398.

(w) *Rex v. Harvey*, 2 B. & C. 257 (9 E. C. L. R.), and malice will be implied from such wilful defaming without excuse. See the case, *post*.

(x) As in *Rex v. Rayner*, 2 Barnard 293, where the defendant was convicted of printing a scandalous libel on the Lords and Commons; and *Rex v. Owen*, 25 Geo. 2; M. S. D. L. L. 67. In *Rex v. Stockdale*, 28 Geo. 3, information was filed by the attorney-general for a libel upon the House of Commons. A prosecution was also instituted in *Rex v. Reeves*, 36 Geo. 3, in consequence of a resolution in the House of Commons, declaring a pamphlet, published by the defendant, to be a libel. In the pamphlet, which was called "Thoughts on the English Government," there was this passage amongst others which the House deemed libellous—"That the King's government might go on if the Lords and Commons were lopped off." The jury considered the expressions as merely metaphors and acquitted the defendant.

(y) *Ante*, note (z).

in his speech to the jury, after stating the address of the House of Commons to the King, praying that his Majesty would direct the information to be filed, proceeded thus, "I state it as a measure which they have taken, thinking it in their wisdom, as every one must think it, to be the fittest to bring before a jury of their country an offender against themselves, avoiding thereby, what sometimes indeed is unavoidable, but which they wish to avoid whenever it can be done with propriety, the acting both as judges and accusers, which they must necessarily have done, had they resorted to their own powers, which are great and extensive, for the purpose of *vindicating themselves against insult and contempt, but which in the present instance they have wisely forborne to exercise, thinking it better [339 to leave the offender to be dealt with by a fair and impartial jury." (z)

VI. The extent to which the measures of the King, or the proceedings of his government, may be fairly and legally canvassed, has been the subject of much discussion, as it is undoubtedly one of the first importance: but it is not within the scope and design of this Treatise to enter further upon the question, than by stating a few of the established principles and decided cases.

It may be observed, that the liberty of discussion, which in many instances has been admitted on the part of the officers of the crown, would seem to be sufficient to answer all the purposes of the honest patriot;—the man who would condemn only with a view to genuine and constitutional reformation. Upon a late prosecution for a libel the attorney-general, in his opening to the jury, thus expressed himself: "The right of every man to represent what he may conceive to be an abuse or grievance in the government of the country, if his intention in so doing be honest, and the statement made upon fair and open grounds, can never for a moment be questioned. I shall never think it my duty to prosecute any person for writing, printing, and publishing, fair and candid opinions on the system of the government and constitution of this country, nor for pointing out what he may honestly conceive to be grievances, nor for proposing legal means of redress." (a) Every man has a right to give every public matter a candid, full, and free discussion; but although the people have a right to discuss any grievances they have to complain of, they must not do it in a way to excite tumult; and if a party publish a paper on any such matter, and it contain no more than a calm and quiet discussion, allowing something for a little feeling in men's minds, that will be no libel; but if the paper go beyond that limit, and be calculated to excite tumult, it is a libel. (b)

In many cases which may occur, the due exercise of this liberty and right of discussion will involve considerations of much difficulty, and require great nicety of discrimination: as it may become necessary to ascertain the particular points at which the bounds of rational discussion have been exceeded. The answer to the following question has, however, been proposed as a test, by which the intrinsic illegality of such publications may be decided: (c) "Has the communication a plain tendency to produce public mischief by perverting the mind of the subject, and creating a general dissatisfaction towards government?"

However innocent and allowable it may be to canvass political measures within these limits, it is quite clear that their discussion must not be made a cloak for an attack upon private character. Libels on persons employed in a public capacity receive an aggravation as they tend to scandalize the government by reflecting on those who are intrusted with the administration of public affairs; *for they [340 not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned to acts of revenge, but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. (d) If a paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, it is a seditious libel. (e)

(z) See 2 Ridgway's speeches of the Hon. T. Erskine, p. 208.

(a) Rex v. Perry, 1793. See 2 Ridgway's speeches, 371.

(b) Reg. v. Collins, 9 C. & P. 456 (38 E. C. L. R.), Littledale, J.

(c) Starkie on Libel 525, 1st edit.

(d) 1 Hawk. P. C. c. 73, s. 7; Bac. Abr. tit. Libel (A.) 2; Rex v. Franklin, 9 St. Tri. 255.

(e) Reg. v. Lovett, 9 C. & P. 462 (38 E. C. L. R.), Littledale, J.

A person delivered a ticket up to the minister after sermon, wherein he desired him to take notice that offences passed now without control from the civil magistrate, and to quicken the civil magistrate to do his duty, &c.; and this was held to be a libel, though no magistrate in particular was mentioned, and though it was not averred that the magistrates suffered those vices knowingly. *(f)*

In a case where the defendant was prosecuted upon an information for a libel upon the government, his counsel contended that the publication was innocent, and could not be considered as libellous, because it did not reflect upon particular persons. But Holt, C. J., said, "They say nothing is a libel but what reflects on some particular person. But this is a very strange doctrine to say that it is not a libel, reflecting on the government, endeavoring to possess the people that the government is maladministered by corrupt persons that are employed in such stations, either in the navy or army. To say that corrupt officers are appointed to administer affairs is certainly a reflection on the government. If men should not be called to account for possessing the people with an ill opinion of the government, no government can subsist; nothing can be worse to any government than to endeavor to procure animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe unless it be punished." *(g)*

The doctrine was recognized in a case, where the defendant was charged with publishing a libel upon the administration of the Irish government, and upon the public conduct and character of the Lord Lieutenant and Lord Chancellor of Ireland. Lord Ellenborough, C. J., in his address to the jury, observed, "It is no new doctrine that if a publication be calculated to alienate the affections of the people, by bringing the government into disesteem, whether the expedient be by ridicule or obloquy, the person so conducting himself is exposed to the inflictions of the law. It is a crime; it has ever been considered as a crime, whether wrapt in one form or another. The case of *Reg. v. Tuchin*, decided in the time of Lord Chief Justice Holt, has removed all ambiguity from this question; and, although at the period when that case was decided great political contentions existed, the matter was not again brought before the judges of the Court by any application for a new trial." And afterwards his lordship said, "It has been observed, that it is the right of the British subject to exhibit the folly or imbecility of the members of the government. But, gentlemen, we must confine ourselves within limits. If in so doing individual feelings are violated, there the line of interdiction begins, and the offence becomes the subject of penal visitation." *(h)*

VII. As nothing tends more to the disturbance of the public weal than aspersions upon the administration of justice; contempts against the King's judges, and scandalous reflections upon their proceedings, have always been considered as highly criminal offences; and one of the earliest cases of libel appears to have been an indictment for an offence of this kind. *(i)*

Generally, any contemptuous or contumacious words spoken to the judges of any courts in the execution of their offices are indictable; and when reflecting words are spoken of the judges of the superior courts at Westminster, the speaker is indictable both at common law and under the statutes of *scandalum magnatum*, whether the words relate to their office or not. *(k)*

Any publications reflecting upon and calumniating the administration of justice, are, without doubt, of a libellous nature; and where a libel was published in a newspaper, in the form of an advertisement, reflecting on the proceedings of a court

(f) Bac. Abr. tit. *Libel* (A.) 2.

(g) *Reg. v. Tuchin*, 1704; Holt's R. 424; 5 St. Tri. 532.

(h) *Rex v. Cobbett*, 1804; Holt on Libel 114, 115; Starkie on Libel 193, where see in the note other cases referred to.

(i) Holt on Libel 153.

(k) 2 Starkie on Libel 195, where see the cases collected. And see 1 Hawk. P. C. c. 7, *et seq.* The proceeding by writ of *scandalum magnatum* upon the statutes 3 Edw. 1, c. 34; 2 R. 2, st. 1, c. 5; 12 R. 2, c. 11, is of a civil as well as of a criminal nature; and was formerly had recourse to in case of defamation of any of the great officers and nobles. But the civil proceeding is now almost obsolete, the nobility preferring to waive their privileges in any action of slander, and to stand upon the same footing, with respect to civil remedies, as their fellow subjects.

of justice, it was characterized as a reproach to the justice of the nation, a thing insufferable, and a contempt of court.^(l) So an order made by a corporation and entered in their books stating that A. (against whom a jury had found a verdict with large damages in an action for a malicious prosecution, and which verdict had been confirmed in the Court of Common Pleas), was actuated by motives of public justice in preferring the indictment, was held to be a libel reflecting on the administration of justice, for which an information should be granted against the members who had made the order. Ashhurst, J., said, that the assertion that A. was actuated by motives of public justice carried with it an imputation on the public justice of the country; for if those were his only motives, then the verdict must be wrong. Buller, J., said, "Nothing can be of greater importance to the welfare of the public than to put a stop to the animadversions and censures which are so frequently made in courts of justice in this country. They can be of no service, and may be attended with the most mischievous consequences. Cases may happen in which the judge and jury may be mistaken: when they are, the law has afforded a remedy; and the party injured is entitled to pursue every method which the law allows to correct the mistake. But when a person has recourse either by a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a court of justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundation of the constitution itself."^(m)

*In a late case the same doctrine was acted upon: but it was at the same time clearly admitted that it would be lawful to discuss the merits of the verdict of a jury, or the decisions of a judge, provided it be done with candor and decency. An information was filed against the proprietors and printers of a Sunday newspaper, for a libel upon Le Blanc, J., and a jury, by whom a prisoner had been tried for murder and acquitted; and it was contended on the part of the defendants that they had only made a fair use of their right to canvass the proceedings of a court of justice. Grose, J., said, that "it certainly was lawful, with decency and candor, to discuss the propriety of the verdict of a jury, or the decisions of a judge; and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal: but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspaper, set out in the information, contained no reasoning or discussion, but only declamation and invective, and were written not with a view to elucidate the truth, but to injure the characters of individuals, and to bring into hatred and contempt the administration of justice in the country."⁽ⁿ⁾

It seems that no indictment will lie for contemptuous words spoken either of or to inferior magistrates, unless they are at the time in the actual execution of their duty, or at least unless the words affect them directly in their office; though it may be good cause for binding the offender to his good behavior.^(o) This doctrine was recognized in a case, where the defendant was indicted for saying of a justice of the peace for the county of Middlesex, in his absence, that he was a *scoundrel* and a *liar*.^(p) Lord Ellenborough, C. J., said, "the words not being spoken to the justice, I think they are not indictable. This doctrine is laid down by Lord Holt in a case in *Salkeld*; ^(q) and in *Rex v. Pocock* ^(r) the Court of King's Bench refused to grant an information for saying of a justice, in his absence, that he was a *forncorn rogue*. However, I will not direct an acquittal upon this point, as it is upon the record, and may be taken advantage of in arrest of judgment. It will be for the jury now to say whether these words were spoken of the prosecutor as a justice of the peace, and with intent to defame him in that capacity; for if they

(l) Vin. Abr. tit. *Contempt* (A.) 44; *Pool v. Sacheverel*, 1720.

(m) *Rex v. Watson*, 2 T. R. 199.

(n) *Rex v. White*, 1 Campb. 359. And see a note of another proceeding by information against the same defendants for a libel on Lord Ellenborough, C. J.; Holt on Libel 170, 171.

(o) 2 Starkie on Libel 195; 1 Hawk. P. C. c. 21, s. 13.

(p) *Rex v. Weltje*, 2 Campb. 142.

(q) *Rex v. Wrightson*, 2 Salk. 698.

(r) 2 Str. 1157. And see *Rex v. Penny*, 1 Lord Raym. 153.

were not, this indictment is not supported; and it could not by possibility be a misdemeanor to utter them, although the prosecutor's name may be in the commission of the peace for the county of Middlesex "(s) But it has been holden to be an indictable offence to say of a justice of the peace, when *in the execution of his office*, "you are a rogue and a liar." (t) The Court will not, however, grant an information for calling a magistrate a liar, accusing him of misconduct in having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless they tend to a breach of the peace. (u)

VIII. As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as to tend to lessen him in the esteem of the world, and take away his reputation, which to some men is more dear than life itself; it has been held that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous, ignominious, or ludicrous (v) light, whether expressed in printing or writing, or by signs or pictures; for these equally create ill blood, and provoke the parties to acts of revenge and breaches of the peace. (w)

But it should be observed that there is an important distinction under this head between words *spoken* only, and words published by writing or printing. Words spoken, however scurrilous, even though spoken personally to an individual, are not the subject of indictment, unless they directly tend to a breach of the peace, as if they convey a challenge to fight. (x) But words, though not scandalous in themselves, if published in writing, and tending in any degree to the discredit of a man, have been held to be libellous. (y)

Upon these principles it has been held to be libellous to write of a man that he

(s) *Rex v. Weltje*, 2 Camp. 142.

(t) *Rex v. Revel*, 1 Str. 420.

(u) *Ex parte Chapman*, 4 A. & E. 773 (31 E. C. L. R.).

(v) *Cooke v. Ward*, 6 Bing. 409 (19 E. C. L. R.); 4 M. & P. 99.

(w) *Ante*, p. 322; *Bac. Abr. tit. Libel (A.) 2*. So in the case of *Thorley v. Lord Kerry*, 4 Taunt. 364, Mansfield, C. J., delivering the opinion of the Court, said, "there is no doubt this is a libel for which the plaintiff in error might have been indicted and punished, because, though the words impute no punishable crimes, they contain that sort of imputation which is calculated to vilify a man, and bring him, as the books say, into hatred, contempt, and ridicule; for all words of that description an indictment lies." And in *Rex v. Cobbett*, Holt on Libel 114, 115, Lord Ellenborough, C. J., said, "No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals, or of society, be interrupted, or even exposed by types and figures, the act, by the law of England, is a libel."

(x) *Reg. v. Langley*, 6 Mod. 125; *Rex v. Bear*, 2 Salk. 417, by Holt, C. J.; *Villars v. Monsley*, 2 Wils. 403; and see 2 Starkie on Libel 208. In *Thorley v. Lord Kerry*, 4 Taunt. 355 (in the Exchequer Chamber), it was held, that an action may be maintained for words written for which an action could not be maintained if they were merely spoken. Mansfield, C. J., stated the arguments which would have prevailed in his mind to repudiate the distinction between written and spoken scandal, but that the distinction had been established by some of the greatest names known to the law, Lords Hardwicke, Hale, Holt, and others; and that Lord Hardwicke, C. J., had especially laid it down, that an action for a libel may be brought on words written when the words, if spoken, would not sustain it.

(y) *Bac. Abr. tit. Libel (A.) 2*.

¹ It is libellous to publish of one in his capacity of a juror, that he agreed with another juror to stake the decision of the amount of damages to be given in a cause then under consideration upon a game of draughts: *Comm. v. Wright*, 1 Cush. 46. When a publication is malicious, and its obvious design and tendency is to bring the subject of it into contempt and ridicule, it will be a libel, although it imputes no crime liable to be punished with infamy: *State v. Henderson*, 1 Rich. 179.

An indictment for a libel charged the defendant with publishing of the plaintiff that he "was the most swindling and worthless speculator who ever brought ruin upon the city of St. Louis." On the issue of not guilty, the jury found a special verdict of "guilty of charging the plaintiff of being a visionary, worthless speculator," held, that the verdict found matter not charged in the indictment, and was also bad in not finding malice: *Webber v. State*, 10 Miss. 4.

the itch, and stunk of brimstone.(z) And an information was granted against mayor of a town for sending to a nobleman a license to keep a public house.(a) information was also granted for a publication reflecting upon a person who had been unsuccessful in a lawsuit;(b) and against the printer of a newspaper for publishing a ludicrous paragraph, giving an account of the marriage of a nobleman with an actress, and of his appearing with her in the boxes with jewels, &c.(c) defendant was convicted for publishing a libel in a review, tending to traduce, vilify, and ridicule an officer of high rank in the navy; and to insinuate that he wanted courage and veracity; and to cause it to be believed that he was of conceited, obstinate and incendiary disposition.(d) And an information was granted against a printer of a newspaper, for publishing a paragraph containing a libel on the Bishop of Derry, by representing him as a bankrupt.(e) But in an action for publishing a libel by posting it on a paper in the Casino-room at Southwold, containing these words: "The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room;" the Court of Exchequer held, that the publication was not a libel, as it did not affect the moral character of the plaintiffs, nor state that they were not proper persons for general society; that the paper might import no more than that the plaintiff was not a liberal and agreeable character in the intercourse of common life.(f) But where a plaintiff alleged that the defendant published of the Duke of Brunswick the following libel: "Why should Theophilus be surprised at anything Mrs. W. does? If she chooses to entertain the Duke of Brunswick, she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all expatriated foreigners who crowd our streets to her table, if she thinks fit;" the Court of Exchequer Chamber held that the matter stated was libellous, as it might be understood in such a sense as to be injurious to the prosecutor's character.(g) A publication reflecting upon a man in respect of his trade may also be libellous; where A., a gunsmith, published in an advertisement that he had invented a new sort kind of a gun, that shot as far as others of a longer size, and that he was gunsmith to the Prince of Wales; and B., another gunsmith, counter-advertised, that whereas, &c. (reciting the former advertisement), he desired all gentlemen to be cautious, for that the said A. durst not engage with any artist in town, nor ever would make such an experiment, except out of a leather gun, as any gentleman might be satisfied at the Cross Guns in Long Acre, the said B.'s house." The Court held, that though B., or any other of the trade, might counter-advertise what was published by A., yet it should have been without any general reflections on him in the way of his business: that the advice "all gentlemen to be cautious," was a reflection upon his honesty; and the allegation that he would not engage with an artist was setting him below the rest of his trade, and calling him a bungler in general terms; and that the expression "except out of a leather gun" was charging him with a lie, the word *gun* being vulgarly used for a *lie*, and *gunner* for a *liar*; and that therefore these words were libellous.(h)

So words spoken of a person in respect of his office or profession *are libellous, if they impute incapacity, or misconduct, or want of some qualification necessary to carry on the office or profession of such person, but not otherwise.(i) [*345]

(z) *Villars v. Monsley*, 2 Wils. 403. The libel, the material part of which is stated in the text, was in rhyme, and very abusive.

(a) *The Mayor of Northampton's case*, 1 Str. 422.

(b) 2 Barnard 84.

(c) *Rex v. Kinnersley*, 1 Blac. R. 294. It was sworn that the nobleman was a married man; and the Court said, that under such circumstances the publication would have been high offence even against a commoner, and that it was high time to stop such intermeddling in private families.

(d) *Rex v. Dr. Smollet*, 1759; Holt on Libel 224.

(e) *Anonymous*, Hill. T. 1812.

(f) *Robinson v. Jermyn*, 1 Price R. 11.

(g) *Gregory v. The Queen*, 15 Q. B. 957 (69 E. C. L. R.).

(h) *Harman v. Delany*, Barnard, K. B. 289; Fitzgib. 121; 2 Str. 898, S. C.

(i) *Lumby v. Allday*, 1 Tyrw. 217; 1 C. & J. 301; *Ayre v. Craven*, 2 Ad. & E. 2 (29 E. L. R.); *Doley v. Roberts*, 3 B. N. C. 835 (32 E. C. L. R.); *Brayne v. Cooper*, 5 M. & W. 2; *Galloway v. Marshall*, 9 Exch. R. 294.

General imputations upon a body of men are indictable, though no individuals may be pointed out.^(k) An information was prayed against the defendant for publishing a paper containing an account of a murder committed upon a Jewish woman and her child, by certain *Jews* lately arrived from Portugal, and living near Broad Street, because the child was begotten by a Christian.^(l) It was objected that no information should be granted in this case, because it did not appear who in particular the persons reflected on were.^(m) But the Court said, that admitting that an information for a libel might be improper, yet the publication of this paper was deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders amongst the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible.⁽ⁿ⁾ And if some of the individuals affected by the libel are specified, it will be sufficient; as where it was objected that the names of certain trustees, who were a part of the body prosecuting, were not mentioned, Lord Hardwicke observed, that though there were authorities where, in cases of libel upon persons in their private capacities, it had been holden necessary that some particular person should be named, this was never carried so far as to make it necessary that every person injured by such libel should be specified.^(o)

Where a publication stated that, upon the death of her late Majesty, none of the bells of the several churches at Durham were tolled; and ascribed this omission to the clergy, and then proceeded to make some very severe observations on that body, a criminal information was granted.^(p)

A malicious defamation of one who is dead, if published with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, will be libellous; but it has been holden that an indictment for a libel, reflecting on the memory of a deceased person, cannot be supported, unless it state that it was done with a design to bring contempt on his family, or to stir up the hatred of the King's subjects against his relations, and to induce them to break the peace in vindicating the honor of the family.^(q)

But there are some exceptions to the general rules and doctrines concerning libels, in the case of comments upon literary productions, *and also in the
*346] case of communications considered as confidential, or made *bonâ fide* with a view of investigating a fact, or in the regular and proper course of a proceeding.

A publication commenting upon a literary work, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer, unconnected with his publication; and every one has a right to publish a comment of this description.^(r) But if a person, under the pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller.^(s) So

(k) *Ante*, p. 323.

(l) The affidavit set forth that several persons therein mentioned, who were recently arrived from Portugal, and lived in Broad street, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more.

(m) *Rex v. Orme*, 3 Salk. 224; 1 Lord Raym. 486, as cited.

(n) *Rex v. Osborne*, Sess. Cas. 260; 2 Barnard 138, 166; Kel. 230, pl. 183.

(o) *Rex v. Griffin and others*, Holt on Libel 239.

(p) *Rex v. Williams*, 5 B. & A. 597 (7 E. C. L. R.); and this upon an affidavit merely stating the purchase of the paper, and that the defendant was the proprietor or publisher of it, without any affidavit of the charge being untrue.

(q) *Rex v. Topham*, 4 T. R. 126.

(r) *Carr v. Hood*, 1 Campb. 355. And in an action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, may adduce evidence to show that the supposed libel is a fair stricture upon the general run of the plaintiff's publications: *Tabart v. Tipper*, 1 Campb. 350.

(s) *Nightingale v. Stocdale*, 49 Geo. 3, cor. Ellenborough, C. J.; Selw. N. P. 1044.

if a reviewer imputes base, sordid, dishonest, and wicked motives, it is no answer that the reviewer published only what he believed was correct and true.(t) A fair and candid comment on a place of public entertainment, in a newspaper, is not a libel.(u) And there is no distinction between a handbill, circular, or advertisement of a tradesman and a book; both are literary productions, and are addressed to the public, and both are subject to such comments as do not exceed the bounds of fair and reasonable criticism.(v)

It has been doubted whether the preaching a sermon in the ordinary mode of a clergyman's duty, makes it public property, so as to allow observations upon it in the same way that a publication of a literary work does.(w) And if a clergyman chooses to institute or to recommend a subscription among his parishioners for a charity of any kind, and makes regulations for that purpose, by so doing he does not put these regulations in the same position as a literary work, and make them public property, and so give occasion to any person to make criticisms on his conduct in that respect.(x)

Confidential communications are in some cases privileged: as where it was holden that a letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns which they had intrusted to him, and in which B., the writer of the letter, was likewise interested, was not a libel.(y) And if a *person, in [347 a private letter to the party, should expostulate with him about some vices, of which he apprehends him to be guilty, and desire him to refrain from them; or if a person should send such a letter to a father, in relation to some faults of his children; these, it seems, would not be considered as libellous, but as acts of friendship, not designed for defamation but reformation.(z) But this doctrine must be applied with some caution; since the sending an abusive letter filled with provoking language to another, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood, and cause a disturbance of the public peace;(a) and the reason assigned by Lord Bacon, why such private letter should be punishable, seems to be a very sufficient one, namely, that it enforces the party to whom the letter is directed to publish it to his friends, and thus induces a compulsory publication.(b) And though a letter written by a master, in giving a character of a servant, will not be libellous, unless its contents be not only false but malicious;(c) yet in such a case malice may be inferred from the circumstances.(d)

Where a writer is acting on any duty, legal or moral, towards the person to

Though it is lawful to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it is actionable *falsely* to impute to him the publication of any immoral or absurd literary production: *Tabart v. Tipper*, 1 Campb. 354. And see *Herriot v. Stuart*, 1 Esp. 437, and *Stuart v. Lovell*, 2 Stark. R. 93 (3 E. C. L. R.), that the editor of one public newspaper is not justified in attacks upon the private character of the writer of another public newspaper.

(t) *Campbell v. Spottswoods*, 8 Law T. (N. S.) 201.

(u) *Dibden v. Swan*, 1 Esp. N. P. C. 28; and see also *Ashley v. Harrison*, 1 Esp. N. P. C. 48; *Peake N. P. C.* 194.

(v) *Paris v. Levy*, 9 C. B. (N. S.) 342 (99 E. C. L. R.).

(w) *Gathercole v. Miall*, 15 M. & W. 319.

(x) *Ibid.*

(y) *McDonnell v. Claridge*, 1 Campb. 267; *Wright v. Woodgate*, 1 T. & G. 12.

(z) *Peacock v. Sir George Reynell*, 2 Brownl. 151, 152; *Bac. Abr. tit. Libel (A.) 2*, in the notes.

(a) *Bac. Abr. tit. Libel (B.) 2*; *Rex v. Cator*, 2 East R. 361; *Thorley v. Lord Kerry*, 4 Taunt. 355. In the last case the letter was unsealed, and opened and read by the bearer.

(b) *Poph.* 189, cited in *Holt on Libel* 222.

(c) *Weatherstone v. Hawkins*, 1 T. R. 110; *Edmondson v. Stephenson*, Bull. N. P. 8; *Child v. Affeck*, 9 B. & C. 403 (17 E. C. L. R.); 4 M. & R. 338; *Manby v. Witt*, 18 C. B. 544 (86 E. C. L. R.); *Taylor v. Hawkins*, 16 Q. B. 308 (71 E. C. L. R.); *Somerville v. Hawkins*, 10 C. B. 583 (70 E. C. L. R.); *Gardiner v. Slade*, 13 Q. B. 796 (66 E. C. L. R.); *Croft v. Stevens*, 7 H. & N. 570.

(d) *Rogers v. Sir G. Clifton*, 3 Bos. & Pul. 587; *Pattison v. Jones*, 8 B. & C. 578 (15 E. C. L. R.); 3 M. & R. 101; *Kelly v. Partington*, 4 B. & Ad. 700 (24 E. C. L. R.); 2 Nev. & M. 400.

whom he writes, where he has by his situation to protect the interests of another, that which he writes under such circumstances is a privileged communication, if he write it *bonâ fide*. If, therefore, a tenant be desired by his landlord to make communications to him in respect of any neglect of duty in his gamekeepers, any communication made by him in respect of any such neglect of duty is privileged, if written *bonâ fide*, and on the supposition that he was doing his duty to his landlord. (e)

If a man *bonâ fide* writes a letter in his own defence, and for the defence of his rights and interests, and is not actuated by any malice, that letter is privileged, although it may impute dishonesty to another. (f)

Any one in the transaction of business with another has a right to use language *bonâ fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another; and this is the principle upon which privileged communication rests; but defamatory comments on the motives or conduct of the party with whom he is dealing do not fall within that rule. (g) But the privilege, which protects a communication, must result from a right to discuss the particular matter in respect of which the alleged libel is published; nothing else can be privileged. *348] Where, therefore, remarks were made reflecting on a *Roman Catholic priest at a public meeting called for the purpose of petitioning Parliament against the grant to the Roman Catholic College at Maynooth, it was held that the speaker was not justified by the circumstance that the libel was published in the course of a *bonâ fide* discussion respecting the propriety of supporting that college. (h)

Although that which is written may be injurious to the character of another, yet if done *bonâ fide*, or with a view of investigating a fact in which the party making it is interested, it is not libellous. Thus where an advertisement was published by the defendant at the instigation of A., the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A., it was held that although the advertisement might impute bigamy to the plaintiff, yet having been published under such authority, and with such a view, it was not libellous. (i)

A communication fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned, is a privileged communication. (k) And if the communication be made in the regular and proper course of a proceeding, it will not be libellous. As where a writing, containing the defendant's case, and stating that some money, due to him from the government for furnishing the guard Whitehall with fire and candle, had been improperly obtained by a Captain C., was directed to a general officer, and the four principal officers of the guards, to be presented to his Majesty for redress, an information was refused, on the ground that the writing was no libel, but a representation of an injury drawn up in a proper way for redress, without any intention to asperse the prosecutor; and that though there was a suggestion of fraud, yet that is no more than is contained in every petition in Chancery, which is never held libellous if relative to the subject-matter. (l) a petition addressed by a creditor of an officer in the army to the Secretary-at-War *bonâ fide*, and with the view of obtaining, through his interference, the payment of a debt due, and containing a statement of facts which, though derogatory to

(e) *Cockayne v. Hodgkinson*, 5 C. & P. 543 (24 E. C. L. R.), Parke, B.

(f) *Coward v. Wellington*, 7 C. & P. 531 (32 E. C. L. R.), Littledale, J. As to privileged communications, see *Whitely v. Adams*, 15 C. B. (N. S.) 392 (109 E. C. L. R.); *Fryer v. Kinnarsley*, *Ibid.* 422, and *Force v. Warren*, *Ibid.* 806.

(g) *Per curiam*, *Tuson v. Evans*, 12 A. & E. 733 (40 E. C. L. R.).

(h) *Hearne v. Stowell*, 12 A. & E. 719 (40 E. C. L. R.).

(i) *Delany v. Jones*, 4 Esp. 191; *Lay v. Lawson*, 4 A. & E. 795 (31 E. C. L. R.).

(k) *Toogood v. Spyring*, 4 Tyrw. 582; 1 C. M. & R. 181. See *Spencer v. Amerton*, 1 M. & Rob. 470; *Warren v. Warren*, 4 Tyrw. 850; 1 C. M. & R. 150; *Wright v. Woodgate*, 2 C. M. & R. 573; 1 T. & G. 12; *Coxhead v. Richards*, 2 C. B. 569 (52 E. C. L. R.).

(l) *Rex v. Bayley*, Andr. 229; Bac. Abr. tit. *Libel* (A.) 2. As to the privilege of petitioning in courts of justice, see *ante*, p. 326.

officer's character, the creditor believed to be true, is not a malicious libel for which an action is maintainable.(m) A letter written to the Postmaster-General, or to the Secretary to the General Post-Office, complaining of misconduct in a postmaster, or guard of a mail, is not a libel, if it was written as a *bonâ fide* complaint to obtain redress for a grievance that the party really believed he had suffered.(n) And where the defendant, being deputy-governor of Greenwich Hospital, wrote a large *volume, containing an account of the abuses of the hospital, and [349 treating the characters of many of the officers of the hospital (who were public officers), and Lord Sandwich in particular, who was First Lord of the Admiralty, with much asperity, and printed several copies of it, which he distributed to the governors of the hospital only, and not to any other persons; the rule for an information was discharged. Lord Mansfield said, that this distribution of the copies to the persons only who were from their situations called on to redress these grievances, and had, from their situations, competent power to do it, was not a publication sufficient to make the writing a libel (o) Where, however, the defendant wrote a letter to the Secretary of State, imputing to the town clerk and clerk to the justices of a borough corruption in the latter office, it was held that this was not privileged, because the Secretary of State had no direct authority in respect of the matter complained of, and was not a competent tribunal to receive the application.(p) But a memorial presented to the Secretary of State for the Home Department by the elector of a borough complaining of the conduct of a justice of the peace during a recent election of a Member of Parliament for the borough, and imputing that he had made speeches inciting to a breach of the peace, and praying that the secretary would cause an inquiry to be made into the conduct of the plaintiff, and that, on the allegations being substantiated, the secretary would recommend to the Queen that the justice should be removed from the commission of the peace, is a privileged communication; for though the Lord Chancellor generally is consulted as to the removal of justices of the peace, the memorial might be considered as addressed to the Queen, through the secretary, who might have caused the inquiry to be made, have communicated with the Lord Chancellor, and have, in effect, recommended the removal of the justice.(q) And where the publication is an admonition, or in the course of the discipline of a religious sect, as the sentence of expulsion from a society of Quakers, it is not libellous.(r) So a letter written by a son-in-law to his mother-in-law, containing imputations on the character of a person whom she was about to marry, and desiring a diligent and attentive inquiry into his character, if written *bonâ fide*, is a privileged communication.(s) And it has been decided, that an action will not lie for words innocently read as a story out of a book, however false or defamatory they may be. Thus where a clergyman in a sermon recited a story out of *Fox's Martyrology*, that one G., being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth he never was so plagued, and was himself actually present at the *discourse; the words being delivered only as a matter of history, and not with any intention to slander, it was adjudged [350 for the defendant.(t)

(m) *Fairman v. Ives*, 5 B. & A. 642 (7 E. C. L. R.); and if an action be brought for such publication, the writer may, even upon the general issue, give evidence to show that he believed the fact stated in the petition to be true. See per Maule, J., in *Wenman v. Ash*, 13 C. B. 836 (76 E. C. L. R.).

(n) *Woodward v. Lander*, 6 C. & P. 548 (25 E. C. L. R.), Alderson, B.; *Blake v. Pilford*, 1 M. & Rob. 198, Taunton, J.

(o) *Rex v. Baillie*, 30 Geo. 3; Holt on Libel 173; 1 Ridgway's Collection of Erskine's Speeches, p. 1. Lord Mansfield seemed to think that whether the paper were in manuscript or printed, under these circumstances, made no difference.

(p) *Blagg v. Sturt*, 10 Q. B. 899 (59 E. C. L. R.). This case was much considered in *Harrison v. Bush*, *infra*, and may, perhaps, be shaken by it. The cases, however, are distinguishable, as the clerk to justices of the peace is appointed by them, and a secretary of state has no authority as to him, either directly or indirectly.

(q) *Harrison v. Bush*, 5 E. & B. 344 (85 E. C. L. R.).

(r) *Rex v. Hart*, 2 Burn's Ecc. L. 779.

(s) *Todd v. Hawkins*, 8 C. & P. 88 (34 E. C. L. R.), Alderson, B.

(t) *Bac. Abr. tit. Libel (A.) 2.*

The proper meaning of a privileged communication is this: that the occasion on which the communication was made, rebuts the inference, *primâ facie*, arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact; that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made. This may be made out either from the language of the letter itself, or by extrinsic evidence, or by proof of the conduct or expressions of the defendant, showing that he was actuated by a motive of personal ill-will.^(u) But where the publication is *primâ facie* privileged, juries ought not to look too strictly at the particular expressions used, but ought clearly to see that the letter was written with a malicious intent before they find it to be a libel.^(v)

When once a confidential relation is established between two persons, with regard to an inquiry of a private nature, whatever takes place between them relative to the same subject, though at a different time and place, may be entitled to the same privilege as what took place at the original interview; and it is for the jury to decide whether any further conversation on the same subject, though apparently casual and voluntary, did not take place under the influence of the confidential relation already established, and therefore is privileged.^(w)

It is matter of law for the judge to determine whether the occasion of writing or speaking criminatory language repels the inference of malice, constituting what is called a privileged communication; and if at the close of the case for the prosecution there is no intrinsic or extrinsic evidence of malice, it is the duty of the judge to direct a verdict for the defendant; but wherever there is evidence of malice, either intrinsic or extrinsic, it is the duty of the judge to leave the question of express malice to the jury.^(x) But where a communication is *primâ facie* privileged, in order to leave the question of malice to the jury, it is not enough that the facts proved are consistent with the presence of malice as well as with its absence; for actual malice must be proved, and therefore its absence must be presumed until such proof is given.^(y)

IX. Upon the ground that malicious and scurrilous reflections upon those who are possessed of rank and influence in foreign states may tend to involve this country in disputes and warfare, it has been held that publications tending to degrade and defame persons in considerable situations of power and dignity in foreign countries may be treated as libels. Thus an information was filed, by the command of the crown, for a libel on a French ambassador, then residing at the British court, consisting principally of some angry reflection on his public conduct, and charging him with ignorance in his official capacity, and with having used stratagem to supplant and depreciate the defendant at the court of Versailles.^(z) And Lord George Gordon was found guilty upon an information for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction: upon which occasion Ashhurst, J., observed, in passing sentence, that the object of the publication being to rekindle animosities between England and France by the personal abuse of the sovereign one of them, it was highly necessary to repress an offence of so dangerous a nature, and that such libels might be supposed to have been made with the connivance of the state where they were published, unless the authors were subjected to punishment.^(a) So a defendant was found guilty upon an information charging him with having published the following libel: "The Emperor of Russia is rendering

^(u) Wright v. Woodgate, 2 C., M. & R. 573; 1 T. & Gr. 12. See Blake v. Pilfold, 1 M. & Rob. 198, Taunton, J.; Blagg v. Sturt, 10 Q. B. 899 (59 E. C. L. R.).

^(v) Woodward v. Lander, 6 C. & P. 548 (25 E. C. L. R.), Alderson, B.; Todd v. Hawkins, 8 C. & P. 88 (34 E. C. L. R.).

^(w) Beatson v. Skene, 5 H. & N. 838.

^(x) Cooke v. Wildes, 5 E. & B. 328 (85 E. C. L. R.); Gilpin v. Fowler, 9 Exch. R. 615.

^(y) Somerville v. Hawkins, 10 C. B. 583 (70 E. C. L. R.); Taylor v. Hawkins, 16 Q. B. 308 (71 E. C. L. R.); Harris v. Thompson, 13 C. B. 333 (76 E. C. L. R.); Wenman v. Ash, 13 C. B. 836. See Campbell v. Spottiswoode, 3 B. & S. 769 (113 E. C. L. R.), as to a libel in the *Saturday Review*.

^(z) Rex v. D'Eon, 1 Blac. Rep. 510. The defendant was convicted.

^(a) Rex v. Lord George Gordon, 1787.

himself obnoxious to his subjects by various acts of tyranny, and ridiculous in the eyes of Europe by his inconsistency. He has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without freight." (b)

And in a case where the defendant was charged by an information with a libel upon Napoleon Bonaparte, Lord Ellenborough, C. J., in his address to the jury, said, "I lay it down as law, that any publication which tends to degrade, revile, and defame persons in considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly when it has a tendency to interrupt the pacific relations between the two countries." (c)

Having stated the different sorts of publications for which a party may be found guilty of libel, we may mention some of the points relating to the indictment and evidence on a prosecution for this offence.¹

An indictment for a libel must import to whom the libellous matter referred to; and stating that the libel was published to defame and vilify J. S., and to bring him into disgrace, and concluding that it was to the great scandal and disgrace of J. S., is not sufficient to show that the libellous matter referred to J. S. An indictment stated that the defendant intended to vilify W. S., Mayor of Colchester, and a justice; and in order to cause it to be believed that W. S., as such mayor, had been guilty of great abuse in granting an ale-license to J. L., and in order to bring him into great disgrace, published a certain scandalous libel, in which said libel was contained, &c., and the libel stated a speech supposed to have been made before the borough magistrates by a fictitious character, called Excise, who was supposed to lay before them a case of gross corruption, sanctioned by the mayor (*innuendo* the said W. S.) to the great scandal, injury, and disgrace of the said W. S. The usual allegation, that the libellous matter was of and concerning W. S. [352] was omitted; and, on account of this omission, the judgment was arrested. (d)

Where a count alleged that the defendant published of and concerning the Duke of Brunswick the following libel: "the evidence to facts in relation to the particular subject alluded to is procuring; and we have no doubt sufficient information will be obtained for a strong case to lay before the Home Secretary, to enable that functionary to cause it to be intimated to the suspected party (meaning the said duke) that his presence here can be dispensed with, as it may be attended with danger to himself," thereby meaning and intending to have it believed that the said duke was suspected of having committed and had committed some crime which would bring his life into danger from the laws of England; the count was held bad on error, because it did not show in what manner the life of the duke would be

(b) *Rex v. Vint*, 1801.

(c) *Rex v. Peltier*; *Holt* on Libel 78; 2 *Starkie* on Libel 218. The defendant was convicted, but never was called upon to receive the judgment of the Court. Shortly after the trial, war broke out between Great Britain and France.

(d) *Rex v. Marsden*, 4 M. & S. 164. Lord Ellenborough said, that if by inevitable construction no other person could have been intended but W. S., he should have been inclined to support the indictment; but that did not appear: *Clement v. Fisher*, 7 B. & C. 59 (14 E. C. L. R.); 1 M. & R. 281, s. p.

¹ If an indictment for libel does not profess on its face to set forth an accurate copy of the alleged libel in words and figures, it will be held insufficient on demurrer or in arrest of judgment. It is not sufficient to profess to set it forth according to its substance or effect. When the indictment charged that the libel "contained among other things, in substance, the following false, malicious and libellous matters and things, according to the tenor and effect following, that is to say," &c., it was held that this averment professed to set forth the substance and not the words of the libel, and was therefore invalid. Each specification of libellous matters must allege the words published to have been of and concerning the prosecutor. Prosecutions for libels have always been regarded with jealousy, and the greatest strictness has been required in the pleadings: *State v. Brownlow*, 7 Humph. 63; *Comm. v. Wright*, 1 Cush. 46. Marks of quotations used in an indictment for a libel to distinguish the libellous matter are not sufficient to indicate that the words thus designated are the very words of the alleged libel. The words "according to the purport and effect and in substance," in an indictment for a libel, do not import that the very words are set out. The word "tenor" imports an exact copy, and that it is set out in words and figures: *Ibid.*

endangered.^(e) But where a count alleged that the defendant, intending to defame the Duke of Brunswick, published a libel containing divers false and malicious matters and things of and concerning the said duke, that is to say: We should think that no lady would admit to her society such a crack-brained scamp as the Duke of Brunswick (meaning the said duke), the Court of Exchequer Chamber held that these averments showed sufficiently, without more formal introduction that the libel was of and concerning the duke.^(f)

Where a libel is charged to be of and concerning the government of the kingdom though it do not in express terms impute to the government any of the facts which it mentions, the Court is to judge from its whole tenor and import (understanding it as other men would understand it) whether it does not mean to cast that imputation. And as an imputation upon some part of a body of men may be a libel though it does not define what part it means, an allegation that the defendant published of and concerning the said persons, and an innuendo that he meant the said persons, will be understood to apply to that undefined part. An information stated that the defendant, intending to excite hatred against the government of the realm and to cause it to be believed that divers subjects had been inhumanely killed by certain troops of the King, published a libel of and concerning the government of this realm, and of and concerning the said troops, which libel stated, that the defendant saw with abhorrence, in the newspapers, the accounts of a transaction at Manchester, and alleged, that unarmed and unresisting men had been inhumanely cut down by the dragoons (meaning the said troops), and then commented strongly upon this being the use of a standing army, and called upon the people to demand justice, &c.; but it did not, in terms, say, that the dragoons acted under the authority or orders of the government. After conviction, a motion was made in arrest of judgment, on the ground that it did not sufficiently appear that the libel ^{*353} was written of and concerning the government, nor of or concerning ~~the~~ troops it was written: but the Court held, that it was obvious, from its whole tenor and import, that it meant to cast imputations upon the government that it was a libel to impute crime to any of the King's troops, though it did not define what troops in particular were referred to; and that the innuendo of "the said troops" meant the undefined part of those troops.^(g) It is the duty of a judge to say whether a publication is capable of the meaning ascribed to it by an innuendo; but when the judge is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.^(h)

Where written or printed matter in itself imports a libel on a person, no statement of extrinsic circumstances, by way of inducement, is necessary. It is an objection, therefore, in arrest of judgment that words are not explained by innuendo where they are commonly enough understood in a libellous sense to warrant a jury in so applying them;⁽ⁱ⁾ and if, in such a case, there be innuendoes properly enlarging the sense, they may be rejected as surplusage after verdict; ¹ for on motion in arrest of judgment, or on error, an innuendo, which is not warranted by the words themselves, or properly connected with them by prefatory matter, may be rejected.^(l) Thus, where on error in the House of Lords judges were asked, "If a declaration in an action of libel contains an innuendo which extends the meaning of the words in the libel, can the innuendo be rejected as surplusage, without prejudice to the question whether the matter complained gives a cause of action?" The judges answered that it might be rejected as repugnant and void. But the case would be different if the words were capable of two senses, and the innuendo ascribed one meaning to them, and was good on ¹

(e) *Gregory v. The Queen*, 15 Q. B. 974 (69 E. C. L. R.).

(f) *Gregory v. The Queen*, 15 Q. B. 957 (69 E. C. L. R.).

(g) *Rex v. Burdett*, 4 B. & A. 314 (6 E. C. L. R.).

(h) *Blagg v. Sturt*, 10 Q. B. 899 (59 E. C. L. R.).

(i) *Hoare v. Silverlock*, 12 Q. B. 624 (64 E. C. L. R.). See *Homer v. Taunton*, 5 B. 661, where there was no innuendo to explain "truckmaster," and it was held that it was properly left to the jury to say whether it was used in a defamatory sense, though evidence was given to explain its meaning.

(k) *Harvey v. French*, 2 Tyrw. 585; 1 C. & M. 11.

(l) *Williams v. Stott*, 3 Tyrw. 688; 1 C. & M. 675, per Bayley, B.

face of it. And the House of Lords held accordingly.^(m) If there be contained in the alleged libel matter which is *capable* of receiving the interpretation put upon it by an innuendo, there is no fault in the count for not having explanatory averments to fix and point the libel. But generally if the words written or spoken *cannot* apply to the individual, no previous averments or subsequent innuendos can help to give the words an application which they have not. "Suppose the words to be, 'a murder was committed in A's house last night,' no introduction can warrant the innuendo 'meaning that B. committed the said murder,' nor would it be helped by the finding of the jury for the plaintiff. For the Court must see that the words do not and cannot mean it, and would arrest the judgment accordingly."⁽ⁿ⁾ But if an innuendo ascribes to certain words a particular meaning, which cannot be supported in evidence, the innuendo, if well pleaded in form, **cannot* be repudiated on the trial, so as to let in proof that the words have *[*354* another meaning.^(o) If words be laid to be uttered with intent to convey a particular meaning to persons present, it must be proved that the party uttering them had that meaning, and that they were so understood by the hearers;^(p) and the whole of an innuendo must be proved, unless it is bad on the face of it.^(q)

If one man repeats a libel, another writes it, and a third approves what is written, they will all be makers of the libel; and it may be laid down generally that all who are concerned in composing, writing, and publishing a libel, are guilty of the misdemeanor, unless the part they had in the transaction was a lawful or an innocent act;^(r) and ignorance has been held not to excuse. Thus upon an information against the defendant, for printing and publishing a libel, the evidence was, that he acted as servant to the printer, and clapped down the press; and few or no circumstances were offered of his knowing the import of the paper, or being conscious that he was doing anything illegal; and Raymond, C. J., held that this made the defendant guilty, and so the jury found him.^(s) But there must be a publication; and the mere writing or composing a defamatory paper by any one, which is confined to his closet, and neither circulated nor read to others, will not render him responsible; nor will he be held to have published the paper, if he deliver it, by mistake, out of his study.^(t) But this position admits of great doubt, and two very great judges seem to have been of opinion, that one who composes or writes a libel with intent to defame another, is guilty of a misdemeanor, although the libel be not published.^(u) A count charging a defendant with having an obscene libel in his possession, with intent to publish it, seems to be bad.^(v) And

(m) *Barrett v. Long*, 3 H. L. C. 395.

(n) *Solomon v. Lawson*, 8 Q. B. 823 (55 E. C. L. R.), *per curiam*.

(o) *Williams v. Stott*, *supra*.

(p) *Per Bayley, B.*, *Ibid.*, citing *Woolnoth v. Meadows*, 5 East 470. See as to the office and nature of an innuendo: 1 Stark. on Libel 418, *et seq.*; *Clegg v. Laffer*, 10 Bing. 250 (25 E. C. L. R.); 3 M. & S. 727; *Day v. Robinson*, 1 Ad. & E. 554 (28 E. C. L. R.); 4 N. & M. 884; *West v. Smith*, 1 T. & G. 825; *Kelly v. Partington*, 5 B. & Ad. 645 (27 E. C. L. R.).

(q) *Per Bayley, B.*, *Williams v. Stott*, *supra*.

(r) *Bac. Abr. tit. Libel* (B.) 1.

(s) *Rex v. Clerk*, 1 Barnard 304. *Sed qu.* and *vide Day v. Bream*, *post*, p. 371.

(t) *Rex v. Paine*, 5 Mod. 165, 167.

(u) *Lord Tenterden, C. J.*, and *Holroyd, J.*, in *Rex v. Burdett*, 4 B. & A. 95 (24 E. C. L. R.). *Lord Tenterden* said, "The composition of a treasonable paper intended for publication, has, on more than one occasion, been held an overt act of high treason, although the actual publication had been intercepted or prevented, and I have heard nothing on the present occasion to convince my mind that one who composes or writes a libel with intent to defame, may not, under any circumstances, be punished, if the libel be not published." *Holroyd, J.*, said, "Where a misdemeanor has been committed by writing and publishing a libel, the writing of such a libel so published is in my opinion criminal, and liable to be punished by the law of England as a misdemeanor, as well as the publishing of it." And again, "The composing and writing, with intent and for the purpose above stated, of a libel proved to have been published by the defendant, is in my opinion of itself a misdemeanor, in whatever county the publishing of it took place." Upon the principle that an act done, and a criminal intention joined to that act, are sufficient to constitute a crime (*ante*, p. 85), it should seem that writing a libel with intent to defame is a crime. C. S. G.

(v) *Rex v. Rosenstein*, 2 C. & P. 414 (12 E. C. L. R.), *Park, J.*, J. A. This count seems

it will not be a publication of a libel if a party takes a copy of it, provided he never publishes it; (*w*) but a person who appears once to have *written a *355] libel, which is afterwards published, will be considered as the maker of it, unless he rebut the presumption of law by showing another to be the author, or prove the act to be innocent in himself. (*x*) For by Holt, C. J., if a libel appears under a man's handwriting, and no other author is known, he is taken in the mainour, (*y*) and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. (*z*) Where the manuscript of a libel was in the handwriting of the defendant, and a printer had printed five hundred copies from it, three hundred of which had been posted about Birmingham, but there was no evidence to connect the defendant with the printing or the posting, except the handwriting, it was held, that there was evidence to go the jury that it was published by the defendant. (*a*) So the sale of an obscene print to a person in a private room, he having requested that such print should be shown to him, his object being to prosecute the seller, is a sufficient publication. (*b*) Where, in an action for libel contained in a pamphlet, a witness proved that the defendant gave her a pamphlet, and that she read parts of it, and that she had lent it to several persons, and it was returned to her, but she could not swear the copy produced was the same pamphlet the defendant gave her, but it was an exact copy, if it was not the same, and she believed it to be the same, it was held that this was sufficient evidence to be left to the jury. (*c*)

The reading of a libel in the presence of another, without previous knowledge of its being a libel, or the laughing at a libel read by another, or the saying that such a libel is made by J. S., whether spoken with or without malice, does not amount to a publication. And it has also been held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is not punishable; though this has been doubted. (*d*) But it seems to have been agreed that if he who had read a libel himself, or has heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or show it to another, he is guilty of an unlawful publication of it. (*e*) In an action for a libel contained in a caricature print, where the witness stated, that having heard that *356] the defendant had a copy of this print, he went to his house and *requested liberty to see it, and that the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed, Lord Ellenborough, C. J., ruled that this was not sufficient evidence of publication to support the action. (*f*)

clearly bad, on the ground that no act was charged; it is precisely similar to *Rex v. Stewart*, *ante*, p. 85. C. S. G.

(*w*) Com. Dig. tit. *Libel* (B.) 2; *Lamb's case*, 9 Co. 596. But see *Rex v. Beare*, 2 Salk. 417; 1 Lord Raym. 414.

(*x*) Bac. Abr. tit. *Libel* (B.) 1; *Lamb's case*, 9 Co. 59. The writing a libel may be an innocent act in the clerk who draws the indictment, or in the student who takes notes of it. But in a late case (*Maloney v. Bartley*, 3 Campb. 210) Wood, B., held, on the trial of an action for a libel, in the shape of an *extra-judicial* affidavit sworn before a magistrate, that a person who acted as the magistrate's clerk was not bound to answer whether by the defendant's orders he wrote the affidavit, and delivered it to the magistrate, as he might thereby criminate himself.

(*y*) A man was taken with the mainour, mainouvre, when he was taken with the thing stolen in his possession, or, as it was termed in the ancient indictments, *captus cum re sua opere*, and when so taken he might be brought into Court, arraigned, and tried without a grand jury: 2 Hale 148. And some lords of manors had jurisdiction to try such cases, for I have the record for such an indictment for horse stealing, tried in the Court of Leek, Staffordshire, in the 35 Edw. 1. C. S. G.

(*z*) *Rex v. Beare*, 1 Ld. Raym. 417; 2 Salk. 417.

(*a*) *Reg. v. Lovett*, 9 C. & P. 462 (38 E. C. L. R.), Littledale, J.

(*b*) *Reg. v. Carlisle*, 1 Cox C. C. 229.

(*c*) *Fryer v. Gathercole*, 4 Ex. R. 262.

(*d*) Bac. Abr. tit. *Libel* (B.) 2. This is doubted in 1 Hawkins P. C. c. 78, s. 14, on the grounds that jests of such a kind are not to be endured, and that the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it.

(*e*) Bac. Abr. tit. *Libel* (B.) 2.

(*f*) *Smith v. Wood*, 3 Campb. 323. And see *Rex v. Paine*, 5 Mod. 165, where a

Proof that the libel was contained in a letter directed to the party, and delivered into the party's hands, is sufficient proof of a publication upon an indictment or information.^(g) Addressing a letter to a wife, containing a matter reflecting on her husband, is a sufficient publication to support an action.^(h) And delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication.⁽ⁱ⁾ The production of a letter containing a libel with the seal broken, and the postmark on it, is *prima facie* evidence of publication.^(k)

In an information for a libel against the doctrine of the Trinity, the witness for the Crown who produced the libel, swore that it was shown to the defendant, who owned himself the author of that book, *errors of the press and some small variations excepted*. The counsel for the defendant objected that this evidence would not entitle the attorney-general to read the book, because the confession was not absolute, and therefore amounted to a denial that he was the author of that identical book. But Pratt, C. J., allowed it to be read, saying he would put it upon the defendant to show that there were material variances.^(l)

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material whether he who disperses a libel knew anything of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the greatest security, if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them.^(m) Where a reporter to a newspaper proved that he had given a written statement to the editor of the paper, the contents of which had been communicated to him by the defendant for the purpose of such publication, and that the newspaper then produced was exactly the same, with the exception of some slight alterations, not affecting the sense; it was held, that what the reporter published, in consequence of what passed with the defendant, might be considered as published by the defendant; *but that the newspaper could not be read without producing the written [357 account delivered by the reporter to the editor.⁽ⁿ⁾

The defendant was indicted for causing to be published in a newspaper a libel which told a story of the prosecutor, and added comments on the story, giving it a ludicrous character. The editor of the newspaper stated that the defendant had expressed a wish to him that he would "show up" the prosecutor, and had told him the story. The witness communicated it to a reporter for the paper, and the libel was substantially what was so communicated. Before the publication the defendant

made in the margin, whether a person who has a libellous writing in his possession, and reads it to a private friend in his own house, is thereby guilty of publishing it.

^(g) 1 Hawk. P. C. c. 73, s. 11; Bac. Abr. tit. *Libel* (B.) 2; *Ante*, p. 347, n. (a); Selw. N. P. 1050, n. (9); Reg. v. Brooke, 7 Cox C. C. 251. And see *ante*, 347. A further publication is necessary to support an action. Thus it has been held that where the action was brought for a libel contained in a letter transmitted by the defendant to the plaintiff, by means of a third person, it is a question for the jury whether there has been any publication except to the plaintiff himself, and that if there has not, the defendant is entitled to their verdict: Clutterbuck v. Chaffers, 1 Stark. R. 471 (2 E. C. L. R.). But in an action for a libel contained in a letter written by the defendant to the plaintiff, it was holden that proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk, was evidence to go to the jury of the defendant's intention that the letter should be read by a third person: Delacroix v. Thevenot, 2 Stark. R. 63 (3 E. C. L. R.).

^(h) Wenman v. Ash, 13 C. B. 836 (76 E. C. L. R.).

⁽ⁱ⁾ Rex v. Burdett, 4 B. & A. 95 (6 E. C. L. R.), *post*, 366.

^(k) Warren v. Warren, 4 Tyrw. 850; 1 C. M. & R. 360; Shipley v. Todhunter, 7 C. & P. 680 (32 E. C. L. R.).

^(l) Rex v. Hall, 1 Str. 416.

^(m) Bac. Abr. tit. *Libel* (B.) 2; 1 Hawk. P. C. c. 73, s. 10.

⁽ⁿ⁾ Adams v. Kelly, R. & M. N. P. C. 157.

¹ State v. Avery, 7 Conn. 266; Swindle v. State, 2 Yerg. 581. Depositing a libel (which was in the form of an anonymous letter) in the post office, where it was mailed and despatched, together with the fact of its production by the plaintiff, on the trial is sufficient evidence of its publication, without the oath of the person to whom it was addressed, who, living out of the State, was out of the jurisdiction of the court: Collan v. Gaylord, 3 Watts 321. See State v. Jeandill, 5 Harring. 475.

remarked to the witness that the article had not yet appeared. After it had appeared, the defendant told the witness that he had seen it, and that he liked it very much. The witness had heard the story before the defendant told it him. The Court of Queen's Bench held, that on this evidence the jury might find that the defendant authorized the publication of this particular libel, notwithstanding the comments added, as there was both a general authority to publish, and an approval of the particular publication.(o)

Upon this foundation it was for a long time held, that the buying of a book or paper containing libellous matter, in a bookseller's shop, was sufficient evidence to charge the master with the publication, although it did not appear that he knew of any such book being there, or what the contents thereof were, and though he was not upon the premises, and had been kept away for a long time by illness; and it would not be presumed that it was bought and sold there by a stranger; but the master must, if he suggested anything of this kind in his excuse, prove it.(p) So the proprietor of a newspaper was answerable criminally as well as civilly for the acts of his servants in the publication of a libel, although it could be shown that such publication was without the privity of the proprietor;(q) for a person who derives profit from, and who furnishes means for, carrying on the concern, and entrusts the conduct of the publication to one whom he selects, and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although it cannot be shown that he was individually concerned *358] in the particular publication;(r) *and these are acts done in the course of the trade or business carried on by the master. But there were cases in which the presumption arising from the proprietorship of a paper might be rebutted.(s) In an action for a libel, where it appeared upon the evidence that the defendant, a tradesman, was accustomed to employ his daughter to write his bills and letters; that a customer, to whom a bill written by the daughter had been sent by the daughter, sent it back on the ground of the charge being too high, and that the bill was afterwards returned to the customer inclosed in a letter also written by the defendant's daughter, and being a libel upon the plaintiff who had inspected and reduced the bill for the customer; it was holden that this was not sufficient evidence to go to a jury, either of command, authority, adoption, or recognition by the defendant.(t) But now, on the trial of an indictment or information, the defendant may prove that the publication was without his authority, consent, or knowledge.(u)

The proceedings against the printers, publishers, and proprietors of newspapers

(o) Reg. v. Cooper, 8 Q. B. 533 (55 E. C. L. R.), Lord Denman, C. J., said, "If a man request another generally to write a libel, he must be answerable for any libel written in pursuance of his request: he contributes to a misdemeanor, and is therefore responsible as a principal." "I have no doubt that a man who employs another generally to write a libel must take his chance of what appears, though something may be added which he did not state."

(p) Bac. Abr. tit. *Libel* (B.) 2; Rex v. Nutt, Fitzgib. 47; 1 Barnard, K. B. 306; 2 Sess. Cas. 33, pl. 38. And see also Rex v. Almon, 5 Burr. 2686. And by Lord Hardwicke, in 2 Atk. 472. "Though printing papers and pamphlets is a trade by which persons get their livelihood, yet they must take care to use it with prudence and caution; for if they print anything that is libellous, it is no excuse to say that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous."

(q) Rex v. Walter, 3 Esp. N. P. C. 21. And in Rex v. Dod, 2 Sess. Cas. 33, pl. 38, Lord Raymond, C. J., said it had been ruled that where a master lived out of town, and his trade was carried on by his servant, the master would be chargeable if his servant should publish a libel in his absence. In 1 Hawk. P. C. c. 73, s. 10 (7th edit.), is the following marginal note;—"But if a printer is confined in a prison to which his servants have no access, and they publish a libel without his privity, the publication of it shall not be imputed to him; Woodfall's case, Essay on Libels, p. 18. See vide Salmon's case, B. R. Hil. 1777, and Rex v. Almon, 5 Burr. 2687."

(r) Rex v. Gutch, Moo. & M. 433 (22 E. C. L. R.), Lord Tenterden, C. J.

(s) Rex v. Gutch, Moo. & M. 433 (22 E. C. L. R.), Lord Tenterden, C. J., and see Rex v. Almon, 5 Burr. 2686.

(t) Harding v. Greening, 8 Taunt. 42 (4 E. C. L. R.). And it was also held in this case that the daughter could not be compelled to prove by whose direction the letter was written. The answer would tend to fix herself with the crime of writing it.

(u) 6 & 7 Vict. c. 96, s. 7, *post*, p. 375.

for any libel contained in such papers were much facilitated by the 38 Geo. 3, c. 78, which is repealed by the 6 & 7 Will. 4, c. 76; sec. 6 of which enacts, that no person shall print or publish, or shall cause to be printed or published, any newspaper(v) before there shall be delivered to the commissioners of stamps and taxes, or to the proper authorized officer at the head office for stamps in Westminster, Edinburgh, or Dublin respectively, *or to the distributor of stamps or other [*359 proper officer appointed by the said commissioners for the purpose in or for the district within which such newspaper shall be intended to be printed and published, a declaration in writing containing the several matters and things hereinafter for that purpose specified; that is to say, every such declaration shall set forth the correct title of the newspaper to which the same shall relate, and the true description of the house or building wherein such newspaper is intended to be printed, and also of the house or building wherein such newspaper is intended to be published, by or for or on behalf of the proprietor thereof, and shall also set forth the true name, addition, and place of abode of every person who is intended to be the printer, or to conduct the actual printing of such newspaper, and of every person who is intended to be the publisher thereof, and of every person who shall be a proprietor of such newspaper who shall be resident out of the United Kingdom, and also of every person resident in the United Kingdom, who shall be a proprietor of the same, if the number of such last-mentioned persons (exclusive of the printer and publisher) shall not exceed two, and in case such number shall exceed two, then of such two persons, being such proprietors, resident in the United Kingdom, the amount of whose respective proportional shares in the property or in the profit or loss of such newspapers shall not be less than the proportional share of any other proprietor thereof resident in the United Kingdom, exclusive of the printer and publisher, and also where the number of such proprietors resident in the United Kingdom shall exceed two, the amount of the proportional shares or interests of such several proprietors whose names shall be specified in such declaration; and every such declaration shall be made and signed by every person named therein as printer or publisher of the newspaper to which such declaration shall relate, and by such of the said persons named therein as proprietors as shall be resident within the United Kingdom; and a declaration of the like import shall be made, signed,

(v) By sec. 4, and schedule A, the word newspaper includes any paper containing public news, intelligence, or occurrences printed in any part of the United Kingdom to be dispersed and made public:

Also any paper printed in any part of the United Kingdom, weekly or oftener, or at intervals not exceeding twenty-six days, containing only or principally advertisements:

And also any paper containing any public news, intelligence, or occurrences, or any remarks or observations thereon, printed in any part of the United Kingdom for sale, and published periodically or in parts or numbers, at intervals not exceeding twenty-six days between the publication of any two such papers, parts, or numbers, where any of the said papers, parts, or numbers respectively shall not exceed two sheets of the dimensions hereinafter specified (exclusive of any cover or blank leaf, or any other leaf upon which any advertisement or other notice shall be printed), or shall be published for sale for a less sum than sixpence, exclusive of the duty by this Act imposed thereon: provided always that no quantity of paper less than a quantity equal to twenty-one inches in length and seventeen inches in breadth, in whatever way or form the same may be made or may be divided into leaves, or in whatever way the same may be printed, shall, with reference to any such paper, part, or number as aforesaid, be deemed or taken to be a sheet of paper: And provided also, that any of the several papers hereinbefore described shall be liable to the duties by this Act imposed thereon, in whatever way or form the same may be printed or folded, or divided into leaves or stitched, and whether the same shall be folded, divided, or stitched, or not.

Exemptions.

Any paper called "Police Gazette, or Hue and Cry," published in Great Britain, by authority of the Secretary of State, or in Ireland, by the authority of the Lord Lieutenant.

Daily accounts or bills of goods imported and exported, or warrants or certificates for the delivery of goods, and the weekly bills of mortality, and also papers containing any lists of prices current, or of the state of the markets, or any account of the arrival, sailing, or other circumstances relating to merchant ships or vessels, or any other matter wholly of a commercial nature; provided such bills, lists, or accounts do not contain any other matter than what hath been usually comprised therein.

and delivered in like manner whenever and so often as any share, interest, or property soever in any newspaper named in any such declaration shall be assigned, transferred, divided, or changed by act of the parties or by operation of law, so that the respective proportional shares or interests of the persons named in any such declaration as proprietors of such newspapers, or either of them, shall respectively become less than the proportional share or interest of any other proprietor thereof, exclusive of the printer and publisher, and also whenever and so often as any printer, publisher, or proprietor named in any such declaration, or the person conducting the actual printing of the newspaper named in any such declaration shall be changed, or shall change his place of abode, and also whenever and so often as the title of any such newspaper or the printing office or the place of publication thereof shall be changed, and also whenever in any case, or on any occasion, or for any purpose, the said commissioners, or any officer of stamp duties authorized in that behalf, shall require such declaration to be made, signed, and delivered, and shall cause notice in writing for that purpose to be served upon any person, or to be left or posted at any place mentioned in the last preceding declaration delivered as aforesaid, as being a printer, publisher, or proprietor of such *360] newspaper, or *as being the place of printing or publishing any such newspaper respectively; and every such declaration shall be made before any one or more of the said commissioners, or before any officer of stamp duties or other person appointed by the said commissioners, either generally or specially in that behalf; and such commissioners or any one of them, and such officer or other person, are and is hereby severally and respectively authorized to take and receive such declaration as aforesaid.”(w)

Sec. 8. “All such declarations as aforesaid shall be filed and kept in such manner as the commissioners of stamps and taxes shall direct for the safe custody thereof; and copies thereof, certified to be true copies as by this Act is directed, shall respectively be admitted in all proceedings, civil and criminal, and upon every occasion whatsoever, touching any newspaper mentioned in any such declaration, or touching any publication, matter, or thing contained in any such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration as are hereby required to be therein set forth, and of their continuance respectively in the same condition down to the time in question, against every person who shall have signed such declaration, unless it shall be proved that previous to such time such person became lunatic, or that previous to the publication in question on such trial such person did duly sign and make a declaration that such person had ceased to be a printer, publisher, or proprietor of such newspaper, and did duly deliver the same to the said commissioners or to such officer as aforesaid, or unless it shall be proved that previous to such occasion as aforesaid a new declaration of the same or a similar nature respectively, or such as may be required by law, was duly signed and made and delivered as aforesaid respecting the same newspaper, in which the person sought to be affected on such trial did not join; and the said commissioners, or the proper authorized officer by whom any such declaration shall be kept according to the directions of this Act, shall, upon application in writing made to them or him respectively by any person requiring a copy certified according to this Act of any such declaration as aforesaid, in order that the same may be produced in any civil or criminal proceeding, deliver such certified copy or cause the same to be delivered to the person applying for the same upon payment of the sum of one shilling, and no more; and in all proceedings and upon all occasions whatsoever a copy of any such declaration certified to be a true copy under the hand of one of the said commissioners or of any officer in whose possession the same shall be, upon proof made that such certificate hath been signed with the handwriting of a person described in or by such certificate as such commissioner or officer, and whom it shall not be necessary to prove to be a commissioner or officer, shall be received in evidence against any and every person named in such declaration as a person making or signing the same as sufficient proof of such declaration, and that the same was

(w) The same section makes persons knowingly and wilfully making false or defective declarations guilty of a misdemeanor; and sec. 7 imposes a penalty of £50 on any person knowingly and wilfully publishing a newspaper where a declaration has not been made.

duly signed and made according to this Act, and of the contents thereof; and every such copy so produced and certified shall *have the same effect for the purposes of evidence against any and every such person named therein [*361 as aforesaid, to all intents whatsoever, as if the original declaration of which the copy so produced and certified shall purport to be a copy had been produced in evidence, and been proved to have been duly signed and made by the person appearing by such copy to have signed and made the same as aforesaid; and whenever a certified copy of any such declaration shall have been produced in evidence as aforesaid against any person having signed and made such declaration, and a newspaper shall afterwards be produced in evidence intituled in the same manner as the newspaper mentioned in such declaration is intituled, and wherein the name of the printer and publisher and the place of printing shall be the same as the name of the printer and publisher and the place of printing mentioned in such declaration, (x) or shall purport to be the same, whether such title, name, and place printed upon such newspaper shall be set forth in the same form of words as is contained in the said declaration, or in any form of words varying therefrom, it shall not be necessary for the plaintiff, informant, or prosecutor in any action, prosecution, or other proceeding, to prove that the newspaper to which such action, prosecution, or other proceeding may relate was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the same may be usually sold; and if any person, not being one of the said commissioners or the proper authorized officer, shall give any certificate purporting to be such certificate as aforesaid, or shall presume to certify any of the matters or things by this Act directed to be certified by such commissioner or officer, or which such commissioner or officer is hereby empowered or intrusted to certify; or if any such commissioner or officer shall knowingly and wilfully falsely certify under his hand that any such declaration as is required to be made by this Act was duly signed and made before him, the same not having been so signed and made, or shall knowingly and wilfully falsely certify that any copy of any declaration is a true copy of the declaration of which the same is certified to be such copy, the same not being such true copy, every person so offending shall forfeit the sum of one hundred pounds."

Sec. 9, in all proceedings, civil or criminal, service of process at the place of printing or publishing mentioned in the declaration is sufficient.

Sec. 10, the titles of newspapers, and the names of the printers and publishers are to be entered in a book at the stamp office, and all persons are to have liberty to inspect it.

Sec. 13. "The printer or publisher of every newspaper printed or published in the city of London, Edinburgh, or Dublin, or within twenty miles of any of the said cities respectively, shall, upon every day on which such newspaper shall be published or on the day next following which shall not be a holiday, between the hours of ten and three on each day, deliver or cause to be delivered to the commissioners of stamps and taxes, or to the proper authorized officer, at the head office for stamps in one of the said cities *respectively in or nearest to which such [*362 newspaper shall be printed or published, one copy of every such newspaper and of every second or other varied edition or impression thereof so printed or published, with the name and place of abode of the printer or publisher thereof, signed and written thereon after the same shall be printed by his proper hand and in his accustomed manner of signing, or by some person appointed and authorized by him for that purpose, and of whose appointment and authority notice in writing, signed by such printer or publisher in the presence of and attested by an officer of stamp duties, shall be given to the said commissioners, or to the officer to whom such copies are to be delivered; and the printer or publisher of every newspaper printed or published in any other place in the United Kingdom shall, upon every day on which such newspaper shall be published, or within three days next following, in like manner between the hours of ten and three, deliver or cause to be

(x) The following provision is new.

delivered to the distributor of stamps or other authorized officer in whose district such newspaper shall be printed or published, two copies of every such newspaper, and of every second or other varied edition or impression thereof so printed or published, with the name and place of abode of the printer or publisher thereof signed and written thereon in manner aforesaid after the same shall be printed, and the same copies shall be carefully kept by the said commissioners, or by such distributor or officer as aforesaid, in such manner as the said commissioners shall direct; and such printer or publisher shall be entitled to demand and receive from the commissioners, or such distributor or officer, once in every week, the amount of the ordinary price of the newspapers so delivered; and every printer and publisher of such newspaper who shall neglect to deliver or cause to be delivered in manner hereinbefore directed such copy or copies signed as aforesaid, shall for every such neglect respectively forfeit the sum of twenty pounds; and in case any person shall make application in writing to the said commissioners, or to such distributor or officer as aforesaid, in order that any newspaper so signed as aforesaid may be produced in evidence in any proceeding, civil or criminal, the said commissioners, or distributor or officer, shall, at the expense of the party applying, at any time within two years from the publication thereof, either cause such newspaper to be produced in the court in which and at the time when the same is required to be produced, or shall deliver the same to the party applying for the same, taking according to their discretion reasonable security, at the expense of such party, for returning the same to the said commissioners, or such distributor or officer, within a certain period to be fixed by them respectively; and in case by reason that such newspaper shall have been previously applied for in manner aforesaid by any other person, the same cannot be produced or cannot be delivered according to any subsequent application, in such case the said commissioners, or such distributor or officer as aforesaid, shall cause the same to be produced or shall deliver the same as soon as they are enabled so to do; and all copies so delivered as aforesaid shall be evidence against every printer, publisher, and proprietor of every such newspaper respectively in all proceedings, civil or criminal, to be commenced and carried on, as well touching such newspaper as any matter or thing *363] therein contained, and *touching any other newspaper and any matter or thing therein contained which shall be of the same title, purport, or effect with such copy so delivered as aforesaid, although such copy may vary in some instances or particulars either as to title, purport, or effect; and every printer, publisher, and proprietor of any copy so delivered as aforesaid shall to all intents and purposes be deemed to be the printer, publisher, and proprietor respectively of all newspapers which shall be of the same title, purport, or effect with such copies or impressions so delivered as aforesaid, notwithstanding such variances as aforesaid, unless such printer, publisher, or proprietor respectively shall prove that such newspapers were not printed or published by him, nor by nor with his knowledge or privity: provided always, that if any printer or publisher of any newspaper which shall not be printed and published in the cities of London, Edinburgh, or Dublin, or within twenty miles of the said cities respectively, shall find it more convenient to cause such copies of such newspaper to be delivered to any other distributor of stamps than the distributor in whose district such newspapers shall be published, and such printer or publisher shall state such matter by petition to the commissioners of stamps and taxes, and pray that he may have liberty to cause such copies to be delivered to such other distributor as he shall so name at the office of such distributor, it shall be lawful for the said commissioners to order the same accordingly, and from and after the date of such order the place of publication of such newspaper shall for that purpose only be deemed and taken to be within the district of such other distributor until the same shall be otherwise ordered by the said commissioners.”(y)

(y) By sec. 14, at the end of every newspaper, and of any and every supplement sheet or piece of paper, shall be printed the Christian name and surname, addition and place of abode of the printer and publisher of the same, and also a true description of the house or building wherein the same is actually printed and published respectively, and the day of the week, month, and year on which the same is published; and if any person shall

Before the 38 Geo. 3, c. 78, it was holden, upon an indictment for a libel in a newspaper, that evidence that the paper had been sold at the office of the defendant, that the defendant, as proprietor of the paper, had given a bond to the stamp office pursuant to the 29 Geo. 3, c. 50, s. 10, for securing the duties on the advertisements, and that he had from time to time applied to the stamp office respecting the duties on the paper, was evidence to be left to the jury, to show that the defendant was the publisher.(z) And since the statute it has been held to be sufficient evidence of a publication at common law to put in the original affidavit of the proprietor stating where the paper was to be published, and to prove that a paper with a corresponding title, containing the libel, was purchased there.(a) This was held in a case where it *had been previously ruled that in order to render the certified copy of the affidavit made by the proprietor of a newspaper evidence under the 38 Geo. 3, c. 78, it must either appear upon the *jurat* that the person before whom it was made had authority to take it, or this fact must appear *aliunde*.(b) So the delivery of a newspaper to the officer at the stamp office is a sufficient publication to sustain an indictment for a libel in the paper.(c) So proof that the defendant, as proprietor of the newspaper in which a libel is contained, accounted with the distributor of stamps for the duty on advertisements in the paper, is sufficient evidence of a publication by the defendant.(d) An affidavit according to the statute, together with the production of a newspaper, corresponding in every respect with the description of it in the affidavit, is not only evidence of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to be.(e) The same rule applies to criminal informations.(f) Where in an action for libel in a newspaper a certified copy of the stamp office declaration was put in, which stated the title of the paper to be "The Leicester Herald and Midland Counties Advertiser," and the intended place of publication to be "No. 23, Charles Street, in the parish of St. Margaret, in the borough of Leicester," and the paper containing the libel had the same title, but the place of publication was "at the corner of Charles Street and Hadfield Street, in the parish of St. Margaret, in the borough of Leicester;" Lord Denman, C. J., held that the evidence of identity was sufficient.(g) But if the affidavit from the stamp office and the paper vary in the place where the paper is stated to be printed, as where the affidavit stated it to be "in Union Street, Castle Street," and the paper "in Union Buildings, John Street," the production

knowingly or wilfully print or publish, or cause to be printed or published, any newspaper or supplement thereto whereon the several particulars aforesaid shall not be printed, or whereon there shall be printed any false name, addition, place, or day, or whereon there shall be printed any description of the place of printing or publishing such newspaper which shall be different in any respect from the description of the house or building mentioned in the declaration required by this Act, to be made relating to such newspaper as the house or building wherein such newspaper is intended to be printed or published, every such person shall for any and every such offence forfeit the sum of twenty pounds.

(z) *Rex v. Topham*, 4 T. R. 126.

(a) *Rex v. White*, 3 Campb. 100.

(b) *Rex v. White*, 3 Campb. 99.

(c) *Rex v. Amphlit*, 4 B. & C. 35 (10 E. C. L. R.).

(d) *Cook v. Ward*, 6 Bing. 409 (19 E. C. L. R.); 4 M. & P. 99.

(e) *Rex v. Hart*, 10 East 94; *Mayne v. Fletcher*, 9 B. & C. 382 (17 E. C. L. R.); 4 M. & R. 311. It has been doubted in Ireland whether, in addition to the declaration prescribed by the 6 & 7 Will. 4, c. 76, purporting to have been made by a person of the same Christian and surname as the defendant, some evidence must not be given of the identity of the defendant with the person who signed that declaration: *Reg. v. O'Connell*, 1 Cox C. C. 405.

(f) *Rex v. Donnison*, 4 B. & Ad. 689 (24 E. C. L. R.). In moving for a criminal information for a libel contained in a newspaper, the most correct way is to annex it to the affidavits; though perhaps it may be enough that it should be made an exhibit, filed, and the rule drawn up on reading it: per Littledale, J., *Reg. v. Woolmer*, 12 A. & E. 422 (40 E. C. L. R.). A rule may properly be granted on an affidavit, the stamp office certificate, and the newspaper, but such rule cannot be supported unless the rule be drawn up on reading the newspaper (per Patteson, J., *ibid.*), for no rule is stricter than that reference can be made to nothing, upon the reading of which the rule does not appear to be drawn up.

(g) *Baker v. Wilkinson*, C. & M. 399 (41 E. C. L. R.).

of the affidavit and paper is not sufficient. *(h)* So where the affidavit described the proprietor's residence to be in "Red Lion Street, St. Ann's Square," and on the paper it was described as in "St. Ann's Square;" Lord Tenterden held that as the party was not excluded from other proof of publication, if he relied on the statutory proof, he must bring himself within the statute, and that the discrepancy was fatal. *(i)* In moving for a criminal information a prosecutor is not bound to adopt the statutory proof, *but if he adopt any other the publication must be *365] shown by some direct proof, as that a party bought the libel at the defendant's shop; and it is not sufficient to produce an affidavit stating merely that the defendant printed and published a libel in a certain newspaper called, &c., a copy of which libel is hereunto annexed, and to annex such copy. *(k)* And a newspaper may be given in evidence, though it is not one of the copies published, and though it be unstamped at the time of trial. *(l)*

Where in an action for libel to prove that the defendant, Harmer, was the proprietor of the "Sun" newspaper, a certified copy of the declaration made at the stamp office under the 6 & 7 Will. 4, c. 76, s. 6, was put in, and it was a joint declaration, and stated that, "We are the sole proprietor; that is to say, the said James Harmer, as legal owner as mortgagee, and Murdo Young, as owner of the equity of redemption;" it was objected that this declaration showed that the defendant was a mortgagee only, and not a proprietor against whom an action for libel could be maintained; but Lord Campbell, C. J., held that the defendant was liable. *(m)*

Upon the trial the libel must in general be produced on the part of the prosecution, and, after sufficient proof of a publication by the defendant, may be read; and if the libel has merely been exhibited by the defendant, and he refuses on the trial to produce it, after notice for that purpose, parol evidence may be given of its contents. *(n)* The libellous matter must be set out in the indictment; *(o)* and the libel proved must appear to correspond with the statement of it in the indictment, and any variation in the sense between the matter charged and that proved will be fatal. *(p)* But the mere alteration of a single letter, so long as it does not change one word into another, will not vitiate; though the smallest variance, if it renders the meaning different, will be fatal. *(q)*

The libel must also be proved to have been published, by the party accused, in the county laid in the indictment. *(r)* But if a man write a libel in one county and consent to its publication in another, the consent is sufficient to charge him in the latter county. *(s)* So if a man write a libel in London, and send it by post addressed to a person in Exeter, he is guilty of a publication in Exeter. *(t)* And

(h) *Rex v. Franceys*, 2 Ad. & E. 49 (29 E. C. L. R.).

(i) *Murray v. Souter*, cited, 6 Bing. 414 (19 E. C. L. R.), in *Cook v. Ward*. These cases were before the new Act, which seems framed to avoid trifling variances. See *ante*, p. 361.

(k) *Reg. v. Baldwin*, 8 A. & E. 168 (35 E. C. L. R.), and see *Watts v. Fraser*, 7 A. & E. 223 (34 E. C. L. R.), and *qu.* whether the means of proof given by the 6 & 7 Will. 4, c. 76, be applicable to a libel published by a plaintiff.

(l) *Rex v. Pearce*, Peake's N. P. C. 75.

(m) *Duke of Brunswick v. Harmer*, 3 C. & K. 10.

(n) By Buller, J., in *Rex v. Watson and others*, 2 T. R. 201.

(o) *Rex v. Sacheverell*, 15 Sta. Tri. 466.

(p) *Tabart v. Tipper*, 1 Campb. 352. And if it appears upon the proof that parts of the libel which are separated by intervening matter are set forth as if they were continuous, it will be bad, if the sense is altered by the passage omitted: *Id.* *Ibid.* It is settled that the whole libel need not be set forth in the indictment; but if any part qualifies the rest, it may be given in evidence: 2 Salk. 417. See the 9 Geo. 4, c. 15, and 14 & 15 Vic. c. 100, s. 1, as to amendments of variances, *post*, *Evidence*.

(q) *Rex v. Beech*, 1 Leach 133; *Rex v. Hart*, 1 Leach 145.

(r) *Case of the Seven Bishops*, 12 St. Tri. 354.

(t) *Id.* *Ibid.* 332.

(s) 12 St. Tr. 331.

¹ A libel was published in Rhode Island, in a newspaper that usually circulated in the county of Bristol (Mass.), and the number containing the libel was received and circulated in that county; it was held that this was competent and conclusive evidence of publication there: *Comm. v. Blanding*, 3 Pick. 304.

where the defendant wrote a libel in Leicestershire, with intent to publish it in Middlesex, and published it in Middlesex accordingly, and the information against *him was in Leicestershire; three of the judges held the information right: [*366 but Bayley, J., doubted.(u) From the same case it appears to have been considered that delivering a libel sealed, in order that it may be opened and published by a third person in a distant county, is a publication in the county in which it so delivered; and further, that if delivering it open were essential, proof that the defendant wrote it in county A., and that C. delivered it unsealed to D. in county B., would be *prima facie* evidence that the defendant delivered it open to C. in the county A., though there be no evidence of C.'s having been in county A. about the time; or that application had been made to D. to know of whom he received it. The information was in the county of Leicester, for writing and publishing a libel; and it was proved by the date of the letter that the defendant wrote it in that county, and that Bickersteth delivered it to Brooks for publication in the county of Middlesex, it being then unsealed. Bickersteth was not called as a witness; and there was no evidence of his having been in the county of Leicester, or how the libel came to him. The jury were told that as Bickersteth had it open, they might presume that he received it open; and that, as the defendant wrote it in the county of Leicester, it might be presumed that Bickersteth received it in that county; and three judges held against the opinion of Bayley, J., that this direction was proper; and they also held that if the delivering open could not be presumed, a delivery sealed with a view to and for the purpose of publication was a publication; and they thought there was sufficient ground for presuming some delivery, either open or sealed, in the county of Leicester.(v) It appears from this case that the dating a libel at a particular place is evidence of its having been written at that place.(w) The post-mark upon a letter has been considered as no evidence for the purpose of proving that the letter was put into the post-office at the place mentioned by such post-mark.(x) But it appears to be the better opinion that such post-marks, whether in town or country, proved to be such, are evidence that the letters on which they exist were in the offices to which the post-marks belong at the dates thereby specified.(y) But a mark of double postage having been paid on such letter is not of itself sufficient evidence that the letter contained an enclosure.(z) If a libellous letter is sent by the post, addressed to a party at a place out of the county in which the venue is laid in an indictment for the libel, yet, if it were first received by him within that county, it is a sufficient publication to support the indictment.(a) Owing to the signature to a libel is no evidence in *what county it was signed. This was held in the celebrated case of [*367 the Seven Bishops; but additional evidence being afterwards given that the bishops applied to the Lord President of the Council about delivering a petition to the King, and that they were admitted to the King for that purpose in Middlesex, the case was left to the jury.(b) It has been held to be sufficient to prove a defendant

(u) *Rex v. Burdett*, 4 B. & A. 95 (6 E. C. L. R.).

(v) *Ibid.*, and *MS. Bayley, J.*

(w) *Rex v. Burdett*, 4 B. & A. 95 (6 E. C. L. R.).

(x) *Rex v. Watson*, 1 Campb. 215; Lord Ellenborough, C. J., said the postmark might have been forged.

(y) *Rex v. Plumer*, Hil. T. 1824, M.S., Bayley, J., and R. & R. 264; *Rex v. Johnson*, 7 East 65; 2 Stark. Evid. 456, and *Fletcher v. Braddyll*, note (g), *ibid.*

(z) *Rex v. Plumer*, *ante*, note (y). Some person who paid or received the postage should be called.

(a) *Rex v. Watson*, 1 Campb. 215; and see *Rex v. Middleton*, 1 Str. 79. In the case of *Rex v. Johnson*, 7 East 65, the publisher of a public register received an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom letters should be directed, to which an answer was returned in the register, after which he received two letters in the same handwriting directed as mentioned, and having the Irish post-mark on the envelopes, which two letters were proved to be in the handwriting of the defendant, the previous letter having been destroyed, it was held that this was a sufficient ground for the Court to have the letters read; and the letters themselves containing expressions of the writer, indicative of his having sent them to the publisher of the register in Middlesex for the purpose of publication, the whole was evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex.

(b) *Case of Seven Bishops*, 12 St. Tri. 183.

to have *published* a libel without proving him to have *composed* it, upon a count in an information charging him with having "composed, printed, and published" it.(c) So if the defendant is charged by a count in an indictment with having "composed, *printed*, and published" a libel, if the evidence be that he only composed and published it, he may be found guilty of the composing and publishing, and acquitted of the printing.(d) Or he may be found guilty of the printing only, upon an indictment for printing and publishing, if the evidence shows him to have assisted in the printing, and to have had nothing to do with the publishing.(e)

If the libel be in a *foreign language*, as it is necessary that it should be set forth in the indictment in the original language, and also in an English translation, it will be necessary to prove the translation to be correct. Thus upon the trial of an information against the defendant for a libel in the French language on Napoleon Buonaparte, after the witness had proved the purchase of some copies of the book from a certain bookseller, and the bookseller had proved that the defendant was the publisher and had employed him to dispose of the copies on his account, and that he had accounted for them; an interpreter was called, who swore that he understood the French language, and that the translation was correct. The interpreter then read the whole of that which was charged to be a libel in the original; and then the translation was read by the clerk at Nisi Prius.(f)

Where an information for libel stated that the prosecutor had received certain anonymous letters, and that the defendant published a libellous placard of and concerning those letters, and the placard asked, "Were you not warned that your character was at stake?" and the prosecutor stated that he should not have understood the meaning of the placard if he had not also seen the letters, and that he understood the passage in the placard to allude to the letters, it was held that the letters were admissible without proving who wrote or sent them, as the placard referred to them, and would not be intelligible without them, and that a defendant, *who refers to other papers in his publication, must submit to have them
*368] read as explanatory of such publication.(g)

Depositions taken before a magistrate were not evidence upon a trial for a libel, under the 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10.(h) which extended only to cases of felony.(i) But as the 11 & 12 Vict. c. 42, extends to misdemeanors, it should seem that such depositions would now be evidence. A *Gazette* is evidence to prove an averment in an information for a libel, "that divers addresses, &c., had been presented to his Majesty by divers of his loving subjects.(k) The *King's proclamation*, reciting that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, has been held admissible evidence to prove an introductory averment, in an information for a libel, that divers acts of outrage had been committed in those parts.(l) And a *preamble* to an Act of Parliament, reciting the existence of such outrages, and making provision against them, was also held to be admissible for the same purpose.(m)

The criminal intention of the defendant will be a matter of indifference from the nature of the publication. In order to constitute a libel the mind must be in fault, and show a malicious intention to defame; for, if published inadvertently, it will not be a libel; but where a libellous publication appears unexplained by any evidence, the jury should judge from the overt act; and, where the publication contains a charge slanderous in its nature, should from thence infer that the intention

(c) *Rex v. Hunt*, 2 Campb. 583.

(d) *Rex v. Williams*, 2 Campb. 646, Lawrence, J., said, "There is certainly no proof that the defendant *printed* the libel in question; but he may be acquitted of the printing, and found guilty of the composing and publishing. His delivering the libel in his own handwriting to the printer is abundant evidence of the latter offence." A verdict was accordingly found and recorded of "Guilty, except as to printing the libel."

(e) *Rex v. Knell*, 1 Barnard 305.

(f) *Rex v. Peltier*, Selw. N. P. 1048.

(g) *Rex v. Slaney*, 5 C. & P. 213 (24 E. C. L. R.), Lord Tenterden, C. J.

(h) Repealed by 7 Geo. 4, c. 64, s. 33.

(i) *Rex v. Paine*, 5 Mod. 163.

(l) *Rex v. Sutton*, 4 M. & S. 532.

(k) *Rex v. Holt*, 5 T. R. 436.

(m) *Id.* Ibid.

was malicious.(n) It is a general rule that an act unlawful in itself, and injurious to another, is considered both in law and reason to be done *malò animo* towards the person injured; and this is all that is meant by a charge of malice in a declaration for libel, which is introduced rather to exclude the supposition that the publication may have been made on some innocent occasion than for any other purpose.(o)¹ The intention may be collected from the libel, unless the mode of publication, or other circumstances, explain it: and the publisher must be presumed to intend what the publication is likely to produce; so that if it is likely to excite sedition, he must be presumed to have intended that it should have that effect.(p) Publishing what is a libel without excuse is indictable, though the publisher be free from what in common parlance is called malice; for defaming wilfully without excuse is in law malicious. And even if it could be an excuse, that the publisher held what he published to be true, it is not so if he professes to publish it *from authority. A newspaper contained this paragraph: "the malady [*369 under which his Majesty labors is of an alarming nature (meaning insanity); it is from authority we speak." At the trial of the indictment for this publication, the jury asked if malicious intention were necessary to constitute a libel; to which Abbott, C. J., answered, that a man must have intended to do what his act was calculated to effect; and the jury found the defendant guilty. Upon a motion for a new trial it was admitted that the paragraph was libellous, but it was urged that malice was essential to make the defendant criminal; that he believed the King to have been so afflicted, and that the answer to the question by the jury was incorrect. But the Court thought otherwise, as the defendant must know if he spoke from authority, and could have proved it: and if malice were a question of fact, a man must be presumed to have intended to produce the effect which his act will naturally produce; and libelling without excuse is legal malice.(q) A person who publishes matter injurious to the character of another must be considered, in point of law, to have intended the consequences resulting from that act,(r) for every man must be presumed to intend the natural and ordinary consequences of his own act.(s) The Judge, therefore, ought not to leave it as a question to the jury, whether the defendant intended to injure the person libelled, but whether the tendency of the publication was injurious to such person.(t) In some cases, however, the paper or other matter may be libellous only with reference to circumstances which should be laid before the jury by evidence.

In order to show the existence of actual malice in the mind of the writer of a libel, other libels, whether written previously or subsequently, are admissible in evidence.(u) But where a considerable interval has elapsed between the publication of the libel complained of and subsequent statements offered as evidence of malice, the judge ought to direct the jury to consider whether these statements

(n) By Lord Kenyon, C. J., in *Rex v. Lord Abingdon*, 1 Esp. 228. And see *Rex v. Topham*, 4 T. R. 127, and *Rex v. Woodfall*, 5 Burr. 2667. In a case of an action for a libel contained in the "Statesman" newspaper, subsequent publications by the defendant in the "Statesman" newspaper were tendered in evidence to show *quo animo* the defendant published the paragraph in question. Lord Ellenborough said, "No doubt they would be admissible in the case of an indictment; and so they would here show the intention of the party, if it were at all equivocal; but if they be not admitted for that purpose, they certainly are not admissible for the purpose of enhancing the damages." *Stuart v. Lovel*, 2 Stark R. 93 (3 E. C. L. R.).

(o) Per Lord Tenterden, C. J., *Duncan v. Thwaites*, 3 B. & C. 584, 585 (10 E. C. L. R.).

(p) *Rex v. Burdett*, 4 B. & A. 95 (6 E. C. L. R.); *Reg. v. Lovett*, 9 C. & P. 462 (38 E. C. L. R.), *Littledale, J.*

(q) *Rex v. Harvey*, 2 B. & C. 257 (9 E. C. L. R.).

(r) Per Lord Tenterden, C. J., *Fisher v. Clement*, 10 B. & C. 472 (21 E. C. L. R.).

(s) Per Lord Tenterden, C. J., *Haire v. Wilson*, 9 B. & C. 643 (17 E. C. L. R.); 4 M. & R. 605.

(t) *Haire v. Wilson*, *supra*.

(u) *Pearson v. Lemaitre*, 5 M. & G. 700; *Darby v. Ouseley*, 1 H. & N. 1.

¹ Malice in the publisher of a libel does not imply personal ill-will towards the person libelled: *Comm. v. Benner*, 9 Metc. 410.

may not refer to something which happened subsequently to the libel, so as not to show malice at the time of the publication of the libel.^(v) Where therefore the House of Lords asked the judges "in an action for libel, when the plea of the general issue is pleaded, and also a plea under the 6 & 7 Vict. c. 96, s. 1, denying actual malice, and stating the publication of an apology set forth in the plea, is it admissible upon a trial for the plaintiff to give evidence of other publications by the defendant (some of them more than six years before the publication complained of) of and concerning the plaintiff, in order to prove malice against the defendant?" the judges answered, "We are all of opinion that, under such a plea, the publication of the previous libels on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff. A long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place *through carelessness or inadvertence; *370] and the more the evidence approaches to the proof of a systematic practice, the more convincing it is. The circumstance that the other libels are more or less frequent, or more or less remote from the time of the publication of that in question, merely affects the weight, not the admissibility of the evidence." And the House of Lords held accordingly.^(w)

Where an information for libel alleged that a person unknown murdered E. Grimwood, and that one Hubbard had been arrested on the charge of committing the murder and discharged, and the libel set out spoke of "the acquittal of Hubbard for the murder of E. Grimwood;" it was held that the inducement was proved by evidence that a person had been murdered, and that Hubbard had been charged with the murder and afterwards discharged, and that at the inquest held on the body witnesses called the deceased by the name of E. Grimwood, and that this last fact might be proved by the coroner, and that he might for this purpose use an inquisition drawn up on paper.^(x)

Where a declaration for libel set out the following passage: "We would suggest to the ex-Duke of Brunswick the propriety of withdrawing into his own *natural* and sinister obscurity" (meaning thereby to insinuate that the plaintiff was guilty of unnatural practices), Lord Campbell, C. J., refused to permit a witness to be asked if he had read the libel, and what he understood by the word "*natural*" printed in italics, as it was for the jury to form their own opinion as to what was meant by the word so printed.^(y)

In an action for a libel it appeared that the plaintiff, an attorney, was employed by one Nash to bring an action against an executor; and that the defendant, who was employed to adjust the executor's accounts, finding that an action was about to be commenced against the executor, wrote a letter to Nash blaming him for allowing the plaintiff to sue, and containing this passage, "If you will be misled by an attorney, who only considers his own interest, you will have to repent it; you may think when you have once ordered your attorney to write to Mr. G., he would not do any more without your further orders; but if you once set him about it, he will go any length without further orders." And it was held that the question whether this letter applied to the plaintiff individually, or to the profession at large, was properly left to the jury.^(z)

The evidence for the defence will now depend upon the defendant's pleas; if he plead that the libellous matter is true, and that it was published for the public benefit, it will lie upon him to prove these facts; but if he plead not guilty only, then the evidence which can be adduced on his behalf at the trial will in general be confined to a very narrow compass. There may, however, be cases of a publication in point of law, where no criminal intention can be imputed to the party;

(v) *Hemmings v. Gasson*, E. B. & E. 346 (96 E. C. L. R.).

(w) *Barrett v. Long*, 3 H. L. C. 395.

(x) *Reg. v. Gregory*, 8 Q. B. 508 (55 E. C. L. R.).

(y) *Duke of Brunswick v. Harmer*, 3 C. & K. 10.

(z) *Godson v. Home*, 3 Moore 223. And it seems that in this case if the point had been made at the trial whether this was a confidential communication or not, such point would not necessarily have been left to the jury.

as where a person *delivers a letter without knowing its contents, or delivers [371 one paper instead of another; (a) and evidence to such effect may be produced. Where, therefore, an action was brought against the porter of a coach for a libel contained in a hand-bill, which he had delivered tied up in a paper parcel, evidence was admitted that he delivered the parcel in the course of his business without any knowledge of its contents. (b) But it is not competent to the defendant to prove that a paper similar to that, for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it. (c) It was held, in a case where the supposed libel was contained in a newspaper, that the defendant had a right to have read in evidence any extract from the same paper, connected with the subject of the passage charged as libellous, although disjointed from it by extraneous matter, and printed in a different character. (d) Though the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury, yet if he conducts his defence himself, and any point of law arises which he professes himself unable to argue, the Court will hear this argued by his counsel. (e)

If a libel imputes to a man a triable offence, proof of the truth of such imputation is inadmissible [without a plea of justification,] for it would be trying the question behind the man's back, and creating a prejudice upon it. Where a libel imputed murder to certain soldiers, evidence was offered of the truth of such imputation, and rejected: and the Court of King's Bench were unanimous that such evidence was rightly rejected; for the persons charged might afterwards come to be tried, and might be prejudiced by the previous inquiry. (f)

Where a libel stated that there was a riot at Carmarthen, and that a person fired a pistol at an assemblage of persons, and it was proposed to prove the truth of these facts in order to enable the jury to decide whether the remarks in the libel were not within the limits of free discussion, it was held that the evidence was inadmissible, for the jury were to judge upon the examination of the libel itself. (g)

Where an information for a libel states that certain transactions took place, and that the libel was published of and concerning them, and then sets out the libel as referring to them, and general evidence is given in proof of such transactions on the part of the prosecution, the defendant cannot, therefore, give evidence of the particular nature of those transactions so as to bring into issue the truth or falsehood of the libel. But if such evidence were adduced, *bonâ fide*, to show that the transactions referred to in the alleged libel are not the same with those which the information supposes it to have had in view, it is admissible. (h)

*It had been held in many cases, that, on trials for libels, the facts of [372 writing, printing, or publishing, and the truth of the innuendos inserted in the proceedings, were the only matters to be submitted to the consideration of the jury: but the justice of such doctrine being questioned and ably arraigned, (i) the 32 Geo. 3, c. 60, was passed, sec. 1 of which enacts "that on every such trial, the jury sworn to try the issue may give a general verdict of guilty or not guilty, upon the whole matter put in issue upon such indictment or information; and shall not be required or directed, by the Court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty, merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information." By sec. 2, "the Court, or judge before whom such indictment or information shall

(a) By Lord Kenyon, C. J., in *Rex v. Topham*, 4 T. R. 127, 128; *Rex v. Nutt*, Fitz. 47. And see *ante*, p. 248, *et seq.*

(b) *Day v. Bream*, 2 M. & Rob. 54. Patteson, J., who said "*primâ facie* he was answerable, he had in fact delivered and put into publication the libel complained of, and was therefore called upon to show his ignorance of the contents."

(c) *Rex v. Holt*, 5 T. R. 436.

(d) *Rex v. Lambert*, 2 Campb. 398.

(e) *Rex v. White*, 3 Campb. 98.

(f) *Rex v. Burdett*, 4 B. & A. 95 (6 E. C. L. R.).

(g) *Rex v. Brigstock*, 6 C. & P. 184 (25 E. C. L. R.), Patteson, J.

(h) *Rex v. Grant*, 5 B. & Ad. 1081 (27 E. C. L. R.).

(i) See the celebrated speeches of Mr. Erskine, in the case of the Dean of St. Asaph, *Ridgway's Col.*, pp. 234, 264, vol. 1.

be tried, shall according to their or his discretion, give their or his opinion and directions to the jury, on the matter in issue between the King and the defendant or defendants, in like manner as in other criminal cases.”(k)

In criminal cases the judge is to define the crime, and the jury are to find whether the party has committed that offence; this Act made it the same in cases of libel, the practice having been otherwise before.(l) It has been the course for a long time for a judge in cases of libel, as in other cases of a criminal nature, first to give a legal definition of the offence, and then to leave it to the jury to say, whether the facts necessary to constitute that offence are proved to their satisfaction; and that, whether the libel is the subject of a criminal prosecution or civil action. Whether the particular publication, the subject of inquiry, is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a question upon which a jury is to exercise their judgment, and pronounce their opinion, as a question of fact. The judge, as a matter of advice to them in deciding that question, may give his own opinion as to the nature of the publication, but is not bound to do so.(m)¹

It appears to have been considered that the judge may tell the jury that they are to take the law from him, unless they are satisfied that he is wrong.(n)

The judgment in cases of libel at common law is in the discretion of the Court, as in most other cases of misdemeanors; and usually consists of fine, imprisonment, and the finding sureties to keep the peace.(o) In some cases prior to the 56 Geo. 3, c. 138, the offender was also sentenced to the pillory. Judgment was given on *373] each of four counts of an information that the defendant be imprisoned on the first count “for the space of two months now *next ensuing;” on the second count, “for the further space of two months, to be computed from and after the end and expiration of his imprisonment” for the offence mentioned in the first count; on the third count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the second count; and on the fourth count, for the further space of two months, to be computed in like manner from the end of the imprisonment on the third count. The third count was adjudged on error to be insufficient: but it was held, that the sentence on the fourth count was not thereby invalidated, and that the imprisonment on it was to be computed from the end of the imprisonment on the second count.(p)

In the case of a blasphemous or seditious libel, the 60 Geo. 3, & 1 Geo. 4, c. 8, s. 4, made a second offence punishable by banishment from the King’s dominions, or such punishment as might be inflicted in cases of high misdemeanor; but the 11 Geo. 4 & 1 Will. 4, c. 73, s. 1, repealed “so much and such parts of that Act as relate to the sentence of banishment for the second offence;” consequently the common law punishment alone remains.(q)

(k) Sec. 3 provides that the jury may find a special verdict, in their discretion, as in other criminal cases. And sec. 4, that defendants may move in arrest of judgment as before the passing of the Act.

(l) Per Parke, B., *Parmiter v. Coupland*, 6 M. & W. 105.

(m) *Parmiter v. Coupland*, *supra*; *Baylis v. Lawrence*, 11 A. & E. 920 (39 E. C. L. R.); *Paris v. Levy*, 9 C. B. (N. S.) 342 (99 E. C. L. R.).

(n) *Rex v. Burdett*, 4 B. & A. 95 (6 E. C. L. R.).

(o) 1 Hawk. P. C. c. 73, s. 21; Bac. Abr. tit. *Libel* (C.); *Rex v. Middleton*, Fort. 201; *Reg. v. Dunn*, 12 Q. B. 1026 (64 E. C. L. R.). As to the punishment of leasing-making sedition and blasphemy in Scotland, see 6 Geo. 4, c. 47.

(p) *Gregory v. Reg.* 15 Q. B. 974 (69 E. C. L. R.).

(q) A certificate of every indictment and conviction of every offender convicted of having composed, &c., any blasphemous or seditious libel, is, by sec. 2, to be given by the officer having the custody of the records, upon the request of the prosecutor on his Majesty’s behalf, to the justices of assize, &c., where such offender shall be indicted for any second offence, and is to be sufficient proof of the conviction of such offender. And in all cases in which any verdict or judgment by default shall be had against any person

¹ In an indictment for a libel, the indictment must set forth matter on its face libellous in which case the court is to judge whether it be so or not, or it must aver that the matter charged, though not on its face libellous, was intended in fact to be so, and the question is to be submitted to a jury: *State v. White*, 6 Ired. 418.

Most important alterations have been made in the law of libel, since the last edition, by Lord Campbell's Act, and it has been thought best to insert it, and the decisions upon it, in this place. By that Act, (r) 6 & 7 Vict. c. 96, s. 3, [*374] "If any person shall publish or threaten to publish any libel upon any other person, or shall directly or indirectly threaten to print or publish, or shall directly or indirectly propose to abstain from printing or publishing, or shall directly or indirectly offer to prevent the printing or publishing, of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labor, in the common gaol or house of correction, for any term not exceeding three years: provided always that nothing herein contained shall in any manner alter or affect any law now in force in respect of the sending or delivery of threatening letters or writings."

Sec. 4. "If any person shall maliciously publish any defamatory libel knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction for any term not exceeding two years, and to pay such fine as the Court shall award."

Sec. 5. "If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment or both, as the Court may award, such imprisonment not to exceed the term of one year."

Sec. 6. "On the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged

for publishing any blasphemous or seditious libel, the judge or court may make an order for the seizure and carrying away and detaining all copies of the libel in the possession of the party, or of any other person named in the order for his use. See secs. 1, 2, and also sec. 3, as to Scotland. Secs. 8 and 9 provide for the limitation of actions brought for anything done in the execution of the Act. By sec. 10 the punishment of persons convicted of libel in Scotland is not to be altered.

(r) Sec. 1, "for the better protection of private character, and for more effectually securing the liberty of the press, and for better preventing abuses in exercising the said liberty," enacts, "that in any action for defamation it shall be lawful for the defendant (after notice in writing of his intention so to do, duly given to the plaintiff at the time of filing or delivering the plea in such action), to give in evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case the action shall have been commenced before there was an opportunity of making or offering such apology."

Sec. 2. "In an action for a libel contained in any public newspaper or other periodical publication it shall be competent to the defendant to plead that such libel was inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication a full apology for the said libel, or, if the newspaper or periodical publication in which the said libel appeared should be ordinarily published at intervals exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action; and that every such defendant shall upon filing such plea be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel, and such payment into court shall be of the same effect and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court under an Act passed in the session of Parliament held in the fourth year of his late Majesty, intituled 'An Act for the further Amendment of the Law and the better Advancement of Justice;' and that to such plea to such action it shall be competent to the plaintiff to reply generally, denying the whole of such plea." By the 8 & 9 Vict. c. 75, s. 2, the defendant is to pay money into court when the plea is filed; and see 15 & 16 Vict. c. 76, s. 70.

as a defence to such indictment or information it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published; to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such indictment or information it shall be competent to the Court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information shall in no case be inquired into without such plea of justification: provided also, that, in addition to such plea, it shall be competent to the defendant to plead a plea of not guilty: provided also, that nothing in this Act contained shall take away or prejudice any defence under *375] the plea of not guilty which it is now competent to *the defendant to make under such plea to any action or indictment or information for defamatory words or libel."

Sec. 7. "Whosoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

Sec. 8. "In the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the Court before which the said indictment or information is tried."

Sec. 9. "Wherever throughout this Act, in describing the plaintiff or the defendant, or the party affected or intended to be affected by the offence, words are used importing the singular number or the masculine gender only, yet they shall be understood to include several persons as well as one person, and females as well as males, unless when the nature of the provision or the context of the Act shall exclude such construction."

The prisoner was indicted in various counts for publishing, or threatening to publish, or to abstain from publishing, a certain matter, or a false and scandalous libel with intent to extort money from one W. Gee, and in other counts for publishing a certain false and scandalous libel; every count set out *in hæc verba* the words published. One of the publications was, "W. Gee, Solicitor, Bishop Stortford. To be sold by auction, if not previously disposed of by private contract, a debt the above, amounting to £3197, due upon partnership and mortgage transaction. The other was similar, but stated the amount to be £3900. Bramwell, B., was of opinion that these publications were not libellous, as each was a mere offer on face of it to sell an alleged debt, which it did not necessarily imply an inability to pay, and did not, on the evidence, appear to be false. But he left the case to jury, telling them what the law in his opinion was, and leaving them to apply it. Bramwell, B., also held that, assuming the intent to extort money were proved, it was not necessary that the matter threatened to be published should be libellous as the 6 & 7 Vict. c. 96, s. 3, has the words "any matter." On the evidence Bramwell, B., was of opinion that there was no intent to extort money, but only to extort accounts. (rr)

Where one count charged the defendants with offering to prevent the publishing, and another with threatening to publish certain matters of the prosecutor with intent to extort money, and the defendants appeared to have attempted to obtain money from the prosecutor by leading him to believe that an information for an offence relating to the post-horse duties would be laid against him, and that they would prevent it if he paid them a sum of money, it was held that the evidence did not support the counts.^(s)

It has been held in Ireland that to an indictment for publishing in a newspaper "a certain false, defamatory, malicious and seditious libel" concerning Her Majesty's Government and the Parliament of the United Kingdom, with intent to create disaffection and hatred to Her Majesty's Government and the Parliament, a special plea of justification cannot be pleaded under the 6 & 7 Vict. c. 96, s. 6.^(t)

Where to a criminal information for a libel the defendant pleaded a justification, alleging that the imputations contained in the libel were true, it was held that it was not competent to the defendant to prove that imputations identical with those in the libel had been previously published in a book.^(u)

Where a justification is pleaded under the 6 & 7 Vict. c. 96, s. 6, to an information for a defamatory libel, and the libel contains several distinct imputations, and the plea alleges the truth of *all, and is traversed generally, if the evidence fail as to any one of them the verdict will be entered generally against the defendant. Where, therefore, upon the trial of such an issue upon such a plea, evidence was offered in support of some only of the imputations, and the jury found that only one of the imputations upon which evidence was offered was proved, the verdict was entered for the Crown generally; for all authorities agree that there can be no partial finding for a defendant on the ground that a justification is partially established.^(v)

By the express enactment that, wherever there is a conviction after such a plea of justification "the Court, in pronouncing sentence," shall "consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove and disprove the same," the Court is to consider the evidence on the one side and the other, and to form their own conclusion whether it aggravates or mitigates the guilt of the defendant, and they are to apportion the punishment accordingly. The evidence, as it appears on the notes of the judge who presided at the trial, comes in place of affidavits in aggravation and mitigation of punishment when sentence is to be pronounced, and by that the sentence is to be regulated, and not by any declaration of the jury as to the credit which they think ought to be given to the witnesses.^(w)

In such a case the defendant may, in mitigation of punishment, show by affidavit that after the publication, but before pleading, information was given to him which, if true, would have supported an allegation in the plea, evidence having been given at the trial to account for the nonproduction of proof, but no evidence in support of the allegation itself. But where a document, which would have supported the plea, has been rejected at the trial for want of authentication by the place of custody or otherwise, its contents are not admissible in confirmation of the defendant's own affidavit that such a document was communicated to him before pleading.^(x)

If a libel imputes to a man a triable offence, affidavits of its truth cannot be given in evidence in mitigation of punishment. But if a libel imports to be founded on certain newspaper reports, affidavits of the existence of such newspaper reports are admissible; and in such case affidavits of the falsehood of such reports cannot be received in aggravation. A libel imported to be founded on certain newspaper reports, and upon the foundation of those reports charged certain troops with acts of murder: after conviction the defendant offered affidavits that the newspapers did contain those reports, and also other affidavits that the facts were true. The former affidavits were received, because they explained the situation in which the

(s) *Reg. v. Yates*, 6 Cox C. C. 441.

(t) *Reg. v. Duffy*, 2 Cox C. C. 45.

(u) *Reg. v. Newman*, 1 E. & B. 268 (72 E. C. L. R.). See *ante*, p. 371.

(v) *Reg. v. Newman*, 1 E. & B. 558 (72 E. C. L. R.).

(w) *Ibid.*

(x) *Ibid.*

defendant stood at the time he wrote the libel, and showed the impression under which he wrote; but the latter were rejected, because the receiving them might deprive of a fair trial persons who might afterwards be tried for the murders; and if murders were committed, the proper course was to prosecute and bring to a fair trial, not to libel and create an unfair prejudice.(y)

*377] *Where an indictment for a libel on the governor of a parish workhouse was preferred by the direction and carried on at the expense of the select vestry of the parish, and the defendant having removed it into the King's Bench by certiorari was convicted, it was held that the party libelled was not the "party grieved" within the 5 & 6 Will. & M. c. 11, s. 3, and, therefore, was not entitled to costs.(z)

On a criminal information for libel the defendant, if he obtain a verdict, is entitled to costs under the 6 & 7 Vict. c. 96, s. 8, though he has not pleaded a special plea under sec 6; and the judge cannot deprive him of costs by a certificate. the provision in the 4 & 5 Will. & M. c. 18, s. 2, on this head being superseded by the later Act.(a) The Court of Queen's Bench has no jurisdiction to direct the clerk of assize to review his taxation of costs (under the 6 & 7 Vict. c. 96, s. 8) of an indictment for libel tried on the Crown side under a commission of oyer and terminer. But, perhaps, one of the commissioners under that commission might do so, before that commission was superseded.(b)

*378]

*CHAPTER THE TWENTY-FIFTH.

OF RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES.

THE distinction between these offences appears to be, that a *riot* is a tumultuous meeting of persons upon some purpose which they *actually execute* with violence; a *rout* is a similar meeting upon a purpose which, if executed, would make them rioters, and which they *actually make a motion to execute*; and an *unlawful assembly* is a *mere assembly* of persons upon a purpose which, if executed, would make them rioters, but which they *do not execute, nor make any motion to execute*.(a) These offences may be treated of more at large in the order in which they have been mentioned.

I. A riot is described to be a tumultuous disturbance of the peace by *three persons or more*, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same, in violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.(b)¹

(y) *Rex v. Burdett*, 4 B. & A. 314 (6 E. C. L. R.).

(z) *Rex v. Dewhurst*, 5 B. & Ad. 405 (27 E. C. L. R.). See *Reg. v. Hawdon*, 3 P. D. 44.

(a) *Reg. v. Latimer*, 15 Q. B. 1077 (69 E. C. L. R.).

(b) *Reg. v. Newhouse*, 1 Bail. C. R. 129.

(a) 1 Hawk. P. C. c. 65, ss. 1, 8, 9; 3 Inst. 176; 4 Blac. Com. 146.

(b) 1 Hawk. P. C. c. 65, s. 1. *Three persons or more* is the correct description of the number of persons necessary to constitute a riotous meeting; but it should be observed that in Hawkins (c. 65, ss. 2, 5, 7) the words "more than three persons," are three times over inserted instead of "three persons or more;" which in Burn's Just. tit. *Riot, sec.* is remarked as an instance that, in a variety of matter, it is impossible for the mind of man to be always equally attentive. The description of riot stated in the text, and taken from the work of Mr. Serjeant Hawkins, is submitted as that which would probably be deemed most correct at the present time. It should be observed, however, that riot has been described differently by high authority. In *Reg. v. Soley* and others, 11 Mod. 3

¹ *Comm. v. Runnells*, 10 Mass. 518; *Pennsylvania v. Crips*, Addis. 277; *Resp. v. McGomery*, 1 Yeates 419; *Pennsylvania v. Craig*, Addis. 191; *Pennsylvania v. Bugher*, 1 W.

In some cases, in which the law authorizes force, it is not only lawful, but also commendable, to make use of it; as for a sheriff or constable, or perhaps even for a private person, to assemble a competent number of people in order with force to suppress rebels, or enemies, or rioters; and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *posse*, in order to remove a force in making an entry into, or detaining of, lands. Also, it seems to be the duty of a sheriff, or other minister of justice, having the execution of the King's writs, and being resisted in endeavoring to execute them, to raise such a power as may effectually enable them to overpower any such resistance: yet it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find a resistance; and it is certain *that they are highly punishable for using any needless outrage or [379 violence.(c)

It seems to be agreed, that the injury or grievance complained of, and intended to be revenged or remedied by a riotous assembly, must relate to some *private quarrel* only; as the enclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons, in no way concerning the public. For the proceedings of a riotous assembly on a public or general account, as to redress grievances, pull down all inclosures, or to reform religion, and also resisting the King's forces, if sent to keep the peace, may amount to overt acts of high treason by levying war against the King.(d)

It seems to be clearly agreed that in every riot there must be some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the show of armor, threatening speeches, or turbulent gestures; for every such offence must be laid to be done in *terrorem populi*.(e) But it is not necessary, in order to constitute this crime, that personal violence should have been committed.(f) If sufficient force be used to terrify a single person, it is enough, though no other persons are near enough to be within reach of the alarm. Four persons went to a cottage, in which was one old man; one of them began to knock down the end of the cottage with an axe, and knocked part of the woodwork against the old man; he caught the old man by the collar, and said, "Come, you must go out of the house," and he did go out, and the prisoners pulled the house to the ground, except the chimney; the jury were told that if such force was used by the four prisoners as to terrify the old man, they might find that there was a riot, and this direction was held right.(g)

Upon these principles, assemblies at wakes, or other festival times, or meetings for the exercise of common sports or diversions, as bull-baiting, wrestling, and

Holt, C. J., said, "The books are obscure in the definition of riots. I take it, it is not necessary to say they assembled for that purpose, but there must be an unlawful assembly; and as to what act will make a riot, or trespass, such an act as will make a trespass will make a riot. If a number of men assemble with arms, in *terrorem populi*, though no act is done, it is a riot. If three come out of an alehouse, and go armed, it is a riot."

(c) 1 Hawk. P. C. c. 65, s. 2; 19 Vin. Abr. tit. *Riots*, §c. (A.) 4.

(d) 4 Blac. Com. 147; 1 Hawk. P. C. c. 65, s. 6.

(e) 1 Hawk. P. C. c. 65, s. 5.

(f) Per Mansfield, C. J., in *Clifford v. Brandon*, 2 Campb. 369.

(g) *Reg. v. Phillips*, 2 M. C. C. 252; s. c. as *Reg. v. Langford*, C. & M. 602.

333; *State v. Bailey*, 3 Blackf. 209; *Terpin v. State*, 4 Ibid. 72; *State v. Connelly*, 3 Rich. 337; *Shouse v. Comm.*, 5 Barr 83; *State v. Slatcup*, 1 Ired. 30; *State v. Snow*, 18 Maine 346; *Williams v. State*, 9 Miss 270; *Scott v. United States*, 1 Morris 142; *State v. Renton*, 15 N. H. 169; *State v. Brook*, 1 Hill (S. C.) 362; *Comm. v. Berry*, 5 Gray 93; *Sloan v. State*, 9 Ind. 565; *Hardebeck v. State*, 10 Ibid 459; *State v. Russell*, 45 N. H. 83; *Comm. v. Gebney*, 2 Allen 150.

Persons assembled with intent to whip a man, or to have it done, are guilty of a riot though some other person inflict the blows: *Newby v. Territory*, 1 Oregon 163. Four persons, acting in concert, went at midnight in a frolic to the prosecutor's stable and shaved his horse's tail; and in so doing, made noise enough to arouse and alarm the family, held that they were indictable for a riot: *State v. Alexander*, 7 Rich. 5. It is not necessary that the act of the rioters should be in fulfilment of an unlawful purpose: *State v. Blair*, 13 Rich. (Law) 93.

such like, are not riotous.^(h) And upon the same ground also it seems to follow that it is possible for three persons or more to assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a man assemble a number of persons to carry away a piece of timber or other thing to which he claims a right, and which cannot be *380] carried away without a *number of persons, this will not of itself be a riot, if the number of persons are not more than are necessary for the purpose; and if there are no threatening words used, nor any other disturbance of the peace; even though another man has better right to the thing carried away, and the act therefore is wrong and unlawful.⁽ⁱ⁾ Where on an indictment for a riot it appeared that two men were fighting amidst a great crowd, and that some persons were aiding and assisting; but on some peace officers appearing the fight ceased, and the fighters quietly yielded to the officers: Alderson, B., held that this was not a riot.^(k) Much more may any person, in a peaceable manner, assemble a fit number of persons to do any lawful thing; as to remove any common nuisance, or any nuisance to his own house or land. And he may do this before any prejudice is received from the nuisance, and may also enter into another man's ground for the purpose. Thus, where a man having erected a wear across a common navigable river, divers persons assembled with spades and other instruments necessary for removing it, and dug a trench in the land of the man who made the wear in order to turn the water and the better to remove it, and thus removed the nuisance, it was holden not to be a forcible entry nor a riot.^(l)

But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful; from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful.^(m) And if in removing a nuisance the persons assembled use any threatening words (such as, they will do it though they die for it, or the like,) or in any other way behave in apparent disturbance of the peace, it seems to be a riot.⁽ⁿ⁾ So where on an indictment for riot it appeared that the defendants, two of whom were bail to an action for the prosecutor, put in by bail to the sheriff before the return of the writ, had forcibly entered his house, and taken him, in order to render him, Lord Tenterden, C. J., held that, as they were not justified in doing so, they must be convicted.^(o) If a large body of men assemble themselves together for the purpose of obtaining any particular end, and

(h) 1 Hawk. P. C. c. 65, s. 5. But see in 2 Chit. Crim. L. 494, an indictment said to have been drawn in the year 1797, by a very eminent pleader for the purpose of suppressing an ancient custom of kicking about foot-balls on a Shrove-Tuesday, at Kingston-upon-Thames. The first count is for riotously kicking about a foot-ball in the town of Kingston; and the second, for a common nuisance in kicking about a foot-ball in the said town. And in Sir Antony Ashley's case, 1 Roll. R. 109, Coke, C. J., said, that the *stage-players* might be indicted for a riot and unlawful assembly; and see Dalt. Just. c. 137, 6, (citing Roll. R.) that if such players, by their shows occasion an extraordinary and unusual concourse of people to see them act their tricks, this is an unlawful assembly and riot, for which they may be indicted and fined: 19 Vin. Abr. tit. *Riots*, &c. (A.) 8.

(i) 1 Hawk. P. C. c. 65, s. 5; Reg. v. Soley, 11 Mod. 117; Dalt. c. 137; Burn's Just. tit. *Riots*, s. 1.

(k) Reg. v. Hunt, 1 Cox C. C. 177. (l) Dalt. c. 137; Burn. tit. *Riot*, s. 1.

(m) 1 Hawk. P. C. c. 65, s. 7. The law will not suffer persons to seek redress of their private grievances by such dangerous disturbances of the public peace; but the justice of the quarrel in which such an assembly may have been engaged will be considered as a great mitigation of the offence. And per cur. in 12 Mod. 648, Anon., if one goes to assist his right *with force and violence*, he may be guilty of a riot.

(n) Dalt. c. 137. Burn's Just. tit. *Riot*, s. 1, where it is said, that if there is cause to remove any such nuisance, or to do any like act, it is safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools in order to remove it: and that such persons to their business only, without disturbance of the peace, or threatening speeches.

(o) Rex v. Hughes, M. & M. 178, note (a).

conduct themselves in a *turbulent manner, either accompanied with acts of violence, or with threats and intimidations calculated to excite the terror [381 and alarm of the Queen's subjects, this is in itself a riot, whether the end and object proposed be a just and legitimate one or not.(p)

But the violence and tumult must in some degree be premeditated. For if a number of persons, being met together at a fair, market, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it; because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention.(q) But if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous. As where it was held that, although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose makes a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual, or doing any injury to the house, they are guilty of a riot.(r)

Even though the parties may have assembled for an innocent purpose in the first instance, yet if they afterwards, upon a dispute happening to rise amongst them, form themselves into parties, with promises of mutual assistance, and then make an affray, it is said that they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming had been on such a design; and it seems to be clear that if, in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house, or enclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters; because their associating themselves together, for such a new purpose, is in no way extenuated by their having met at first upon another.(s)

If any person, seeing others actually engaged in a riot, joins himself to them and assists them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself to them with an intention of seconding them in the execution of their unlawful enterprise: and it would be endless, as well as superfluous, to *examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design.(t) And the law is that if any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter; for in this case all are principals.(u) It has been ruled, however, that if three or more, being lawfully assembled, quarrel, and the party fall on one of their own company, this is no riot; but that if it be on a stranger, the very moment the quarrel begins, they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in them that concur, so that it is a riot in them that act, and in no more.(v) The *inciting* persons to

(p) Per Tindal, C. J., in his charge to the Stafford grand jury, A. D. 1842, C. & M. 661.

(q) 1 Hawk. P. C. c. 65, s. 3.

(r) Clifford v. Brandon, 2 Campb. 358. See Gregory v. The Duke of Brunswick, 6 M. & G. 953 (46 E. C. L. R.); 3 C. B. 481 (54 E. C. L. R.); 1 C. & K. 24 (47 E. C. L. R.); Rex v. Leigh, Ann. Reg. for 1775, p. 117.

(s) 1 Hawk. P. C. c. 65, s. 3.

(t) Id. Ibid.

(u) By Mansfield, C. J. in Clifford v. Brandon, 2 Campb. 370. And see Rex v. Royce, 4 Burr. 2973, and the second and third resolutions in the Sissinghurst House case, 1 Hale 463; Reg. v. Sharpe, 3 Cox C. C. 288.

(v) 19 Vin. Abr. tit. *Riots*, §c. (A.) 15; Reg. v. Ellis, 2 Salk. 595.

assemble in a riotous manner appears also to have been considered as an indictable offence.^(w)¹

Concerning some acts done in a tumultuous and riotous manner, especial provision is made by particular statutes. By the 24 & 25 Vict. c. 97, s. 11, "If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, pull down, or destroy, any church, chapel, meeting-house, or other place of Divine worship, or any house stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast barn, granary, *shed, hovel, or fold*, or any building or erection used in *farming land*, or in carrying on any trade or manufacture, or any branch thereof, or any building other than such as are in this section before mentioned, belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or movable, prepared for or employed in any manufacture or in any branch thereof or any steam-engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."^(x)

*383] *Sec. 12. "If any persons, riotously and tumultuously assembled together to the disturbance of the public peace, shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of Divine worship, house, stable, coach-house, out-house, warehouse, office, shop, mill, malt-house, hop-oast barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, wagon-way, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor: provided that if upon the trial of any person for any felony in the last preceding section mentioned the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly."^(y)

This clause is new, and is intended to provide both for cases where there is no sufficient evidence of an intention to proceed to the total demolition of the house, &c., and also for cases where no such intent ever existed, provided there be a riot, and injury done, within the terms of the clause.

The latter part of the clause enables the jury, who try an indictment for any felony mentioned in the preceding section, to convict of the offence created by this clause if they are not satisfied that an offence within the preceding clause is satis-

(w) See a precedent, Cro. Circ. Comp. 420 (8th edit.), the first count of which is for inciting persons to assemble, and that in consequence of such incitement they did so; and the second count states the inciting, and omits the assembling in consequence of it. See a similar precedent in 2 Chit. Crim. L. 506, and the principles stated, *ante*, p. 83, *et seq.*

(x) This clause is taken from the 7 & 8 Geo. 4, c. 30, s. 8. There were similar enactments in the 23 & 24 Geo. 3, c. 20, ss. 7, 8 (1), and 27 Geo. 3, c. 15, s. 5 (1). As to the words "meeting house," &c., see the note to s. 1, *post*, vol. 2. As to the other words in *italics*, except "ventilating," see ss. 3 & 5, *post*, vol. 2. As to hard labor, &c., see *ante*, p. 4; and as to principals in the second degree and accessories, see *ante*, p. 5.

(y) As to procurers, aiders and abettors, see *ante*, p. 5; and as to hard labor, &c., see *ante*, p. 4.

¹ The instruction is erroneous, that "in riotous and tumultuous assemblies, all who are present and not actually assisting in the suppression in the first instance, are, in presumption of law participants, and that the obligation is cast upon a person so circumstanced to prove his non-interference." *State v. M'Bride*, 19 Mo. 239.

factorily proved. It is still necessary, however, with a view to the trial of cases under the preceding clause, to mention the decisions on the former clause in the 7 & 8 Geo. 4, c. 30, s. 8.

If rioters, after proceeding a certain length, leave off of their own accord before the act of demolition be completed, that is evidence from which a jury may infer that they did not intend to demolish the house.

A party of rioters came to a house about midnight, and in a riotous manner burst open the door, broke some of the furniture, all the windows, and one of the window frames, and then went away, there being nothing to hinder them from doing more damage; it was held that, although the breaking and damage done was a sufficient beginning to demolish the house, yet unless the jury were satisfied that the ultimate object was to destroy the house, and that, if they had carried their intentions into full effect, they would, in point of fact, have demolished it, it was not a beginning to demolish within the Act.^(z) So where a mob pursued a person to a public-house, where he took refuge, and the doors and windows were all secured, and the mob demanded that he should be given up to them, or they would pull the house down, and the front door and lower windows were beaten in, and the shutters and frames of some of them much broken, and part of the mob entered the house and did much damage to the furniture, *but in about [384 twenty minutes, being unable to find the person who had there taken refuge, and a rumor being spread that the mayor was coming, they went away; it was held that this offence was not within the Act; for the persons committing the outrage must have the intention of destroying the house, before they can be charged with a felonious beginning to demolish, and here they had no such intention, but their intention was to get possession of the person who had entered the house.^(a)

But if rioters are interrupted in the work of demolition by the police or any other force, that is evidence to show that they were compelled to desist from that which they had designed, and the jury may well infer that they had begun to demolish within the meaning of the Act. A party of coal-whippers having a feeling of ill-will to a coal-lumper, who paid less than the usual wages, created a mob, riotously went to the house where he kept his pay-table, cried out that they would murder him, threw stones, brickbats, &c., broke windows and partitions, and threw down part of a wall in a yard, and continued, after his escape, throwing stones at the house, till they were compelled to desist by the threats of the police; it was held that this case was distinguishable from *R. v. Thomas*, because the mob did not leave off voluntarily, but after the threats of the police, and that they might be convicted of beginning to demolish the house, though their principal object was to injure the lumper, provided it was also their object to demolish the house.^(b) The beginning to pull down means not simply a demolition of a part, but a part with an intent to demolish the whole. The prisoners were indicted for beginning to demolish a building used in carrying on a trade. It appeared that they began by breaking the windows and doors, and having afterwards entered the house, they set fire to the furniture, but no part of the house was burnt. Park, J., told the jury "the beginning to pull down means not simply a demolition of a part, but a part with an intent to demolish the whole. It is for you to say if the prisoners meant to stop where they did, and do no more; because if they did they are not guilty; but if they intended, when they broke the windows and doors, to go farther, and destroy the house, then they are guilty of a capital offence. If they had the full means of going farther, and were not interrupted, but left off of their own accord, it is evidence from which you may judge that they meant the work of demolition to stop where it did. If you think that they originally came there without intent to demolish, and the setting fire to the furniture was an afterthought, but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning to destroy the house. If they came originally without such intent, but had afterwards set fire to the house, then the offence would be arson.

^(z) *Rex v. Thomas*, MS. C. S. G. and 4 C. & P. 237 (19 E. C. L. R.), Littledale, J. See also *Reg. v. Howell*, 9 C. & P. 437 (38 E. C. L. R.).

^(a) *Rex v. Price*, 5 C. & P. 510 (24 E. C. L. R.), Tindal, C. J.

^(b) *Rex v. Batt*, 6 C. & P. 329 (25 E. C. L. R.), Gurney, B.

If you have doubts whether they originally came with a purpose to demolish, you may use the setting fire to the furniture under such circumstances, and in such manner, as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such *385] *intent, although they began to demolish in another manner.(c) Upon an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for riotously and tumultuously assembling together, and beginning to demolish a house, the jury could not convict unless they were satisfied that the prisoners intended to leave the house no house at all in fact; for if they intended to leave it still a house, though in a state however dilapidated, they were not guilty of the offence. To have left off the work of devastation without interruption would lead to the inference that the prisoners did not intend to destroy the house; but even if they were interrupted, the question still remained, what was their ultimate intention? If they had been some time at their work of ruin before they were interrupted, it was for the jury to say, looking to the nature of the things which they had destroyed, whether their purpose was to demolish the house itself.(d)

Although setting fire to a house is a substantive felony, yet if fire is made the means of attempting to destroy a house, it is as much a beginning to demolish as if any other mode of destruction were resorted to, and the indictment may be for that offence,(e) for it is impossible that there can be any greater element of destruction than fire. Whether, therefore, the intention of the parties be to demolish or destroy by pulling down the materials of a house, or by reducing a house to a useless state for habitation by the agency of fire, the offence is completely the same.(f)

If a person forms part of a riotous assembly at the time the act of demolition commences, or if he wilfully joins such riotous assembly, so as to coöperate with them whilst the act of demolition is going on, and before it is completed, in either case he comes within the description of the offence, although he may not have assisted with his own hand in the demolition of the building.(g) Where a house was demolished by rioters by means of fire, which was lighted before one o'clock in the night, and there was no evidence to show that the prisoner was present at the time when the house was set on fire, but it was proved that he was there between two and three o'clock whilst the house was burning, and whilst the mob, who set it on fire, were still there; it was held that the prisoner was properly convicted as a principal. For although it was possible, if this had been an indictment for burning the house, that the prisoner could not have been convicted as a principal, yet this was an offence under an enactment that made it a felony if persons riotously and tumultuously assembled together to the disturbance of the public peace, and when so assembled destroy a house; therefore it was not simply the fact of destroying a house by fire, but it was the combined fact of riotously assembling together and whilst the riot continued demolishing the house. Now to make a party guilty of that he must be shown to be one of those who were present at the offence, or he could not be aiding and abetting. But as it was not only the burning, but also the riotously assembling together, the whole of the prisoner's *conduct on that *386] day was left to the jury; and it was distinctly left to them that unless they were satisfied that the prisoner had by his language excited the mob to the act which was the subject matter of the inquiry, and afterwards been present at it, he was not guilty.(h)

Where on an indictment under the 7 & 8 Geo. 4, c. 30, s. 8, for feloniously demolishing a house, it appeared that some of the prisoners set fire to the house itself, and the others carried furniture out of the house and burnt it on the gravel walk in front of the house, the jury were directed that, in order to convict the latter, they must be satisfied they, being on the spot at the time, were taking such

(c) Ashton's case, 1 Lewin 296, Park, J.

(d) Reg. v. Adams, C. & M. 299 (41 E. C. L. R.), Coleridge, J.

(e) Reg. v. Simpson, C. & M. 669 (41 E. C. L. R.); Reg. v. Harris, C. & M. 661, Tindal, C. J., Parke, B., and Rolfe, B.

(f) Per Tindal, C. J., Reg. v. Harris, *supra*.

(g) Per Tindal, C. J., Bristol Special Commission, 5 C. & P. 265 (38 E. C. L. R.), *note*.

(h) Reg. v. Simpson, C. & M. 669 (41 E. C. L. R.), Tindal, C. J., Parke, B., and Rolfe, B.

steps in the transaction that they might be said to have encouraged and assisted, and by their acts to have aided and abetted, in the object and design of destroying the house.(i)

Upon an indictment on the 7 & 8 Geo. 4, c. 30, s. 8, for riotously and feloniously demolishing a house, it was a sufficient demolishing of the house if it were so far destroyed as to be no longer a house; and the fact that the rioters left the chimney standing made no difference.(k)

The 7 & 8 Geo. 4, c. 30, s. 8, not having given any definition of what should be a riot within the meaning of that enactment, the common law definition of a riot was resorted to, and in such a case, if *any one* of Her Majesty's subjects were terrified, this was a sufficient terror and alarm to substantiate that part of the charge.(l)

If persons riotously assembled and demolished a house, *really believing* that it was the property of one of them, and acted *bonâ fide* in the assertion of a supposed right, this was not a felonious demolition of the house within the 7 & 8 Geo. 4, c. 30, s. 8, even though there were a riot.(m)

In order to prove that there was a beginning to demolish the house, it must be proved that some part of the freehold was destroyed; it is not therefore sufficient to prove that the window-shutters were demolished.(n)

The 33 Geo. 3, c. 67, s. 1, reciting that seamen, keelmen, &c., had of late assembled themselves in great numbers, and had committed many acts of violence; and that such practices, if continued, might occasion great loss and damage to individuals, and injure the trade and navigation of the kingdom, enacts, "that if any seamen, keelmen, casters, ship-carpenters, or other persons, riotously assembled together to the number of three or more, shall unlawfully and with force prevent, hinder, or obstruct, the loading or unloading, sailing or navigating, of any ship, keel, or other vessel, or shall unlawfully and with force board, any ship, keel, or other vessel, with intent to prevent, hinder, or obstruct, the loading or unloading, or the sailing or navigating of such ship, keel, or other vessel, every seaman, keelman, caster, ship-carpenter, and other person" (being lawfully convicted of any of the offences aforesaid *upon any indictment found in any court of oyer and terminer, or general or quarter sessions of the peace for the county, [*387 division, district, &c., wherein the offence was committed), shall be committed either to the common gaol or to the house of correction for the same county, &c., there to continue and to be kept to hard labor for any term not exceeding twelve calendar months, nor less than six calendar months. By sec. 4, the Act shall not extend to any act, deed, &c., done in the service or by the authority of his Majesty. By sec. 7, offences committed on the high seas shall be triable in any session of oyer and terminer, &c., for the trial of offences committed on the high seas within the jurisdiction of the Admiralty. And by sec. 8, the prosecution for any of the said offences is to be commenced within twelve calendar months after the offence committed.(o)

Women are punishable as rioters; but infants under the age of discretion are not.(p)

II. By some books the notion of a *rout* is confined to such assemblies only as are occasioned by some grievance common to all the company; as the enclosure of land in which they all claim a right of common, &c. But, according to the general opinion, it seems to be a disturbance of the peace by persons assembling together with an intention to do a thing, which, if it be executed, will make them rioters, and actually making a motion towards the execution of their purpose. In fact, it generally agrees in all the particulars with a riot, except only in this, that it may

(i) Reg. v. Harris, C. & M. 661 (41 E. C. L. R.), Tindal, C. J., Parke, B., and Rolfe, B.

(k) Reg. v. Phillips, 2 M. C. C. 252; s. c. Reg. v. Langford, C. & M. 602.

(l) Ibid.

(m) Ibid.

(n) Reg. v. Howell, 9 C. & P. 437 (38 E. C. L. R.), Littledale, J.

(o) This statute was made perpetual by 41 Geo. 3, c. 19.

(p) 1 Hawk. P. C. c. 65, s. 14; *ante*, 6, *et seq.* and 39. But an infant above the age of discretion is punishable; and, though under the age of eighteen, need not appear by guardian, but may appear by attorney: Reg. v. Tanner, 2 Lord Raym. 1284.

be a complete offence without the execution of the intended enterprize (*g*) And it seems, by the recitals in several statutes, that if people assemble themselves and afterwards proceed, ride, go forth, or move by instigation of one or several conducting them, this is a *rout*; inasmuch as they move and proceed in rout and number. (*r*)

III. An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor making a motion towards its execution. Mr. Serjeant Hawkins, however thinks this much too narrow an opinion; and that any meeting of great numbers of people with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the King's subjects, seems properly to be called an *unlawful assembly*. As where great numbers complaining of a common grievance meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly. (*s*) So in recent cases it *388] has been ruled that an assembly of great numbers of persons, which *from its general appearance and accompanying circumstances is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful. (*t*) And it has been well laid down by a very learned judge, that "any meeting assembled under such circumstances as, according to the opinion of rational and firm men are likely to produce danger to the tranquillity and peace of the neighborhood is an unlawful assembly: and viewing this question, the jury should take into their consideration the way in which the meetings were held, the hour at which they met, and the language used by the persons assembled, and by those who addressed them; and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage." (*u*) And all persons who join an assembly of this kind, disregarding its probable effect and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties. (*v*)

The difference between a riot and unlawful assembly is this: if the parties assemble in a tumultuous manner, and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose which, if executed, would make them rioters, and having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly. (*w*)

An assembly of a man's friends for the defence of his person against those who threaten to beat him if he go to such a market, &c., is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. But an assembly of a man's friends in his own house, for the defence of the possession of it against such as threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his house, is indulged by law; for a man's house is

(*g*) 1 Hawk. P. C. c. 65, s. 8.

(*r*) 19 Vin. Abr. tit. *Riots*, §c. (A.) 2, referring to 18 Edw. 3, c. 1, 13 Hen. 4, c. ult., and 2 Hen. 5, c. 8.

(*s*) 1 Hawk. P. C. c. 65, s. 9. There may be an unlawful assembly if the people assemble themselves together for an ill purpose *contra pacem*, though they do nothing, Br. tit. *Riots*, pl. 4. Lord Coke speaks of an unlawful assembly as being when three or more assemble themselves together to commit a riot or rout, and do not do it: 3 Inst. 176.

(*t*) Per Bayley, J., in *Rex v. Hunt*, York Spring Assizes, 1820; and per Holroyd, J., in *Redford v. Bierley*, Lancaster Spring Assizes, 1822, 3 Stark. N. P. C. 76 (3 E. C. L. R.).

(*u*) *Reg. v. Vincent*, 9 C. & P. 91 (38 E. C. L. R.), Alderson, B. See *Reg. v. Neale*, 9 C. & P. 431 (38 E. C. L. R.), Littledale, J.

(*v*) Per Holroyd, J., *Redford v. Bierley*, *supra*.

(*w*) Per Patteson, J.; *Rex v. Birt*, 5 C. & P. 154 (24 E. C. L. R.).

looked upon as his castle.(x) He is not, however, to arm himself and assemble his friends in defence of his close.(y)

An assembly of persons to witness a prize fight is an unlawful assembly, and every one present and countenancing the fight is guilty of an offence.(z) Where sixteen persons, with their faces blackened, and armed with guns and sticks, met at a house at *night, intending to go out for the purpose of night poaching, [*389 Holroyd, J., held, that it was impossible that a meeting to go out with faces thus disguised, at night, and under such circumstances, could be other than an unlawful assembly.(a)

The conspiring of several persons to meet together for the purpose of disturbing the peace and tranquillity of the realm, of exciting discontent and disaffection, and of exciting the King's subjects to hatred of the government and constitution, may be prosecuted by an indictment for a conspiracy.(b)

Unlawful assemblies and seditious meetings having in many instances appeared to threaten the public tranquillity and the security of the government, several statutes have been passed for the purpose of their more immediate and effectual suppression.

The 1 Geo. 1, st. 2, c. 5, s. 1, reciting that many rebellious riots and tumults had been in divers parts of the kingdom, to the disturbance of the public peace and the endangering of his Majesty's person and government, and that the punishments provided by the laws then in being were not adequate to such heinous offences; for the preventing and suppressing such riots and tumults, and for the more speedy and effectual punishing the offenders, enacts, "that if any persons to the number of *twelve* or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the King's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their habitations or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made) unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony without benefit of clergy."(c)

Sec. 2, the justice of the peace, or other person authorized by the Act to make the proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be while proclamation is making, and after that shall openly and with loud voice make, or cause to be made, proclamation in these words, or like in effect:—"Our sovereign lord the King chargeth and commandeth all persons being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the Act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King." And every justice, *sheriff, &c., within the limits of their respective jurisdictions, [*390 are authorized and required, on notice or knowledge of any such unlawful assembly of twelve or more persons, to resort to the place, and there to make or cause such proclamation to be made.

(x) 1 Hawk. P. C. c. 65, ss. 9, 10; 19 Vin. Abr. tit. *Riots*, &c. (A.) 5, 6. And by Holt, C. J., in *Reg. v. Soley*, 11 Mod. 116, though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence.

(y) By Heath, J., *Rex v. The Bishop of Bangor*, Shrewsbury Summer Ass. 1796.

(z) *Rex v. Billingham*, 2 C. & P. 234 (12 E. C. L. R.), Burrough, J. See *Rex v. Perkins*, 4 C. & P. 537 (19 E. C. L. R.), per Patteson, J.

(a) *Rex v. Brodribb*, 6 C. & P. 571 (25 E. C. L. R.), ante, p. 187.

(b) *Rex v. Hunt*, 3 B. & A. 566 (5 E. C. L. R.).

(c) See post, p. 391, as to the present punishment.

Sec. 3, if the persons so unlawfully, riotously and tumultuously assembled, or twelve or more of them, after such proclamation, shall continue together and not disperse themselves within one hour, it shall be lawful for every justice, sheriff, or under-sheriff of the county where such assembly shall be, and for every constable or other peace-officer within such county, and for every mayor, justice, sheriff, bailiff, and other head officer, constable, and other peace officer of any city or town where such assembly shall be, and for such other persons as shall be commanded to be assisting unto any such justice, sheriff, or under-sheriff, mayor, bailiff, or other head officer (who are hereby authorized to command all his Majesty's subjects of age and ability to be assisting to them therein) to seize and apprehend such persons so unlawfully, riotously, and tumultuously continuing together after proclamation made; and they are hereby required so to do. And they shall carry the persons so apprehended before one or more of his Majesty's justices of the peace of the county or place where such persons shall be so apprehended, in order to their being proceeded against according to law. And the section also enacts, that if any of the persons so assembled shall happen to be killed, maimed, or hurt, in the dispersing, seizing, or apprehending them, or in the endeavor to do so, by reason of their resisting, then every such justice, &c., constable, or other peace officer, and all persons being aiding and assisting to them, shall be free, discharged, and indemnified concerning such killing, maiming, or hurting.

Sec. 5. "If any person or persons do, or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly let, hinder, or hurt, any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering, or hurting, such person or persons, so beginning or going to make such proclamation as aforesaid, shall be adjudged felony without benefit of clergy; and the offenders therein shall be adjudged felons, and shall suffer death, as in case of felony, without benefit of clergy; and that also every such person or persons being so unlawfully, riotously, and tumultuously assembled, to the number of twelve, as aforesaid, or more, to whom proclamation should or ought to have been made, if the same had not been hindered, as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such let or hindrance so made, having knowledge of such let or hindrance so made, shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy." (d)

Sec. 8, the prosecution for any offence against the Act is to be commenced within twelve months after the offence committed. (e)

*The 1 Vict. c. 91, recites, sec. 1 & 5 of this Act, and provides that, [391] after the 1st of October, 1837, any person convicted of any of the said offences shall not suffer death, but be liable to transportation (f) for life, or for any term not less than fifteen (g) years, or imprisonment, with or without hard labor, in the common gaol or house of correction, for any term not exceeding three years, and solitary confinement for any portion or portions of such imprisonment, or such imprisonment with hard labor, not exceeding one month at any one time, and not exceeding three months in any one year. (h)

The 1 Geo. 1, st. 2, c. 5, contains no provisions as to principals in the second degree, or accessories; there may, however, be such principals and accessories. The principals in the second degree and accessories before the fact are punishable as principals in the first degree; (i) and the accessories after the fact are punishable.

(d) See *infra*, as to the present punishment.

(e) By sec. 9, sheriffs, &c., in Scotland, shall have the same power for putting the Act into execution as justices, &c., have here: and offenders in Scotland shall suffer death, and confiscation of movables. This statute is commonly called the *Riot Act*; and is required by sec. 7 to be openly read at every quarter sessions and at every leet or law day.

(f) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(g) Not less than seven years by the 9 & 10 Vict. c. 24, s. 1, and not less than three years penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, pp. 3, 4.

(h) See the sections, *ante*, p. 141.

(i) *Rex v. Royce*, 4 Burr. 2073; 24 & 25 Vict. c. 94, s. 1, *ante*, p. 67.

ble with imprisonment for not exceeding two years, with or without hard labor, in the common gaol or house of correction.(k)

If the magistrate omit the words "God save the King," the proclamation is insufficient.(l) If an indictment upon sec. 1, in setting out the proclamation, omit the words "of the reign of," which were contained in the proclamation read, this is a fatal variance.(m) The hour is to be computed from the first reading of the proclamation. Where, therefore, a magistrate read the proclamation a second and a third time before an hour had elapsed from the time of his reading it the first time, and it was objected that the second and third readings must be considered as new warnings, and as if the former readings were abandoned, it was held that the second, or any subsequent reading of the proclamation, did not at all do away with the effect of the first reading, and that the hour was to be computed from the time of the first reading of the proclamation.(n)

If there be such an assembly that there would have been a riot, if the parties had carried their purpose into effect, it is within the Act.(n)

Upon an indictment under sec. 1, it was not proved that the prisoner was among the mob during the whole of the hour, but he was proved to have been there at various times during the hour; it was held that it was a question for the jury, upon all the circumstances, whether he did substantially continue making part of the assembly for the hour; for although he might have occasion to separate himself for a minute or two, yet if in substance he was there during the hour he would not be thereby excused.(o)

*A riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the Riot Act has not been read, the effect of that being to make the parties guilty of a capital offence if they do not disperse within an hour; but if that proclamation be not read, the common law offence remains.(p)

By the 39 Geo. 3, c. 79, s. 1, reciting that divers societies had been instituted in this kingdom and Ireland, of a new and dangerous nature, inconsistent with public tranquillity, and with the existence of regular government, particularly certain societies calling themselves "*Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen, and The London Corresponding Society*," and that it was expedient and necessary that all such societies, and all societies of the like nature, should be utterly suppressed and prohibited, as unlawful combinations and confederacies, highly dangerous to the peace and tranquillity of these kingdoms, and to the constitution of the government thereof, as by law established, it is enacted, "That all the said societies of *United Englishmen, United Scotsmen, United Irishmen, and United Britons*, and the said society commonly called the *London Corresponding Society*, and all other societies called *Corresponding Societies*, of any other city, town, or place, shall be, and the same are hereby utterly suppressed and prohibited, as being unlawful combinations and confederacies against the government of our sovereign lord the King, and against the peace and security of his Majesty's liege subjects."

Sec. 2, the said societies, and every other society then established, or hereafter to be established, the members whereof shall, according to the rules thereof, or to any provision or agreement for that purpose, be required or admitted to take any oath or engagement which shall be an unlawful oath or engagement, within the intent or meaning of the 37 Geo. 3, c. 123.(q) or to take any oath not required nor authorized by law; and every society the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement, on becoming, or in consequence of being members of such society: and every society, the members whereof shall take, subscribe, or assent to any test or declaration not

(k) 24 & 25 Vict. c. 94, s. 4, *ante*, p. 69.

(l) *Rex v. Child*, 4 C. & P. 442 (19 E. C. L. R.), Vaughan, B., and Alderson, J.

(m) *Rex v. Woolcock*, 5 C. & P. 516 (24 E. C. L. R.), Patteson, J.

(n) *Rex v. Woolcock*, *supra*.

(o) *Rex v. James*, Gloucester Sum. Ass. 1831; MS. C. S. G., Patteson, J.

(p) *Rex v. Fursey*, 6 C. & P. 81 (25 E. C. L.), Gaselee and Park, JJ., where it was held that a meeting to adopt preparatory measures for holding a national convention was illegal.

(q) *Ante*, p. 186, *et seq.*

required by law, or not authorized in manner hereinafter mentioned; and every society of which the names of the members, or any of them, shall be kept secret from the society at large, or which shall have any committee, or select body so chosen or appointed, that the members constituting the same shall not be known by the society at large, to be members of such committee, or select body; or which shall have any president, &c., or other officer, so chosen and appointed, that the election or appointment shall not be known to the society at large, or of which the names of all the members, and of all committees or select bodies of members, and of all presidents, &c., shall not be entered in a book to be kept for that purpose, and open to the inspection of all the members; and every society which shall be composed of different divisions or branches, or of different parts, acting in any manner *393] separately or distinct from each other, or of *which any part shall have any separate or distinct president, &c., or other officer, elected or appointed by, or for such part, or to act as an officer for such part: shall be deemed and taken to be *unlawful combinations and confederacies* (r) And further, that every person who shall directly or indirectly maintain correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, &c., or other officer, or member thereof as such, or who shall by contribution of money or otherwise, aid, abet, or support such society, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy.

The Act shall not extend to declarations approved by two justices, and registered with the clerk of the peace; but such approbation shall only remain valid till the next general session, unless the same shall be confirmed by the major part of the justices at such general session.(s) And it shall not extend to the meetings of societies, or lodges of Freemasons, which, before the passing of the Act, had been usually held, under the denomination of "Lodges of Freemasons," and in conformity to the rules prevailing among such societies;(t) provided that there be a certificate of two of the members upon oath, that such society or lodge had been usually held under such denomination, and in conformity to such rules; the certificate duly attested, &c., being, within two months after the passing of the Act, deposited with the clerk of the peace, with whom also the name or denomination of the society or lodge, and the usual place and time of meeting, and the names and descriptions of the members are to be registered yearly.(u) The clerk of the peace is required to enrol such certificate and registry, and to lay the same once in every year before the general session of the justices; and the justices may upon complaint, upon oath, that the continuance of the meetings of any such lodge or society is likely to be injurious to the public peace and good order, direct them to be discontinued; and any such meeting, held notwithstanding such order of discontinuance, and before the same shall, by the like authority, be revoked, shall be deemed an *unlawful combination and confederacy* under the provisions of the Act.(v)

Sec. 8. "Every person who, at any time after the passing of this Act, shall, in breach of the provisions thereof, be guilty of any such unlawful combination and confederacy as in this Act is described, shall and may be proceeded against for such offence in a summary way, either before one or more justice or justices of the

(r) By the 59 Geo. 3, c. 19, s. 27, this enactment is not to extend to meetings of Quakers, or to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter shall be discussed.

(s) 39 Geo. 3, c. 79, s. 3.

(t) Sec. 5.

(u) Sec. 6.

(v) Sec. 7. The Friendly Societies Act, 18 & 19 Vict. c. 63, s. 12, enacts that the 35 Geo. 3, c. 79, 57 Geo. 3, c. 19, and 14 & 15 Vict. c. 48 (I.), shall not extend to any society established under the 18 & 19 Vict. c. 63, or any of the Acts thereby repealed, or to any meeting of the members or officers thereof, in which society or at which meeting no business whatever is transacted other than that which directly and immediately relates to the objects of the society as declared in the rules thereof, and set forth in the certified copy thereof. Provided that the trustees or other officers of the society, when required under the hands of two of Her Majesty's justices of the peace, shall give full information to such justices of the nature, objects, proceedings, and practices of such society, and in default thereof the provisions of the Acts herein recited shall be in force in respect of such society.

*peace for the county, stewardry, riding, division, city, town, or place, where such person shall happen to be, or by indictment to be preferred in the [394 county, riding, division, city, town, or place, in England, wherein such offence shall be committed, or by indictment in the Court of Justiciary, or in any of the Circuit Courts in Scotland, if the offence shall be committed in Scotland; and every person being convicted of any such offence, on the oath of one or more credible witness or witnesses, by such justice or justices as aforesaid, shall be by him or them committed to the common gaol, or house of correction, for such county, &c., there to remain without bail or mainprize, for the term of three calendar months; or shall be by such justice or justices adjudged to forfeit and pay the sum of twenty pounds, as to such justice or justices shall seem meet; and in case such sum of money shall not be forthwith paid into the hands of such justice or justices, he or they shall, by warrant under his or their hand and seal, or hands and seals, cause the same to be levied by distress and sale of the offender's goods and chattels, together with all costs and charges attending such distress and sale; and, for want of sufficient distress, shall commit such offender to the common gaol, or house of correction, of such county, &c., for any time not exceeding three calendar months: and every person convicted of any such offence, upon indictment by due course of law, shall and may be transported^(v) for the term of seven^(vv) years, in the manner provided by law for transportation of offenders; or imprisoned for any time not exceeding two years, as the Court before whom such offender shall be tried shall think fit; and every such offender, who shall be ordered to be transported, shall be subject and liable to all laws concerning offenders ordered to be transported."^(w)

But the justice or justices, before whom any person shall be convicted of any unlawful combination or confederacy, may mitigate the punishment, so as it be not thereby reduced to less than one-third of the punishment by the Act directed to be inflicted, whether by imprisonment or fine.^(x) And it is provided, that any person who shall be convicted or acquitted by any justice, upon a summary prosecution, shall not afterwards be prosecuted by indictment, or otherwise, for the same offence; and in like manner that any person convicted, or acquitted, upon an indictment, shall not afterwards be prosecuted before any justice in a summary way.^(y) But the Act is not to extend to prevent any prosecution by indictment or otherwise, for anything which shall be an offence within the intent and meaning of the Act, and which might have been so prosecuted if the Act had not been made, unless the offender shall have been prosecuted for such offence under the Act, and convicted or acquitted of such offence.^(z)

*The 60 Geo. 3 & 1 Geo. 4, c. 1, reciting that "in some parts of the [395 United Kingdom men clandestinely and unlawfully assembled had practiced military training and exercise, to the great terror and alarm of his Majesty's peaceable and loyal subjects, and the imminent danger of the public peace," enacts, "that all meetings and assemblies of persons for the purpose of training or drilling themselves, or of being trained or drilled to the use of arms, or for the purpose of practising military exercise, movements, or evolutions, without any lawful authority from his Majesty, or the lieutenant, or two justices of the peace of the county or riding, or of any stewardry, by commission or otherwise, for so doing shall be, and the same are hereby prohibited as dangerous to the peace and security of his Majesty's liege subjects, and of his government; and every person who shall be present at, or attend any such meeting or assembly for the purpose of training and drilling any other person or persons, to the use of arms, or the practice of military

^(v) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

^(vv) And not less than three by the same section: *Ibid*.

^(w) The 9 & 10 Vict. c. 33, recites that by this Act and the 57 Geo. 3, c. 19, "certain offences are created, and certain penalties are attached to the commission thereof," and prohibits "any action, bill, plaint, or information in any of Her Majesty's courts, or before any justice or justices of the peace against any person or persons for the recovery of any fine or forfeiture incurred under the provisions of either of the said Acts," unless the same is commenced, &c., in the name of the law officers of the Crown. *Query*, whether this affects this section or the 57 Geo. 3, c. 19, *post*, p. 396.

^(x) 39 Geo. 3, c. 79, s. 9.

^(y) Sec. 10.

^(z) 39 Geo. 3, c. 79, s. 11.

exercise, movements, or evolutions, or who shall train or drill any other person or persons to the use of arms or the practice of military exercise, movements or evolutions, or who shall aid or assist therein, being legally convicted thereof, shall be liable to be transported^(a) for any term not exceeding seven^(b) years, or to be punished by imprisonment not exceeding two years, at the discretion of the Court in which such conviction shall be had; and every person who shall attend or be present at any such meeting or assembly as aforesaid, for the purpose of being, or who shall at any such meeting or assembly be trained or drilled to the use of arms, or the practice of military exercise, movements, or evolutions, being legally convicted thereof, shall be liable to be punished by fine and imprisonment, not exceeding two years, at the discretion of the Court in which such conviction shall be had.^(c)

Where an indictment alleged that there was an unlawful meeting of the defendant and of divers other persons unknown, for the purpose of unlawfully practising military exercise, and which persons so met and assembled were there without any lawful authority of the Queen, &c., and that the defendant was present at and unlawfully did attend the said meeting for the purpose of unlawfully training and drilling divers persons unknown to the practice of military exercise; Maule, J., held that the indictment was not bad for charging two offences.^(d)

An indictment upon this Act should aver that the meeting was for the purpose of training and drilling, or of being trained and drilled to the use of arms, or for the purpose of practising military exercises, movements, or evolutions, and that the meeting was held without any lawful authority from Her Majesty, or the lieutenant, or two justices of the peace, &c., by commission or otherwise.^(e)

*396] The 57 Geo. 3, c. 19, and 60 Geo. 3 & 1 Geo. 4, c. 6, contained *many enactments relating to assemblies of persons, collected for the purpose, or under the pretext of deliberating on public grievances, and of agreeing on petitions and addresses to the throne, or to the houses of Parliament, which were only temporary enactments, and appear to have now expired.

But the 57 Geo. 3, c. 19, contains also several enactments relating to meetings and assemblies of persons which are not of a limited duration.

Sec. 23, reciting that it is highly inexpedient that public meetings or assemblies should be held near the houses of Parliament, or near the courts of justice in Westminster Hall, on certain days, enacts, that it shall not be lawful for any person to convene, or to give any notice for convening, any meeting consisting of more than fifty persons, or for any number of persons exceeding fifty to meet in any street, square, or open place, in the city or liberties of Westminster, or county of Middlesex, within the distance of a mile from the gate of Westminster Hall (except such parts of the parish of St. Paul's, Covent Garden, as are within such distance), for the purpose of considering of or preparing any petition, &c., for alteration of matters in church or state, or on any day on which the two houses, or either house of Parliament, shall meet and sit, nor on any day on which the courts shall sit in Westminster Hall. And that if any meeting or assembly for such purpose shall be assembled or holden on such day, it shall be deemed an *unlawful assembly*. But there is a provision that the enactment shall not apply to any meeting for the election of members of Parliament, or to persons attending upon the business of either house of Parliament, or of any of the said courts.

Sec. 24 recites that divers societies and clubs have been instituted in the metropolis, and in various parts of the kingdom, of a dangerous nature and tendency, inconsistent with the public tranquillity and the existence of the established government, laws, and constitution of the kingdom; and that the members of many such societies or clubs had taken unlawful oaths and engagements of fidelity and secrecy, and had taken or subscribed or assented to illegal tests and declarations; and that

(a) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(b) And not less than three years by the same clause: *Ibid*.

(c) Sec. 2 provides for the dispersion of persons so assembled, or for their detention and giving bail. By secs. 5 and 6, actions for anything done in pursuance of the Act must be commenced within six months. And by sec. 7 prosecutions for offences against the provisions of the Act must be commenced within six months after the offence committed.

(d) *Reg. v. Hunt*, 3 Cox C. C. 215.

(e) *Gogarty v. The Queen*, 3 Cox C. C. 306, Q. B. (Ireland).

these societies or clubs appointed or employed committees, delegates, &c., or correspond with other societies or clubs, and to induce other persons to members; and by such means maintained an influence over large bodies of deluded many ignorant and unwary persons into the commission of acts criminal: and recites also, that certain societies or clubs, calling themselves *Spencean Philanthropists*, professed for their object the confiscation of the land, and the extinction of the funded property of the kingdom that it was expedient and necessary that they should be utterly suppressed and prohibited as unlawful combinations and confederacies highly dangerous to the peace and tranquillity of the kingdom, and to the constitution of its government then it enacts, "that all societies or clubs calling themselves *Spenceans*, *Spencean Philanthropists*, and all other societies or clubs, by whatever name or in the same are called or known, who hold and profess, or who shall hold the same, the same objects and *doctrines, shall be and the same are hereby suppressed and prohibited as being *unlawful combinations and confederacies* [397] against the government of our sovereign lord the King, and against the security of his Majesty's liege subjects.

5. "All and every the said societies or clubs, and also all and every other club now established, or hereafter to be established, the members whereof required or admitted to take any oath or engagement which shall be an engagement within the meaning of the 37 Geo. 3, c. 123.(*ee*) or within the meaning of the 52 Geo. 3, c. 104,(*f*) or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, or in any manner bind themselves by any such oath or engagement, on oath, or in order to become, or in consequence of being a member or members of any such society or club; and every society or club, the members or any member shall be required or admitted to take, subscribe, or assent to, or shall take, or assent to, any test or declaration not required or authorized by law, in any manner or form such taking or assenting shall be performed, whether by signs, or otherwise, either on becoming or in order to become, or in consequence of being a member or members of any such society or club; and every society or club that shall elect, appoint, nominate, or employ any committee, delegates, representative or representatives, missionary or missionaries, to confer, or communicate with any other society or club, or with any committee, or delegates, representative or representatives, missionary or missionaries, of any other society or club, or to induce or persuade any person or persons to become members thereof, shall be deemed and taken to be *unlawful combinations and confederacies*, within the meaning of the 39 Geo. 3, c. 79,(*g*) and shall be prosecuted, proceeded against, and punished, according to the provisions of the Act; and every person who, from and after the passing of this Act, shall become a member of any such society or club, or who, after the passing of this Act, shall directly or indirectly maintain correspondence or intercourse with any such society or club, or with any committee or delegate, representative or officer, or with any officer or member thereof, as such, or who shall, by contributing money, or otherwise, aid, abet, or support, such society or club, or any officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy within the intent and meaning of the 39 Geo. 3, c. 79, and may be proceeded against, prosecuted, and punished, according to the provisions of the said Act, with regard to the prosecution and punishment of *unlawful combinations and confederacies*."(*h*)

Nothing contained in this Act is to extend to lodges of Freemasons, complying with the regulations of the 39 Geo. 3, c. 79;(h) nor to any declaration approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices at a general session, or at a general quarter sessions of the peace, pursuant to the regulations in the said Act of the 39 Geo. 3, c. 79, nor to meetings of *Quakers*; nor to any meeting or society for purposes of

de, 186.
te, 393.

(*f*) *Ante*, 187.
(*h*) *Ante*, p. 393.

(*g*) *Ante*, 392, *et seq.*

a religious or charitable nature only, and in which no other matter or business shall be discussed.^(l)

Any person knowingly permitting any meeting of any society or club, declared by this Act to be an unlawful combination or confederacy, or of any division or committee of such society or club, to be held in any place belonging to him, or in his possession or occupation, is made liable, for the first offence, to a forfeiture of five pounds; and for any offence committed after the conviction for such first offence is to be deemed guilty of an *unlawful combination and confederacy* in breach of this Act.^(m) And two justices, upon evidence on oath that any such meeting, or any meeting for any seditious purpose, has been held at any house, &c., licensed for the sale of liquors, with the knowledge and consent of the persons keeping such house, &c., may adjudge the license to be forfeited.⁽ⁿ⁾

The thirtieth and three following sections relate to the recovery of the pecuniary penalties, which may be incurred under the Act, their application and the limitation of actions against justices, &c., for anything done in pursuance of the Act. Penalties exceeding £20 may be recovered by action of debt; and those not exceeding £20 may be recovered before a justice in a summary way.^(o)

Sec. 35, nothing contained in the Act shall be deemed to take away, or abridge, any provision already made by the law of the realm, for the suppression or punishment of any offence described in the Act. And sec. 36, no person shall be prosecuted, under the Act, for having been a member of any illegal society, if such person shall not have acted as a member, after the passing of the Act; but that the Act shall not extend to prevent any prosecution, by indictment or otherwise, for anything which shall be an offence within the Act, and which might have been so prosecuted, if the Act had not been made.

Sec. 36, also provides that no person prosecuted and convicted, or acquitted, of an offence against the Act, shall be liable to be again prosecuted for the same offence.

Sec. 37, where any proceeding or prosecution shall be instituted for any offence against the 39 Geo. 3, c. 79, or this Act, either by action or information, before any justice or justices, or otherwise, the attorney-general in England, or the lord advocate in Scotland, may order them to be stayed; and, in case of any judgment or conviction, one of his Majesty's principal secretaries of state may, by an order under his hand, stay the execution of such judgment or conviction, or mitigate, or remit, any fine or forfeiture, or any part thereof.^(p)

As to Ireland, the Irish Act, 33 Geo. 3, c. 29, and the 4 Geo. 4, c. 87, and 2 & 3 Vict. c. 74 (as amended by the 11 & 12 Vict. *c. 89),^(q) declare certain societies, clubs, &c., in that country, to be unlawful assemblies, combinations, and confederacies; make the members guilty of an unlawful combination and confederacy, and provide for the suppression of the societies and the punishment of the members.

Several statutes have been passed for the purpose of regulating places used for delivering lectures, and holding debates: but the enactments contained in them are for the most part of limited duration.

Many of the sections of the 36 Geo. 3, c. 8, were intended to remedy the evil occasioned by persons who, under pretence of delivering lectures and discourses on public grievances, delivered lectures and discourses, and held debates, tending to stir up hatred and contempt of the King's person and government, and of the constitution: but this statute was limited to a duration of three years from the passing of the Act, and until the end of the then next session of Parliament. It is referred to in the 39 Geo. 3, c. 79, s. 15,^(r) which, reciting that divers places had

(l) 57 Geo. 3, c. 19, s. 26. See note (w), *ante*, p. 394.

(m) *Id.* sec. 28. Sec. 13 of the 39 Geo. 3, c. 79, is nearly similar.

(n) *Id.* sec. 29. Sec. 14 of the 39 Geo. 3, c. 79, is similar, except that it does not contain the words "with the knowledge and consent of the person keeping such house,"

(o) See note *ante*, p. 394.

(p) Sec. 39. The Act does not extend to Ireland.

(q) Continued by the 25 & 26 Vict. c. 32, for five years from the 7th July, 1862, and the end of the then next session of Parliament.

(r) The 2 & 3 Vict. c. 12, repeals sec. 27 of this Act, but does not affect the provisions here set out. See *Reg. v. Johnson*, 8 Q. B. 102 (55 E. C. L. R.).

been used for lectures or debates, which were not within the former Act, but which lectures or debates had in many instances been of a seditious and immoral nature, and that other places had been used for seditious and immoral purposes, under the pretence of being places of meeting for the purpose of reading books, pamphlets, newspapers, or other publications, enacts, that every house, room, field, or other place at or in which any lecture or discourse shall be publicly delivered, or any public debate shall be had on any subject whatever, for the purpose of raising or collecting money, or any other valuable thing, from the persons admitted; or to which any person shall be admitted by payment of money, or by any ticket or token of any kind, delivered in consideration of money or other valuable thing, or in consequence of paying, or giving, or having paid or given, or having agreed to pay or give, in any manner, any money or other valuable thing; or where any money or other valuable thing shall be received from any person admitted, either under pretence of paying for any refreshment, or other thing, or under any other pretence, or for any other cause, or by means of any device or contrivance whatever; and every house, &c., which shall be opened or used as a place of meeting, for the purpose of reading books, pamphlets, newspapers, or other publications, and to which any person shall be admitted by payment of money, or by any ticket, &c. (as before) shall be deemed a *disorderly house or place*, within the 36 Geo. 3, unless the same shall have been previously licensed in the manner afterwards mentioned in the Act. And the persons by whom such house, &c., shall be opened or used, are to forfeit £100 for every time of opening or using, and be otherwise punished as the law directs in cases of disorderly houses; and every person conducting the proceedings, debating, or furnishing books, &c.; and also every person giving or receiving money, &c., in respect of the admission to any such house, &c., or delivering *out, or receiving, any tickets or tokens, knowing such house, &c., to [*400 be opened or used for any such purpose, is, for every such offence, to forfeit twenty pounds.

By the 39 Geo. 3, c. 79, s. 16, any person appearing as master, or as having the management of any such house, &c., shall be deemed to be a person by whom the same is opened, or used, and liable to be sued or prosecuted, though not the real owner or occupier. A power is also given to any justice who shall, by information upon oath, have reason to suspect that any house, &c., is opened or used for lectures, debates, reading, &c., contrary to the Act, to go to such house, &c., and demand to be admitted; and, in case of admittance being refused, such house, &c., is to be deemed a *disorderly house or place* within this Act and the 36 Geo. 3, and the provisions in both the Acts are to be applied to such house, &c., where such admittance shall have been so refused; and every person refusing is to forfeit twenty pounds.(s)

Sec. 18, relates to the licensing any place for lecturing, or reading, by two or more justices at their general sessions, or at a special session held for the purpose; but gives a power to the justices at any general sessions to revoke such license. And any justice may demand admittance to any licensed place; and, in case of refusal, such place is to be deemed, notwithstanding the license, a *disorderly house or place*, within the Act; and every person refusing such admittance is to forfeit twenty pounds.(t) Any two justices upon evidence, on oath, that any licensed place is commonly used for lectures or discourses of a seditious or immoral tendency, or that books, &c., of a seditious or immoral nature are there commonly kept, and delivered to be read, may declare the license to have been forfeited.(u) Every house, &c., licensed for the sale of ale, or liquors, is to be deemed licensed for reading within the Act: but two or more justices on evidence, on oath, that seditious or immoral publications are usually distributed there for the purpose of being read, may declare the license for selling ale, or liquors, to have been forfeited.(v)

The Act is not to extend to lectures delivered in the universities by members, &c., or to lectures delivered in the hall of any of the inns of court by persons authorized; and payments to school-masters are not to be deemed payments for ad-

(s) Sec. 17.
(u) Sec. 20.

(t) Sec. 19.
(v) Sec. 21.

mission to lectures within the Act.^(w) And prosecutions for any penalty imposed by the Act are to be commenced within three months after it shall have been incurred.^(x)

The 13 Car. 2, c. 5, reciting the mischiefs of *tumultuous petitioning*, enacts, that no person shall solicit or procure the getting of hands, or other consent of any persons above the number of twenty, to any petition, &c., to the King or the houses of Parliament, for alteration of matters established by law in church or state, unless the matter thereof shall have been first consented unto and ordered by three justices, or by the major part of the grand jury of the county, &c., at the assizes or quarter sessions; or, in London, by the lord mayor, aldermen, and common council: and that no person shall repair to his Majesty or the houses of Parliament, upon pretense of presenting or delivering any petition, &c., accompanied with excessive number of people, nor at any one time with above the number of ten persons; upon pain of incurring a penalty not exceeding one hundred pounds, and three months' imprisonment for every offence; such offence to be prosecuted in the Court of King's Bench, or at the assizes or quarter sessions within six months, and proved by two credible witnesses.^(y) But there is a proviso, that the Act shall not hinder persons, not exceeding twenty in number, from presenting any public or private grievance or complaint to any member of Parliament, or to the King, for any remedy to be thereupon had; nor extend to any address to his Majesty by the members of the houses of Parliament, during the sitting of Parliament.^(z)

The common law, and also several more ancient statutes than those which have been mentioned, authorize proceedings for the restraining and suppression of riot. By the common law the sheriff, under-sheriff, constable, or any other peace officer, may, and ought to do, all that in them lies towards the suppressing of a riot, and may command all other persons to assist them; and by the common law also any private person may lawfully endeavor to appease such disturbances by staying the persons engaged from executing their purpose, and also by stopping others coming to join them.^(a) It has been holden also, that private persons may arm themselves in order to suppress a riot;^(b) from whence it seems clearly to follow that they may also make use of arms in suppressing it, if there be a necessity. However, it may be very hazardous for private persons to proceed to these extremities; and such violent methods seem only proper against such riots as savor of rebellion.^(c) But if a felony be about to be committed, the interference of private persons will be justifiable; for a private person may do anything to prevent the perpetration of a felony.^(d) In the riots which took place in the year 1780, this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the authority of a magistrate; in consequence of which much mischief was done, which might otherwise have been prevented.^(e)

Upon an information against the Mayor of Bristol for neglect of duty in not suppressing the Bristol riots in 1831, which was tried at the bar of the King's Bench, it was laid down that the general rules of law require of magistrates, that at the time of riots, they should keep the peace, restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the King's subjects to assist them, which they are bound to do upon reasonable warning; and in point of law, a magistrate would be justified in giving firearms to those who thus

(w) Sec. 22.

(x) Sec. 34.

(y) 13 Car. 2, st. 1, c. 5, s. 2.

(z) 13 Car. 2, st. 1, c. 5, s. 3. By 1 Will. & M. sess. 2, c. 2, s. 1, art. 5, usually styled the Bill of Rights, it is enacted, "That it is the right of the subjects to petition the King, and that all commitments and prosecutions for such petitioning are illegal." It was contended, that this article had virtually repealed the statute 13 Car. 2, c. 5, but Lord Mansfield declared it to be the unanimous opinion of the Court, that neither that nor any other Act of Parliament had repealed it, and that it was in full force: *Rex v. Lord George Gordon*, Dougl. 571.

(a) 1 Hawk. P. C. c. 65, s. 11.

(b) *Case of arms*, Poph. 121; Kel. 76.

(c) 1 Hawk. P. C. c. 65, s. 11.

(d) By *Chambre, J.*, in *Handcock v. Baker*, 2 Bos. & Pul. 265.

(e) By *Heath, J.*, in *Handcock v. Baker*, 2 Bos. & Pul. 265.

came to assist *him, but it would be imprudent in him to give them to those who might not know their use, and who might be under no control, and [*402 who, not being used to act together, might be cut off from the rest of the force, and the arms, by those means, get into the hands of the rioters. (f)

It is no part of the duty of a magistrate to go out and head the constables, or to marshal and arrange them; neither is it any part of his duty to hire men to assist him in putting down a riot: nor to keep a body of men, as a reserve, to act as occasion may require; neither is he bound to call out the Chelsea Pensioners, any more than any of the rest of the King's subjects: nor is it any part of his duty to give any orders respecting the firearms in gunsmiths' shops. Nor is a magistrate bound to ride with the military; if he gives the military officer orders to act, that is all that is required of him. (g)

*The 34 Edw. 3, c. 1, empowers justices of the peace to restrain and [*403 arrest rioters; and, having been construed liberally, it has been resolved,

(f) *Rex v. Pinney*, 5 C. & P. 254 (24 E. C. L. R.); 3 B. & Ad. 946 (23 E. C. L. R.); Littledale, Parke, and Taunton, JJ.; and see *Rex v. Kennett*, 5 C. & P. 282 (24 E. C. L. R.).

(g) *Rex v. Pinney*, *Ibid.* The duties of private persons, soldiers, sheriffs, and peace officers in such cases were most clearly and elaborately expounded by Lord C. J. Tindal, in his charge to the Bristol grand jury [1832, 5 C. & P. 261 (24 E. C. L. R.)] as follows: "By the common law every private person may lawfully endeavor, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up from joining the rest; and not only has he the authority, but it is his *bounden duty* as a good subject of the King to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil doers to keep the peace." "It would undoubtedly be more prudent to attend, and be assistant to the justices, sheriffs, or other ministers of the King in doing this; for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger were sufficiently immediate, or until some felony was either committed, or could not be prevented without recourse to arms; and at all events the assistance given by men who act in subordination and concert with the civil magistrate will be more effectual to attain the object proposed than any efforts, however well intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself, and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law. The law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation, and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose, when arms are necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a stronger degree with a military force. But where the danger is pressing and immediate, where a felony has actually been committed, or cannot otherwise be prevented, and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities, the military subjects of the King not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people. Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer, is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the King to assist him in that undertaking. By an early statute (13 Hen. 4, c. 7) any two justices, with the sheriff or under-sheriff of the county, may come with the power of the county, if need be, to arrest any rioters, and shall arrest them; and they have power to record that which they see done in their presence against the law; by which record the offenders shall be convicted, and may afterwards be brought to punishment. And here I must distinctly observe, that it is not left to the choice or will of the subject, as some have erroneously supposed, to attend or not to the call of the magistrate, as they think proper, but every man is bound, when called upon, under pain of fine and imprisonment, to yield a ready and implicit obedience to the call of the magistrate, and to do his utmost in assisting him to suppress any tumultuous assembly." See *Reg. v. Neale*, 9 C. & P. 431 (38 E. C. L. C.), per Littledale, J.

that a single justice may arrest persons riotously assembled, and may also authorise others to arrest them by a parol command. By the 13 Hen. 4, c. 7, s. 1, the justices of the peace, three or two of them at the least, and the sheriff or undersheriff of the county where any riot, assembly, or rout of people against the law shall be made, shall come with the power of the county (if need be) to arrest them; and shall arrest them; and shall have power to record that which they shall find so done in their presence against the law: and by such record the offenders shall be convicted in the same manner as is contained in the statute of forcible entries.^(h) In the interpretation of this statute it has been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable.⁽ⁱ⁾

An indictment for a riot must show for what act the rioters assembled, that the Court may judge whether it was lawful or not:^(k) and it must state that the defendants unlawfully assembled; for a riot is a compound offence: there must be not only an unlawful act to be done, but an unlawful assembly of more than two persons.^(l) In a case where six persons being indicted for a riot, two of them died without being tried, two were acquitted, and the other two were found guilty, the Court refused to arrest the judgment, saying, that as the jury had found two persons to be guilty of a riot, it must have been together with those two who had never been tried, as it could not otherwise have been a riot.^(m) But as two persons only cannot be guilty of a riot, it was held, that where several were indicted, and all but two were acquitted, no judgment could be given against the two.⁽ⁿ⁾ And though the indictment in this case charged a battery upon an individual as well as a riot, and it was argued that the *riotose*, &c., was only to express the manner of the assault, and a kind of aggravation of the offence, it was held that the two persons could not be intended to be guilty of the battery; that the offence was special and laid as a riot, the *riotose* extending to all the facts, and the battery being but part of the riot; so that the defendants being acquitted of the riot were acquitted of the whole of which they were indicted. But it was also held,^{*404} that if the indictment had been, that the defendants, with *divers other* disturbers of the peace, had committed this riot and battery, and the verdict had been as in this case, the King might have had judgment.^(o)

If an indictment for a riot and assault do not conclude *in terrorem populi*, and there be no evidence of an assault, the defendants must be acquitted:^(p) but if such an indictment charge the defendants with a riot and cutting down fences, they may be convicted of an unlawful assembly, notwithstanding the want of such a conclusion.^(q) An indictment, however, upon the 1 Geo. 1, st. 2, c. 5, s. 1, for remaining assembled one hour after proclamation has been made, need not charge the riot to have been *in terrorem populi*.^(r)

Upon an indictment against H. Hunt and others, for a conspiracy, and unlawfully meeting together with persons unknown, for the purpose of exciting discontent

(h) 5 R. 2, st. 1, c. 7.

(i) 4 Blac. Com. 146, 147; 1 Hale 495. The 17 R. 2, c. 8; 2 Hen. 5, c. 8, and 19 Hen. c. 13, relate also to summary proceedings of justices, &c., in cases of riots, which it not thought necessary to mention further in this work. The different statutes and the construction put upon them may be seen in 1 Hawk. P. C. c. 65, s. 14, *et seq.* and Bur tit. *Riots*, &c., II., III., IV., V. The 2 Hen. 5, c. 8; 2 Hen. 5, c. 9; and 2 Hen. 6, c. 1, relate to process out of Chancery in cases of riots.

(k) Reg. v. Gulston, 2 Lord Raym. 1210.

(l) Reg. v. Soley, 2 Salk. 593, 594.

(m) Rex v. Scott and another, 3 Burr. 1262.

(n) Rex v. Sadbury and others, 1 Lord Raym. 484; and see 19 Vin. Abr. tit. *Riots* (E.) 1.

(o) Rex v. Sadbury and others, 1 Lord Raym. 484; s. c., 2 Salk. 593, and 12 Mod. 26 19 Vin. Abr. tit. *Riots* (E.) 6.

(p) Rex v. Hughes, 4 C. & P. 373 (19 E. C. L. R.), Park, J. J. A. But see the 14 & 15 Vict. c. 100, s. 24.

(q) Rex v. Cox, 4 C. & P. 538 (19 E. C. L. R.), Patteson, J.

(r) Rex v. James, 5 C. & P. 153 (24 E. C. L. R.), Patteson, J., MS. C. S. G. s. c.

and disaffection, at which meeting H. Hunt was the chairman, it was holden, that resolutions passed at a former meeting assembled a short time before, in a distant place, but at which H. Hunt also presided, and the avowed object of which meeting was the same as that of the meeting mentioned in the indictment, were admissible in evidence, to show the intention of H. Hunt in assembling and attending the meeting in question. And it was holden that a copy of these resolutions delivered by H. Hunt to the witness at the time of the former meeting, as the resolutions then intended to be proposed, and which corresponded with those which the witness heard read from a written paper, was admissible, without producing the original.^(s)

In the same case it appeared, that large bodies of men had come to the meeting in question from a distance, marching in regular order resembling a military march: and it was holden to be admissible evidence, to show the character and intention of the meeting, that within two days of the time at which it took place considerable numbers were seen training and drilling before daybreak, at a place from which one of these bodies had come to the meeting; and that, upon their discovering the persons who saw them, they ill-treated them, and forced one of them to take an oath never to be a king's man again. And it was also admitted as evidence for the same purpose, that another body of men in their progress to the meeting, on passing the house of the person who had been so ill-treated, expressed their disapprobation of his conduct by hissing.^(t)

It was decided in this case, that parol evidence of inscriptions and devices on banners and flags displayed at a meeting is admissible without producing the originals.^(u)

And that upon the indictment in question evidence of the supposed misconduct of those who dispersed the meeting was not admissible.^(v)

*Where the question was, with what intention a great number of persons assembled to drill, declarations made by those assembled and in the act of drilling, and further declarations made by others who were proceeding to the place, and solicitations made by them to others to accompany them declaratory of their object, were held to be admissible in evidence for the purpose of showing their object.^(w) And in general, evidence is admissible to show that the meeting caused alarm and apprehension, and to prove information given to the civil authorities, and the measures taken by them in consequence of such information.^(x)

It was held by the judges,^(y) on the special commission of 1830, 1831, at Salisbury, that the prisoners must first be identified as forming part of the crowd before the riot is proved, and the fifteen judges confirmed the holding of the special commission.^(z) But this is a very inconvenient course, and causing much waste of time by recalling witnesses; and it has since been held that in riot, the prosecutor is entitled to prove the acts of any of the rioters before he connects the others with the riot,^(a) and this is in conformity with the practice in cases of conspiracy.^(b)

Where several were indicted for a riot, it was moved, that the prosecutor might name two or three, and try it against them, and that the rest might enter into a rule to plead not guilty (*guilty if the others were found guilty*); and a rule was made accordingly; this being to prevent the charges in putting them all to plead.^(c)

The punishment for offences of the nature of riots, routs, or unlawful assemblies, at common law, is fine and imprisonment, in proportion to the circumstances of the

(s) *Rex v. Hunt*, 3 B. & A. 566 (5 E. C. L. R.).

(t) *Id. Ibid.*

(u) *Id. Ibid.*

(v) *Id. Ibid.*

(w) *Redford v. Birley, cor. Holroyd, J.*; 3 Stark. N. P. C. 76 (3 E. C. L. R.).

(x) *Id. Ibid.*

(y) *Vaughan, B., Park and Alderson, JJ.*

(z) *Per Alderson, B., in Nicholson's case*, 1 Lew. 300, where the same course was adopted.

(a) *Reg. v. Cooper*, Stafford Summer Ass. 1850, Williams, J., MSS. C. S. G.

(b) See vol. III., p. 167.

(c) *Anon.*, 2 Salk. 317; *Reg. v. Middlemore*, 6 Mod. 212.

offence : (d) and formerly, in cases of great enormity, it appears that the offenders were sometimes punished with the pillory ; (e) but such punishment is now taken away by the 56 Geo. 3, c. 138.

And by the 3 Geo. 4, c. 114, whenever any person shall be convicted of a riot, " it shall and may be lawful for the Court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order, if such Court shall think it fit, sentence of imprisonment, with hard labor, for any term, not exceeding the term for which such Court may now imprison for such offences, either in addition to or in lieu of any other punishment which may be inflicted on any such offenders, by any law in force before the passing of this Act ; and every such offender shall thereupon suffer such sentence, in such place, and for such time as aforesaid, as such Court shall think fit to direct."

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*CHAPTER THE TWENTY-SIXTH.

OF AFFRAYS.

AFFRAYS are the fighting of two or more persons in some public place, to the terror of his Majesty's subjects. (a) The derivation of the word *affray* is from the French *effrayer*, to terrify ; and as in a legal sense it is taken for a public offence to the terror of the people, it seems clearly to follow that there may be an assault which will not amount to an affray ; as where it happens in a private place, out of the hearing or seeing of any except the parties concerned, in which case it cannot be said to be to the terror of the people. (b)¹ Thus, where two of the prisoners had fought together amidst a great crowd of persons, and the others were present aiding and assisting, at a place a considerable distance from any highway, and the fighting ceased on the appearance of some peace officers, it was held that this was not an affray ; for an affray must occur in some public place, and this was to all intents and purposes a private one. (c) And there may be an affray which will not amount to a riot, though many persons be engaged in it : as if a number of persons, being met together at a fair or market, or on any other lawful or innocent occasion,

(d) 1 Hawk. P. C. c. 65, s. 12.

(e) Id. Ibid.

(a) 4 Blac. Com. 144 ; 3 Inst. 158 ; Burn's Just. tit. *Affray*, l.

(b) 1 Hawk. P. C. c. 63, sec. 1. In 3 Inst. 158, it is said that an affray is a public offence to the terror of the King's subjects ; and is an English word, and so called because it affrighteth and maketh men afraid ; and is inquirable in a leet as a common nuisance.

(c) Reg. v. Hunt, 1 Cox C. C. 177, Alderson, B. If all the persons present went to see the fight, they were all guilty of an assault : Rex v. Perkins, 4 C. & P. 537 (19 E. C. L. R. 519), Patteson, J. An assembly for a prize fight is clearly an unlawful assembly, and where there is resistance to lawful authority exercised for the purpose of putting a stop to it, the offence may amount to an affray, or even a riot : Reg. v. Billingham, 2 C. & P. 234 (12 E. C. L. R.), Burrough, J.

¹ An indictment for an affray must charge the fighting to have been in a public place : State v. Heflin, 8 Humph. 84. An indictment charged that two persons with force, arms, &c., " did make an affray by fighting." It is held that this charge of fighting was sufficiently certain and definite and the indictment valid : State v. Benthall, 5 Humph. 519.

Mere words do not constitute an affray ; nor is a party guilty of that offence who offers no resistance to an attack made upon him, although the attack is induced by insulting language used by him to the assailant : O'Neill v. State, 16 Ala. 65. Words alone will not constitute an affray ; but accompanied by acts, such as drawing knives or attempting to use them in a public street of a city will : Hawkin v. State, 13 Geo. 322. A field surrounded by a forest and situated one mile from any highway or other public place, does not lose its private character by the casual presence of three persons, so as to make two of them, who fight together willingly guilty of an affray : Taylor v. State, 22 Ala. 15. Affray and assault are distinct offences : Champer v. State, 14 Ohio (N. S.) 437. See Roscoe on Criminal Evidence, 7 Am. ed., p. 270, note.

a sudden quarrel to fall together by the ears, it seems agreed that they are guilty of a riot, but only of a sudden affray, of which none are guilty who actually engage in it; and this on the ground of the design of their being innocent and lawful, and the subsequent breach of the peace happened without any previous intention.^(d) An affray differs also from a riot, that *two* persons only may be guilty of it: whereas three persons are necessary to constitute a riot, as has been shown in the preceding chapter. An affray may be much aggravated by the circumstances under which it takes place—first, in respect of its dangerous tendency; secondly, in respect of the place against whom it is committed; or, thirdly, in respect of the place in which it happens.

An affray may receive an aggravation from its dangerous tendency; as where it is a duel which cannot but be attended with great danger of murder, and is not only an open defiance of the law, but with it a direct contempt of the justice of the nation, putting at issue the necessity of righting themselves.^(e) And an affray may receive an aggravation from the persons against whom it is committed; as where the officers are violently disturbed in the due execution of their office, by the rescue of a legally arrested, or the bare attempt to make such a rescue; the law being under its more immediate protection.^(f) And further, an affray may receive an aggravation from the place in which it is committed; it is more severely punishable when committed in the King's courts, or even in a church-yard near those courts; and it is highly fineable when made in the face of any of the King's inferior courts of justice.^(g) And, upon the same ground, affrays in a church or church-yard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose service such places are immediately dedicated.^(h)

And, that no quarrelsome or threatening words whatsoever can amount to an affray, and that no one can justify laying his hands on those who shall barely utter angry words, without coming to blows: but it seems that a constable, upon the request of the party threatened, may carry the person who threatens to beat him to a justice, in order to find sureties. And granting that no bare words, without a demand of law, carry in them so much terror as to amount to an affray, it is certain that in some cases there may be an affray where there is no violence; as where persons arm themselves with dangerous and unusual arms in such a manner as will naturally cause a terror to the people, which is always an offence at common law, and is strictly prohibited by statutes.⁽ⁱ⁾

The principal of these statutes is 2 Edw. 3, c. 3, sometimes spoken of as the Statute of Northampton. It enacts, that no man, of what condition soever, except a knight or servant in his presence, and his ministers in executing their office, and his men in their company assisting them, and also upon a cry made for arms to the King's peace, shall come before the King's justices, or other of the King's officers, doing their office, with force and arms, nor bring any force in affray of

1 R. 2. P. C. c. 65, s. 3.

2 R. 2. P. C. c. 63, s. 21. This would apply to such duels as were fought in the open air; and to such as have been occasionally heard of, in more modern days, in foreign countries, fought amid a number of spectators. But, *quod*, if a duel as introduced in this country of late years, would be an affray.

3 R. 2. P. C. c. 63, s. 22. And see *post*, chap. on *Rescue*.

4 R. 2. P. C. c. 21, s. 6, 10; c. 63, s. 23. As to striking in the courts of justice, see 1038, *Aggravated Assaults*.

5 R. 2. P. C. c. 63, s. 23. And see *post*, p. 415, *Of Disturbances in Places of Public*

Assembly, secs. 2, 4.

Simpson v. State, 5 Yerg. 356. If one person, by such abusive language as is intended to bring on a fight, induces the other to strike him, he is guilty of an affray, though he may be unable to return the blow: *State v. Perry*, 5 Jones

peace,^(k) nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the King's justices, or other ministers, or elsewhere; upon pain to forfeit their armor to the King, and their bodies to prison at the King's pleasure.

*408] The statute also provides, that the King's *justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-holders, constables, and wardens of the peace within their wards, shall have power to execute the act; and that the judges of assize may inquire and punish such officers as have not done that which pertained to their office.^(l)

In the exposition of the 2 Edw. 3, c. 3, it has been holden, that no wearing of arms is within its meaning, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.^(m) And no person is within the intention of the statute who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavors to suppress or resist such disturbers of the peace and quiet of the realm.⁽ⁿ⁾ But a man cannot excuse wearing such armor in public by alleging that a person threatened him, and that he wears it for the safety of his person from the assault: though no one will incur the penalty of the statute, for assembling his neighbors and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle.^(o)

It may be useful to mention shortly the acts which may be done for the suppression of an affray, by a private person, by a constable, or by a justice of peace.

It seems to be agreed, that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace; and it is said that any private person may stop those whom he shall see coming to join either party.^(p) Any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled and his desire to break the peace has ceased, and then deliver him to a peace officer; and so any person may arrest an affrayer after the actual violence is over, but whilst he shows a disposition to renew it by persisting in remaining on the spot where he has committed it. Both cases fall within the same principle, which is that for the sake of the preservation of the peace, any individual who sees it broken, may restrain the *liberty of him whom he sees breaking it, so long as his ^{*409]} conduct shows that the public peace is likely to be endangered by his acts. In truth, whilst those are assembled together who have committed acts of violence and the danger of their renewal continues, the affray itself may be said to continue: and during the affray, the constable may, not merely on his own view, bu

(k) The words of the statute are *en affrai de la pees*. But Lord Coke, in 3 Inst. 158, cites it as *en affraier de la pais*; and observes, that the writ grounded upon the statute says *in quorundam de populo terrorem*, and that therefore the printed book (*en affray de la peace*) should be amended.

(l) The 7 R. 2, c. 13, and 20 R. 2, c. 1, enforcing this Act, are repealed by the 19 & 20 Vict. c. 64.

(m) 1 Hawk. P. C. c. 63, s. 9.

(n) Id. sec. 10.

(o) Id. sec. 8, and see in secs. 5, 6, 7, as to the proceedings of justices, &c, executing the Act.

(p) 1 Hawk. P. C. c. 63, s. 11. Where it is said that from hence it seems clearly follow, that if a man receive a hurt from either party, in thus endeavoring to preserve the peace, he shall have his remedy by an action against him; and that upon the same ground it seems equally reasonable that if he unavoidably happen to hurt either party, in thus doing what the law both allows and commends, he may well justify it; inasmuch as there is no way in fault, and the damage done to the other was occasioned by a laudable intention to do him a kindness. See particularly the charge of Tindal, C. J., to the Bristol grand jury, *ante*, p. 402, note (g).

on the information and complaint of another, arrest the offenders, and of course the person so complaining is justified in giving the charge to the constable. The plaintiff went into the defendant's shop, and offered to purchase an article at a price marked on a ticket; the plaintiff disputed with the shopman about the price, and was desired to leave the shop, which he refused to do, and declared he would strike any man who laid hands on him: a shopman then struck him on the face; the plaintiff returned the blow, and a contest commenced, the noise of which brought down the defendant from the room above; when he came down the plaintiff was scuffling with the shopman; the defendant sent for a policeman, and on his arrival the plaintiff was requested by the defendant to go from the shop quietly, but he refused; he was standing still in the shop, insisting on his right to remain there, and a mob gathering round the door, when the defendant gave him in charge to the policeman, who took him to the police station. It was held that the defendant had a right, the danger continuing, to deliver the plaintiff into the hands of the policeman, and that the circumstance that the plaintiff was not guilty of the first illegal violence made no difference; for at the time the defendant interfered he was ignorant of that fact: he saw the plaintiff and others in a mutual contest, and that mutual contest the law gave him power to terminate, for the sake of securing the peace of his house and neighborhood, and the persons of all those concerned from violence.(q) And it seems to be clear, that if either party be dangerously wounded in such an affray, and a stander by, endeavoring to arrest the other, be not able to take him without hurting or even wounding him, yet he is in no way liable to be punished, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die, or carry him before a justice of peace.(r)

It seems agreed, that a constable is not only empowered, as all private persons are, to part an affray which *happens in his presence*, but is also bound, at his peril, to use his best endeavors for this purpose:(s) and not only to do his utmost himself, but also to demand the assistance of others, which, if they refuse to give him, they are punishable with fine and imprisonment. In order to support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove: first, that the constable actually saw a breach of the peace committed by two or more persons: secondly, that there was a reasonable necessity for the constable calling upon other persons for their assistance and support; and lastly, *that the defendant was duly called upon to render his assistance, and that without any physical impossibility [*410 or lawful excuse, he refused to give it; and whether the aid of the defendant, if given, would have proved sufficient or useful, is not the question or criterion.(t) And it is laid down in the books, that if any affray be in a house, the constable may break open the doors to preserve the peace; and if affrayers fly to a house, and he follow with fresh suit, he may break open the doors to take them.(u) And so far is the constable intrusted with a power over all actual affrays, that though he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore if an assault be made upon him, he may not only defend himself but also imprison the offender in the same manner as if he were in no way a party.(v) It is said also, that if a constable see persons either actually engaged in an affray, as by striking, or offering to strike, or drawing their weapons, &c., or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice of the peace, to the end that such justice may compel him to find sureties for the peace, &c., or he may

(q) *Timothy v. Simpson*, 5 Tyrw. 244; 1 C., M. & R. 757.

(r) 1 Hawk. P. C. c. 63, s. 12; 3 Inst. 158.

(s) See the charge of Tindal, C. J., *ante*, p. 402, note (g).

(t) *Reg v. Brown*, C. & M. 314 (41 E. C. L. R.).

(u) 1 Hawk. P. C. c. 63, ss. 13, 16. But *qu.*, if a constable can safely break open the door of a dwelling-house in such case, without a magistrate's warrant. At least, it should seem, there must be some circumstances of extraordinary violence in the affray to justify him in so doing.

(v) *Id.* *Ibid.* sec. 15.

imprison him of his own authority for a reasonable time till the heat be over, and also afterwards detain him till he find such surety by obligation. But it seems that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence; and it is said that he ought not to lay hands on those who barely contend with hot words, without any threats of personal hurt: and that all which he can do in such a case is to command them, under pain of imprisonment, to avoid fighting.(w)

It has been much doubted whether a private individual, who has seen an affray committed, may give in charge to a constable who has not; and whether such constable may, therefore, take into his custody the affrayers, or either of them, in order to be carried before a justice, after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there was no danger *411] of renewal (x) but it seems now to be settled *that a constable has no power to arrest a man for an affray done out of his own view, without a warrant from a justice of peace,(y) unless a felony be done, or likely to be done: for it is the proper business of a constable to preserve the peace, not to punish the breach of it; and where a breach of the peace has been committed, and is over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate.(z) It is said that he may carry those before a justice of peace who were arrested by such as were present at an affray, and delivered by them into his hands.(a) Where the plaintiff was imprisoned by a constable in a cell on a false charge of assault, and the defendant, another constable, on hearing the charge from a third constable, without inquiry into the facts, took the plaintiff before the magistrates, it was held that the defendant, in order to justify himself, was bound to show that the charge was well founded, and having failed to do so, was liable to an action of trespass.(b)

There is no doubt but that a justice of peace may and must do all such thing

(w) Id. *ibid.* sec. 14.

(z) See *Timothy v. Simpson*, 5 Tyrw. 244, s. c.; 1 C., M. & R. 757. The Court did not decide the question. They observed, "the power of a constable to take into his custody upon a reasonable information of a private person under such circumstances, and of the person to give in charge, must be correlative. Now as to the authority of a constable, is perfectly clear that he is not entitled to arrest in order himself to take sureties of the peace, for he cannot administer an oath: *Sharrock v. Hannemer*, Cro. Eliz. 375, *Owen v. Owen*, 105, s. c. *nom. Scarrett v. Tanner*. But whether he has that power in order to take before a magistrate, that he may take sureties of the peace, is a question on which the authorities differ. Lord Hale seems to have been of opinion that a constable has this power: *H. P. C.* 89, and the same rule has been laid down at *Nisi Prius* by Lord Mansfield, in a case referred to in 2 East 306, and by Buller, J., in two others, one quoted in the same place, and another cited in 3 Campb. N. P. 421. On the other hand, there is a dictum to the contrary in Brooke's Abridgment, tit. *Faux Imprisonment*, which is referred to and adopted by Lord Coke in 2 Inst. 52; and Lord Holt, in 2 Lord Ray. 1301. *Reg. v. Tool*, expresses the same opinion. Lord C. J. Eyre, in *Coupey v. Henley*, 1 Esp. C. N. P. 5, does the same, and many of the modern text-books state that to be the law: *Burn's Justice*, 258, tit. *Arrest*, 26th edit.; *Bac. Abr.* (D) tit. *Trespass*, 53; 2 East P. C. 506; *Hawk. P. C.* b. 2, c. 13, s. 8.

(y) *Cook v. Nethercote*, 6 C. & P. 741 (25 E. C. L. R.), *Alderson, B.*; *Fox v. Gaunt*, 3 & Ad. 798 (23 E. C. L. R.); *Rex v. Curvan*, R. & M. C. C. R. 132; *Rex v. Bright*, 4 C. & P. 387 (19 E. C. L. R.); *Reg. v. Light*, D. & B. C. C. 332; *Reg. v. Walker*, *Dears. C. C.* 3. See these cases, *post*, p. 797; *Manslaughter in Resisting Officers*, and *Cohen v. Huskiss*, 2 M. & W. 477; *Baynes v. Brewster*, 2 Q. & B. 375 (42 E. C. L. R.); *Webster v. Watts*, Q. B. 311 (63 E. C. L. R.).

(z) *Cook v. Nethercote*, *supra*. See the 2 & 3 Vict. c. 47, s. 65, the Metropolitan Police Act, as to the apprehension of persons on a charge of aggravated assault committed out of sight of a policeman.

(a) 1 Hawk. P. C. c. 63, s. 17, citing Lamb. 131, and Dalt. C. 8. Dalton says, "every private man, being present, may stay the affrayers till their heat be over, and then deliver them to the constables to imprison them till they find surety for the peace:" which seems to imply that they may take them before a justice, in order that they may find such sureties; and as it seems that the private individual might take them for that purpose before a justice, it is but reasonable that the constables should have the authority to take them likewise. See *ante*, p. 408.

(b) *Griffin v. Coleman*, 4 H. & N. 265.

for the suppression of an affray, which private men or constables are either enabled or required by the law to do: but it is said that he cannot, without a warrant, authorize the arrest of any person for an affray out of his view. Yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. Also it seems that a justice of peace has a greater power over one who has dangerously wounded another in an affray, than either a private person or a constable; for there does not seem to be any good authority, that these have any power to take sureties of such an offender; but it seems certain that a justice of the peace has a discretionary power, either to commit him or to bail him till the year and day be past. It is said, however, that a justice ought to be very cautious how he takes bail, if the wound be dangerous; since, if the party die, and the offender do not appear, the justice is in danger of being severely fined, if upon the whole circumstances of the case he has been too favorable.(c)

*The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for [*412 where there is any material aggravation, the punishment will be proportionably increased.(d)

*CHAPTER THE TWENTY-SEVENTH.

[*413

OF CHALLENGING TO FIGHT.

It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavor to provoke another to send a challenge, or to fight; as by dispersing letters, for that purpose, full of reflections, and insinuating a desire to fight.(a)¹ And it will be no excuse for a party so offending, that he has received provocation: for as, if one person should kill another, in a deliberate duel, under the provocation of charges against his character and conduct ever so grievous, it will be murder in him and his second; the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace.(b) Where, after a prisoner had been convicted, his brother went to the house of the foreman of the jury, and challenged him to mortal combat, it was held that this was a high contempt of the Court before which the trial was held, and punishable as such.(c)

The offence of endeavoring to provoke another to send a challenge to fight was much considered in a modern case, in which it was held to be an indictable misdemeanor: and more especially as such provocation was given in a letter containing libellous matter, and as the prefatory part of the indictment alleged that the defendant intended to do the party bodily harm, and to break the King's peace.(d) And the sending such letter was held to be an act done towards the procuring the

(c) 1 Hawk. P. C. c. 63, s. 19. As maliciously wounding is now a felony under the 24 & 25 Vict. c. 100, s. 18, whether the case would have been murder or manslaughter, in case death had ensued, the proper course in such cases is to commit, unless the case be one of doubt. C. S. G.

(d) 4 Black. Com. 145; 1 Hawk. P. C. c. 63, s. 20.

(a) 1 Hawk. P. C. c. 63, s. 3; 3 Inst. 158; 4 Black. Com. 150; Hick's case, Hob. 215.

(b) Rex v. Rice, 3 East 581.

(c) Reg. v. Martin, 5 Cox C. C. 356, Pigot, C. B., and Pennefather, B. Martin was adjudged to a month's imprisonment, and to find sureties for keeping the peace for seven years.

(d) Rex v. Phillips, 6 East 464. The letter was: "Sir—It will, I conclude from the description you gave of your feelings and ideas with respect to insult, in a letter to Mr. Jones, of last Monday's date, be sufficient for me to tell you, that in the whole of the Carmarthenshire election business, as far as it relates to me, you have behaved like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make."

¹ See Roscoe's Crim. Ev. 7th Am. edit., p. 379, note.

commission of the misdemeanor meant to be accomplished.(e) In this case, with respect to the *intent* of the defendant, the rule was adopted that where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved; though it is sufficient to allege it in the prefatory part of the indictment: but that where the act is in itself unlawful, the law infers an evil intent; and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecution.(f)

*414] "It has been considered that mere words of provocation, as "liar" and "knave," though motives and *mediate* provocation for a breach of the peace, yet do not tend *immediately* to the breach of the peace, like a challenge to fight, or a threatening to beat another.(g) But words which directly tend to a breach of the peace may be indictable; as if one man challenge another by words;(h) and if it can be proved that the words used were intended to provoke the party to whom they were addressed to give a challenge, the case would seem to fall within the same rule.(i)

In a case where a person wrote a letter with intent to provoke a challenge, sealed it up, and put it into the twopenny post-office in a street in Westminster, addressed to the prosecutor in the city of London, by whom it was there received; Lord Ellenborough, C. J., held that the defendant might be indicted in Middlesex, as there was a sufficient publication in that county by putting the letter into the post-office there, with the intent that it should be delivered to the prosecutor elsewhere; and that if the letter had never been delivered, the defendant's offence would have been the same.(k)

It may be observed, before this subject is concluded, that sending a challenge is an offence for which the Court of King's Bench will grant a criminal information: but in a case where it appeared, upon the affidavits, that the party applying for an information had himself given the first challenge, the Court refused to proceed against the other party by way of information; and left the prosecutor to his ordinary remedy by action or indictment.(l) A rule to show cause why such an information should not be granted has been made, upon producing *copies* only of the letters in which the challenge was contained, such copies being sufficiently verified.(m)

The punishment for this offence, as a misdemeanor, is discretionary, and must be guided by such circumstances of aggravation or mitigation as are to be found in each particular case.(n)

(e) See *ante*, pp. 84, 85.

(f) *Rex v. Phillips*, 6 East 470 to 475.

(g) *King's case*, 4 Inst. 181.

(h) *Reg. v. Langley*, 6 Mod. 125; s. c. 2 Lord Raym. 1031.

(i) The rule given in 3 Inst. 158, is *Quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*.

(k) *Rex v. Williams*, 2 Campb. 506.

(l) *Rex v. Hankey*, 1 Burr. 316, where it is said that the Court held that it might have been right to have granted *cross informations*, in case each party had applied for an information against the other.

(m) *Rex v. Chappel*, 1 Burr. 402.

(n) *Rex v. Rice*, 3 East 584, in which case the defendant (though he had undergone some imprisonment, and though there were several circumstances tending materially to mitigate his offence) was sentenced to pay a fine of £100 and to be imprisoned for one calendar month, and at the expiration of that time to give security to keep the peace for three years, himself in £1000, and two sureties in £250 each, and to be further imprisoned till such fine was paid and such securities given. Hawkins, speaking of the pernicious consequences of duelling, says, "upon which considerations persons convicted of barely sending a challenge have been adjudged to pay a fine of £100, and to be imprisoned for one month without bail, and also to make a public acknowledgment of their offence, and to be bound to their good behavior:" 1 Hawk. P. C. c. 63, s. 21.

*CHAPTER THE TWENTY-EIGHTH

[*415

OF DISTURBANCES IN PLACES OF PUBLIC WORSHIP.

It has been already stated that affrays in a church or churchyard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated; (a) and upon this consideration all irreverent behavior in these places has been esteemed criminal by the makers of our laws. So that many disturbances occurring in these places are visited with punishment which, if they happened elsewhere, would not be punishable at all; as bare quarrelsome words: and some acts are criminal which would be commendable if done in another place; as arrests by virtue of legal process. (b)

Several statutes have been passed for the purpose of preventing disturbances in places of worship belonging to the established church, and also in those belonging to congregations of Protestant Dissenters and Roman Catholics. (c)

By the 5 & 6 Edw. 6, c. 4, "if any person whatsoever shall, by words only, quarrel, chide, or brawl in any church or churchyard, that then it shall be lawful unto the ordinary of the place where the offence shall be done, and proved by two lawful witnesses, to suspend every person so offending; that is to say, if he be a layman, *ab ingressu ecclesie*, and if he be a clerk, from the ministration of his office, for so long time as the said ordinary shall by his discretion think meet and convenient, according to the fault." (c)

By sec. 2, "if any person or persons shall smite or lay violent hands upon any other, either in any church or churchyard, then *ipso facto* every person so offending shall be deemed excommunicate, and be excluded from the fellowship and company of Christ's congregation." (d)

In the construction of this statute it has been held that the Ecclesiastical Court may proceed upon the two first sections, and is not to be prohibited; for though the offence mentioned in the second section of smiting in the church or churchyard is still an offence at common law, and the offender may be indicted for it, *yet, besides this, he may, by the act be *ipso facto* excommunicated. (e) No previous conviction is necessary in this case; though, if there be one, the ordinary may use it as proof of the fact. But if the Ecclesiastical Court proceeds for damages on either clause, the Court of King's Bench will prohibit them; for the proceedings of the Ecclesiastical Court are *pro salute animæ*. (f) [416

Cathedral churches, and the churchyards which belong to them, are within the statute. (g) And it will be no excuse for a person who strikes another in a church, &c., to show that the other assaulted him. (h) But churchwardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, or turn them out of the church, are not within the meaning of the statute. (i)

(a) *Ante*, p. 407.

(b) 1 Hawk. P. C. c. 63, s. 23.

(c) By the 23 & 24 Vict. c. 32, s. 1, "it shall not be lawful for any ecclesiastical court in England or Ireland to entertain or adjudicate upon any suit or cause of brawling commenced after July 3, 1860, against any person *not* being in holy orders;" and by sec. 4 the 5 & 6 Edw. 6, c. 4 is repealed "so far as relates to persons *not* in holy orders."

(d) The 9 Geo. 4, c. 31, repeals this Act as far "as relates to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike as therein mentioned." The statute has three degrees of offences, per Lord Mansfield, C. J. 1 Burr. 242, and only the last, *i. e.*, sec. 3, seems to be repealed. C. S. G.

(e) *Wilson v. Greaves*, 1 Burr. 240.

(f) *Id. Ibid.* And by Lord Mansfield, C. J., in the same case, "We proceed to *punish* they to *amend*."

(g) *Dethick's case*, 1 Leon. 248.

(h) 1 Hawk. P. C. c. 63, s. 28.

(i) *Id. Ibid.* sec. 29.

¹ *Comm. v. Porter*, 1 Gray 476; *Hollingsworth v. State*, 5 Sneed 518; *Campbell v. Comm.*, 9 P. F. Smith 268.

By the 1 Mary, sess. 2, c. 3, s. 2, "if any person or persons, of their own power and authority, do, and shall willingly and of purpose, by open and overt word, fact, act, or deed, maliciously or contemptuously molest, let, disturb, vex, or trouble, or by any other unlawful ways or means disquiet or misuse, any preacher or preachers, licensed, allowed, or authorized, to preach by the Queen's Highness, or by any archbishop or bishop of this realm, or by any other lawful ordinary, or by any of the universities of Oxford and Cambridge, or otherwise lawfully authorized or charged by reason of his or their cure, benefice or other spiritual promotion or charge, in any of his or their open sermon, preaching, or collation, that he or they shall make, declare, preach or pronounce, in any church, chapel, churchyard, or in any other place or places, used, frequented, or appointed, or that hereafter shall be used or appointed to be preached in; or if any person or persons shall maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or otherwise trouble any parson, vicar, parish priest, or curate, or any lawful priest, preparing, saying, doing, singing, ministering or celebrating the mass, or other such divine service, sacraments, or sacramentals, as was most commonly frequented and used in the last year of the reign of the late sovereign lord King Henry the Eighth, or that at any time hereafter shall be allowed, set forth, or authorized, by the Queen's Majesty; or, if any person or persons shall unlawfully, contemptuously, or maliciously, of their own power or authority, pull down, deface, spoil, or otherwise break any altar or altars, or any crucifix, or cross, in any church, chapel, or churchyard, every such offender, his aiders, procurers, or abettors, may be apprehended by any constable or churchwarden of the place where such offence shall be committed, or by any other officer or person then being present at the time of the said offence, and being so apprehended, shall be brought before some justice of the peace, by whom he shall, upon due accusation, be committed forthwith; and within six days next after the accusation the said justice, with one other justice, shall *417] diligently examine the offence; and if the *two justices find the person guilty, by proof of two witnesses, or confession, they shall commit him to gaol for three months, and further to the quarter sessions next after the end of the three months; at which sessions he is upon repentance to be discharged, finding security for his good behavior for a year; and if he will not repent, he is to be further committed till he does. (k)

The disturbance of a minister in saying the present common prayer is within this statute; for the express mention of such divine service as should be afterwards authorized by Queen Mary impliedly includes such service also as should be authorized by her successors, upon the principle that as the King never dies, a prerogative given generally to one goes of course to others. (l)

The 1 Mary, sess. 2, c. 3, merely gave to the common law cognizance of offence, which was before punishable by the ecclesiastical law; and in order to within that statute, the party must maliciously, wilfully, or of purpose, molest a person celebrating divine service. The plaintiff on a Sunday presented a notice the parish clerk, and desired him to read it. The clerk, after consulting the minister, refused to do so. After the Nicene Creed had been read, and whilst the minister was walking from the communion table to the vestry-room, and whilst part of the service was actually going on, the plaintiff stood up in his pew and read a notice that a vestry would be held to choose churchwardens, whereupon the minister desired a constable to take him out of the church, which the constable did and detained him an hour after the service was over, and then allowed him to upon promising to attend before a magistrate the next day. It was held, though the constable might be justified in removing him from the church, in detaining him until the service was over, he could not detain him afterwards to take him before a magistrate under this statute. Abbott, C. J., said, "had notice been read by the plaintiff whilst any part of the service was actually going on, we might have thought that he had done it on purpose to molest the minister, but the act having been done during an interval when no part of the service was

(k) 1 Mary, sess. 2, c. 3, ss. 2, 3, 4, 5, 6. *Qu.*, how far is this Act repealed by the 1 Eliz. c. 2.

(l) 1 Hawk. P. C. c. 63, s. 31; Gibs. 372.

in the course of being performed, and the party apparently supposing that he had a right to give such a notice, I am not prepared to say that the 1 Mary, sess. 2, c. 3, warranted his detention in order that he might be taken before a justice."^(m)

The statute further provides, that persons rescuing offenders so apprehended as aforesaid, or hindering the arrest of offenders, shall suffer like imprisonment, and pay a fine of five pounds for each offence.⁽ⁿ⁾ And if any offenders be not apprehended, but escape, the escape is to be presented at the quarter sessions, and the inhabitants of the parish where the escape was suffered are to forfeit five pounds.^(o)

Precedents are to be met with of indictments for breaking the windows of a church, by firing a gun, against them:^(p) but it has *been doubted whether such an indictment is sustainable, as being for a mere trespass.^(q) [*418

By the 24 & 25 Vict. c. 100, s. 36, "Whosoever shall, by threats or force, obstruct or prevent, or endeavor to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor."^(r)

The 1 Will. & M. c. 18, s. 18, which was passed for the purpose of exempting Protestants dissenting from the Church of England from the penalties of certain laws therein mentioned, enacts, "that if any person or persons shall, willingly and of purpose, maliciously or contemptuously, come into any cathedral or parish church, chapel, or other congregation permitted by this Act, and disquiet or disturb the same, or misuse any preacher or teacher; such person or persons, upon proof thereof before any justice of peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognizance in the penal sum of fifty pounds; and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions, shall suffer the pain and penalty of twenty pounds," to the use of the King.

Before this statute the Court of King's Bench refused to grant a *certiorari* to remove an indictment at the sessions against a person not behaving himself modestly and reverently at the church during divine service; for, although the offence was punishable by ecclesiastical censures, the Court considered it properly to come within the cognizance of the justices of the peace.^(s) An indictment upon the statute, found at the quarter sessions, may be removed by *certiorari* before verdict, notwithstanding the words of the statute, which seem at the first view to confine the cognizance of the offence *to the justices in the first instance, [*419 and in the next to the quarter sessions.^(t)

(m) *Williams v Glenister*, 2 B. & C. 699 (9 E. C. L. R.). It was also held that the case did not come within the 1 Will. & M. c. 18, *post*, p. 418.

(n) Sec. 7.

(p) 2 Chit. Crim. L. 23.

(o) Sec. 8.

(q) *Id. Ibid.*, and see *ante*, p. 91.

(r) This clause is new in England, except that part which applies to the arrest of any clergyman while performing divine service, or going to perform the same, or returning from the performance thereof, which was contained in both the 9 Geo. 4, c. 31, s. 23, and 10 Geo. 4, c. 34, s. 27 (1.). The rest of the clause is framed on the Irish Acts of the 27 Geo. 3, c. 15, s. 5; 40 Geo. 3, c. 96, s. 5; 5 Geo. 4, c. 25, s. 5; and 5 Vict. sess. 2, c. 28, ss. 7, 19. The amendments consist in including ministers not of the Church of England and Ireland, and all places of divine worship, and all burial places, and in adding the endeavor to prevent or obstruct, the offering any violence to, and the arrest under pretence of executing any civil process of, any clergyman or minister engaged in or about to engage in any of the rites or duties mentioned in this clause. As to hard labor, &c., see *ante*, p. 4.

(s) *Rex v. —*, 1 Keb. 491; *Burn's Just. tit. Public Worship*.

(t) *Rex v. Hube*, 5 T. R. 542.

The oaths taken by a preacher under this Act are matter of record, and cannot be proved by parol evidence: but it is not necessary, upon an indictment for disturbing a dissenting congregation, to prove that the minister has taken the oaths.^(u) It is no defence to such an indictment that the defendant committed the outrage for the purpose of asserting his right to the situation of clerk.^(v) And it has been held that a congregation of foreign Lutherans, conducting the service of their chapel in the German language, are within the protection of the statute.^(w) Upon the conviction of several defendants, each of them is liable to a penalty of twenty pounds.^(x)

The 1 Will. & M. c. 18, only applies where the thing is done wilfully, and of purpose to disturb the congregation or misuse the minister.^(y)

By the 52 Geo. 3, c. 155, s. 12, "If any person or persons do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by this Act, or any former Act or Acts of Parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled; such person or persons so offending, upon proof thereof before any justice of the peace by two or more credible witnesses, shall find two sureties to be bound by recognizances in the penal sum of fifty pounds to answer for such offence; and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said general or quarter sessions shall suffer the pain and penalty of forty pounds." By sec. 14 nothing contained in the Act shall extend to *Quakers*, nor to any meetings or assemblies for religious worship held or convened by them.

It has been holden upon this statute, in conformity to the decision which has been mentioned upon the 1 Will. & M. c. 18,^(z) that an indictment found at the quarter sessions may be removed into the Court of King's Bench by *certiorari* before trial,^(a) and may be tried at the assizes.

A similar provision to that contained in the 1 Will. & M. c. 18, s. 18,^(b) relating to Protestant dissenters, is enacted in the 31 Geo. 3, c. 32, s. 10, with respect to *Roman Catholic* congregations, or assemblies of religious worship permitted by the latter statute.

The 18 & 19 Vict. c. 86, recites the 1 Will. & M. sess. 1, c. 18, and 52 Geo. 3, c. 155, and enacts that nothing contained in these Acts or in the 15 & 16 Vict. c. 36, shall apply, (1), to any congregation or assembly for religious worship held in any parish or ecclesiastical district, and conducted by the incumbent, or in case the incumbent is not resident, by the curate of such parish or district, or by any person authorized by them respectively; (2), to any congregation or assembly for religious worship meeting in a private dwelling-house or on the premises belonging thereto; (3), to any congregation or assembly for religious worship meeting occasionally in any building or buildings not usually appropriated to the purposes of religious worship. And no person permitting any such congregation to meet as herein-mentioned in any place occupied by him shall be liable to any penalty for so doing.^(c)

The 23 & 24 Vict. c. 32, s. 2, renders liable to summary conviction any person guilty of riotous, violent or indecent behavior in any church or chapel of the Church of England* and Ireland, or in any chapel of any religious denomination or in any place of religious worship certified under the 18 & 19 Vict. c. 86: whether during the celebration of divine service or at any other time, or in any

(u) *Rex v. Hube*, Peake R. 131.

(v) *Id. Ibid.*

(w) *Id. Ibid.*

(x) *Rex v. Hube*, 5 T. R. 542.

(y) *Per Abbott, C. J., Williams v. Glenister*, ante, p. 417.

(z) *Rex v. Hube*, supra.

(a) *Rex v. Wadley*, 4 M. & S. 508.

(b) *Ante*, p. 418.

(c) By sec. 2, so much of the 2 & 3 Will. 4, c. 115, as relates to Roman Catholics, and of the 9 & 10 Vict. c. 59, as relates to Jews, is to be read as applicable to the law which Protestant dissenters are subject after the passing of this Act. See the 18 & 19 Vict. c. 81, as to registering places of religious worship.

churchyard or burial ground, or who molests, disturbs, &c., any preacher or clerk, man as therein mentioned.

The facts attending disturbances of religious assemblies may sometimes authorize proceedings at common law for a conspiracy or a riot: (d) and we have seen that by the 24 & 25 Vict. c. 97, s. 11, if persons riotously assembled begin to demolish or pull down any church or chapel, or any chapel for the religious worship of persons dissenting from the worship of the united church of England and Ireland they will be guilty of felony. (e)

*CHAPTER THE TWENTY-NINTH.

[*421

OF FORCIBLE ENTRY AND DETAINER.

A **FORCIBLE entry** or *detainer* is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law. (a) It has been laid down in the books that, at common law, and before the passing of the statutes relating to this subject, if a man had a right of entry upon lands or tenements, he was permitted to enter with force and arms; and to detain his possession by force, where his entry was lawful: (b) and that even at this day he who is wrongfully dispossessed of his *goods*, may justify the retaking of them by force from the wrongdoer, if he refuses to redeliver them. (c) However, it is clear that, in many cases, an indictment will lie at common law for a forcible entry, if it contain, not merely the common technical words, "with force and arms," but also such a statement as shows that the facts charged amount to more than a bare trespass, for which no one can be indicted. (d) And in a modern case in the Court of King's Bench, it was mentioned, by the great judge who then presided in that Court, as a part of the law which ought to be preserved, that no one shall with force and violence assert his own title. (e) But on a subsequent day of the same term he said that the Court wished that the grounds of their opinion in that case might be understood, and desired that it might not be considered as a precedent in other cases to which it did not apply. He then proceeded: "Perhaps some doubt may hereafter arise respecting what Mr. Serjeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title. But without giving any opinion concerning that dictum one way or the other, but leaving it to be proved or disproved whenever that question shall arise, all that we wish to say is, that our opinion in this case leaves that question untouched: it appearing by this indictment that the defendants unlawfully entered, and therefore the Court cannot intend that they had any title. (f) There seems to be no doubt that a party may be guilty of a forcible entry by violently, and with force, entering into that to which he has a legal title. (g)" [*422

) See Proceed. 2 Chit. Crim. L. 29.

(e) *Ante*, p. 382.

4 Blac. Com. 148.

Dalt. Just. 297; Lamb. 135; Crom. 70 a, b; 2 Hawk. P. C. c. 64, ss. 1, 2, 3; Bac. tit. *Forcible Entry and Detainer*.

1 Hawk. P. C. c. 64, s. 1; *Blades v. Higgs*, 10 C. B. (N. S.) 713. (100 E. C. L. R.).

Rex v. Bake, 3 Burr. 1731; *Rex v. Bathurst*, Say. 225, referred to in *Rex v. Storr*, 3 1699, 1702; *Rex v. Wilson*, 8 T. R. 357, in which last case the indictment charged defendants (twelve in number) with having *unlawfully and with a strong hand* entered, and it was held good.

7 Lord Kenyon, C. J., *Rex v. Wilson*, 8 T. R. 361, and in *Taunton v. Costar*, 7 T. the same learned judge said, "If the landlord had entered with a strong hand to dispossess the tenant by force [after the expiration of his term] he might have been guilty of a forcible entry," and see *Turner v. Meymot*, 1 Bing. 158 (8 E. C. L. R.); 7 4.

F. R. 364.

Newton v. Harland, 1 M. & Gr. 644, the judges of the Court of Common Pleas

1. v. *Keeper of the Prison*, 1 Ashm. 140. It is no forcible entry for a man to dispossess of which his wife is in possession: *Morris v. Bowles*, 1 Dana 97.

But where a breach of the peace is committed by a freeholder, who, in order to get into possession of his land, assaults a person wrongfully holding possession of it against his will, although the freeholder may be responsible to the public in the shape of an indictment for a forcible entry, he is not liable to the person wrongfully holding possession.^(h)

Whatever may be the true doctrine upon this subject at common law, the statutes which have been passed respecting forcible entries and detainers are clearly intended to restrain all persons from having recourse to violent methods of doing themselves justice: and it is the more usual and effectual method to proceed upon these statutes, which give restitution and damages to the party grieved.

By the 5 Rich. 2, c. 8, "none shall make entry into any lands and tenements, but in case where entry is given by the law; and in such case not with strong hand, nor with multitude of people, but only in a peaceable and easy manner," on pain of imprisonment and ransom. This statute gave no speedy remedy, leaving the party injured to the common course of proceeding by indictment or action; and made no provision at all against forcible detainers. The 15 Rich. 2, c. 2, goes further, and enacts, that on complaint of forcible entry into lands and tenements, or other possession whatsoever, "to the justices of peace or any of them, the same justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice," until they make fine and ransom: and that the people of the county and the sheriff shall assist, &c., on pain of imprisonment and fine. "And in the same manner it shall be done of them that make such forcible entries in benefices or offices of holy church." But this statute gave no remedy against those who were guilty of a forcible detainer after a peaceable entry, nor against those who were guilty of both a forcible entry and forcible detainer, if they were removed before the coming of a justice of peace; and it gave *423] no power to the justice to restore the party *injured to his possession, and did not impose any penalty on the sheriff for disobeying the precepts of the justices in the execution of the statute. Further enactments were therefore necessary.⁽ⁱ⁾

By the 8 Hen. 6, c. 9, s. 3, though the persons making forcible entries "be present or else departed before the coming of the justices or justice, the same justices or justice, in some good town next to the tenements so entered, or in some other convenient place, according to their discretion, shall have or either of them shall have authority to inquire, by the people of the same county, as well of them that make such forcible entries in lands and tenements as of them which the same hold with force; and if it be found before any of them that any doth contrary to this statute, then the said justices or justice shall cause to re-seize the lands and

seem to have been of opinion that a landlord who entered forcibly into the house of a tenant after the expiration of his term, would be guilty of a forcible entry, both at common law and under the statutes; and the only doubt was whether, supposing there was such a forcible entry upon a tenant after the expiration of the term, the possession thereby obtained was legal. Tindal, C. J., Bosanquet and Erskine, JJ., holding that if the landlord, in making his entry upon the tenant, had been guilty of a breach of a positive statute, or of an offence against the common law, that such violation of the law in making the entry caused the possession thereby gained to be illegal. Coltman, J., holding that although the defendant, if guilty of a forcible entry, was responsible for it in the way of a criminal prosecution, yet that, as against the tenants, who are wrongdoers, and altogether without title, he had obtained by his entry a lawful possession, and might justify in a civil action removing them, in like manner as in the case of any other trespasser. Parke and Alderson, BB., who had each tried the case, were of the same opinion as Coltman, J., and still retain it: *Harvey v. Bridges*, 14 M. & W. 437; 1 Exch. R. 261. See *Butcher v. Butcher*, 7 B. & C. 399 (14 E. C. L. R.); 1 M. & R. 220; *Hillary v. Gay*, 6 C. & P. 284 (25 E. C. L. R.); *Davison v. Wilson*, 11 Q. B. 890 (63 E. C. L. R.); *Burling v. Read*, 11 Q. B. 904; *Pollen v. Brewer*, 7 C. B. (N. S.) 371 (97 E. C. L. R.); which seem to overrule *Newton v. Harland* as to the entry being illegal.

^(h) Per Parke, B., *Harvey v. Bridges*, *supra*.

⁽ⁱ⁾ Upon the imposing and levying the fine under this statute of Rich. 2, see 1 Hawk. P. C. c. 64, s. 8; and the cases collected in Bac. Abr. tit. *Forcible Entry and Detainer* (A.) in the notes.

tenements so entered or holden as afore, and shall put the party put out in full possession as before." And after making provision concerning the precepts of the justices to the sheriff to return a jury to inquire of forcible entries, the qualification of the jurors, and the remedy by action against those who obtain forcible possession of lands, &c., sec. 6 enacts, that mayors, &c., of cities, towns, and boroughs, having franchise, shall have in such cities, &c., like power to remove such entries, and in other articles aforesaid, rising within the same, as the justices of peace and sheriffs in counties. Sec. 7 provides, that "they which keep their possessions with force in any lands or tenements, whereof they or their ancestors, or they whose estates they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endamaged by force of this statute." And by the 31 Eliz. c. 11, "no restitution, upon an indictment of forcible entry, or holding with force, be made to any person or persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession by the space of three whole years together next before the day of such indictment so found, and his, her, or their estate or estates therein not ended or determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried, if the other will deny or traverse the same: and if the same allegation be tried against the same person or persons so indicted, then the same person or persons so indicted to pay such costs and damages to the other party as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions."

The 15 Rich. 2, c. 2, gave magistrates a summary jurisdiction in all cases of forcible entry; but in cases of forcible detainer, only where there had been a previous forcible entry; notwithstanding that statute, a party who had acquired the possession of lands peaceably but unlawfully, might afterwards detain them forcibly; that was a mischief the 8 Hen. 6, c. 9, was intended to remedy; and it gives justices summary jurisdiction only in cases of forcible detainer, preceded by an *unlawful* entry, and therefore a conviction *by justices on that statute merely [*424 stating an entry and a forcible detainer is insufficient. (k)

In the construction of these statutes it has been holden, that if a lessee for years or a copyholder be ousted, and the lessor or lord disseised, and such ouster, as well as disseisin, be found in an indictment of forcible entry, the Court may, in their discretion, award a restitution of the possession to such lessee or copyholder; which was, by necessary consequence, a re-seisin of the freehold also, whether the lessor or lord had desired or opposed it. But it was a great question, whether a lessee for years or a copyholder, being ousted by the lessor or lord, could have a restitution of their possession within the equity of 8 Hen. 6, the words of which are, that the justice "shall cause to re-seize the lands," &c., and by which it seems to be implied that the party must be ousted of such an estate whereof he may be said to be seised, which must at least be a freehold. For the purpose of removing this doubt, it was enacted by 21 Jac. 1, c. 15, that such judges, justices, or justice of the peace as by reason of any Act of Parliament then in force were authorized to give restitution to tenants of any estate of freehold of their lands, &c., entered upon by force, or withholden by force, shall have the like authority (upon indictment of such forcible entries or forcible withholdings) to give like restitution of possession to "tenants for terms of years, tenants by copy of court roll, guardians by knight's service, tenants by elegit, statute merchant and staple." It has been holden, that a tenant by the verge is not within this statute: but the propriety of this decision is doubted; as such person, having no other evidence of his title but by the copy of court roll, seems at least to be within the meaning, if not within the words, of the statute. (l)

If a lessor eject his lessee for years, and afterwards be forcibly put out of possession again by such lessee, he has no remedy for a restitution by force of any of the

(A) *Rex v. Oakley*, 4 B. & Ad. 307 (24 E. C. L. R.). See *Rex v. Wilson*, 1 A. & E. 627 (28 E. E. L. R.); *Rex v. Wilson*, 3 Ad. & E. 817 (30 E. C. L. R.); *Attwood v. Jolliffe*, 3 S. C. 116, as to the form of such a conviction.

(l) 1 Hawk. P. C. c. 64, s. 17.

above-mentioned statutes : there seems, however, to be no doubt but that a justice of peace, &c., may remove the force, and commit the offender.^(m)

The law upon these statutes respecting forcible entries and detainers may be further considered with reference—I. To the persons who may commit the offence. II. To the nature of the possessions in respect of which it may be committed. III. To the acts which will amount to a forcible entry. And, IV. To the acts which amount to a forcible detainer.

I. A man who breaks open the doors of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within these *125] statutes.⁽ⁿ⁾ Where a wife was indicted with others for a forcible entry into a house, which she had taken for herself, but of which her husband had afterwards obtained possession with the landlord's consent, and it was objected that a wife could not be guilty of a forcible entry into the house of her husband; Lord Tenterden, C. J., said, "although a wife certainly cannot commit a trespass on the property of her husband, I am by no means satisfied that, if she comes with strong hand, she may not be indictable for a forcible entry, which proceeds on the breach of the public peace." "As at present advised I think she may be guilty of a forcible entry, if her entry was made under circumstances of violence amounting to a breach of the public peace."^(o) But a joint tenant or tenant in common may offend against the statutes either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry does not excuse the violence, or lessen the injury, done to his companion; and, consequently, an indictment of forcible entry into a moiety of a manor, &c., is good.^(p) Also, where a man has been in possession of land for a great length of time by a defeasible title, and a claim is made by him who has a right of entry, the wrongful possessor, continuing his occupation, will be punishable for a forcible entry and detainer; because all his estate was defeated by the claim, and his continuance in possession afterwards amounts in the judgment of law to a new entry.^(q) It does not follow from the decision in *Rex v. Oakley*^(r) that the 8 Hen. 6, c. 9, does not apply to the case of a tenant at will or for years, holding over after the will is determined or term expired, because the continuance afterwards may amount in judgment of law to a new entry.^(s)

II. A person may be guilty of this offence by a force done to ecclesiastical possessions, as churches, vicarage houses, &c., as much as if it were done to a temporal inheritance. And it has been holden, as a general rule, that a person may be indicted for a forcible entry into any such incorporeal hereditament for which a writ of entry will lie, either by the common law, as for rent, or by statute, as for tithes, &c. It is, however, questioned whether there be any good authority that such an indictment will lie for a common or office; though it seems agreed that an indictment of forcible detainer lies against any one, whether he be the *terre-tenant* or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of these possessions; as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt, if he dare put in his beasts into the common, &c. No one can come within the danger of these statutes by a violence offered to another in respect of a way, or such like easement which is no possession.¹

^(m) 1 Hawk. P. C. 64, ss. 17, 18.

⁽ⁿ⁾ Bac. Abr. tit. *Forcible Entry*, &c. (D.). 1 Hawk. P. C. c. 64, s. 32, where it is said also that a man will not be within the statutes who forcibly enters into land in the possession of his own lessee at will; but a *qu.* is subjoined. And see *Rex v. Wilson*, 8 T. R. 364; *Taunton v. Costar*, 7 T. R. 431; *Turner v. Meymot*, 1 Bing. 158, and *Newton v. Harland*, *ante*, p. 422, note (g), which seem to show that the position in the text is erroneous. C. S. G.

^(o) *Rex v. Smyth*, 1 M. & Rob. 155; 5 C. & P. 201 (24 E. C. L. R.). And see *Doe v. Daly*, 8 Q. B. 934 (55 E. C. L. R.).

^(p) 1 Hawk. P. C. c. 64, s. 33.

^(q) *Id.* ss. 22, 34; *Crom.* 69; *Dalt.* c. 77; *Co. Lit.* 256.

^(r) 4 B. & Ad. 307 (24 E. C. L. R.), *ante*, p. 424.

^(s) *Per Park, J., Rex v. Oakley, supra.*

¹ Nor for a ferry: *Keys v. Lawless*, Little's S. C. 184.

But it seems that a man cannot be convicted, upon view, by force of the 15 Rich. 2, c. 2, of a forcible detainer of any incorporeal inheritance wherein he cannot be said to have made a precedent forcible entry.^(t)

*III. A *forcible entry* must regularly be with a strong hand, with unusual weapons, or with menace of life or limb: it must be accompanied [426 with some circumstances of actual violence or terror; and an entry which has no other force than such as is implied by the law in every trespass is not within these statutes.^(u) An entry may be forcible not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession; but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling-house, and perhaps also by any act of outrage after the entry, as by carrying away the party's goods, &c., which being found in an assize of *novel disseisin*, will make the defendant a disseisor with force, and subject him to fine and imprisonment.^(v) If a man enters to distrain for rent in arrear with force, this is a forcible entry, because, though he does not claim the land itself, yet he claims a right and title out of it, which by these statutes he is forbid to exert by force; but if a man who has a rent be resisted from his distress with force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assize, or may fine and imprison the party: but he cannot have a writ of restitution; for the statute does not give the justices power to re seize the rent, but only the lands and tenements themselves.^(w) If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession of it in the party's absence, this according to the better opinion is a forcible entry.^(x) And there may be a forcible entry where any person's wife, children, or servants, are upon the lands to preserve the possession; because whatever a man does by his agents is his own act: but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and, therefore, their being upon the land continues no possession.^(y)

Whenever a man, either by his behavior or speech, at the time of his entry, gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible; whether he cause such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who shall continue in possession, or by giving out such

(t) 1 Hawk. P. C. c. 64, s. 31; Bac. Abr. tit. *Forcible Entry*, §c. (C.).

(u) Bac. Abr. tit. *Forcible Entry*, §c. (D.); Dalt. 300; 1 Hawk. P. C. c. 64, s. 25.

(v) 1 Hawk. P. C. c. 64, s. 26.

(w) Bac. Abr. tit. *Forcible Entry*, §c. (B.).

(x) 1 Hawk. P. C. c. 64, s. 26, where it is given as the author's opinion; and contrary opinions are noticed proceeding on the ground that no violence was done to the house, but only to the person of the party.

(y) Bac. Abr. tit. *Forcible Entry*, §c. (B.); *Turner v. Meymot*, 1 Bing. 158.

¹ Indictment for forcible entry, &c., cannot be supported without some evidence of actual force or threats and appearance of personal ill usage: *State v. Cargill*, 2 Brevard 445. It is not necessary to constitute a forcible entry, that it should be made by a multitude of people; even where the entry is lawful, it must not be made by a multitude; where it is not lawful, it must not be made at all. The jury, from the evidence of a forcible detainer, may find the defendant guilty of a forcible entry: *Burt v. State*, 3 Brevard 413. In order to constitute a forcible entry, the possession must not be scrambling, but quiet, peaceable and actual, and the entry must be accompanied by actual force or intimidation: *Comm. v. The Keeper of the Prison*, 1 Ashm. 140. Locking the doors of a house and keeping the keys, closing the windows and driving a portion of the stock upon the premises constitute evidence of an actual possession of land, which will authorize a recovery in forcible entry and detainer: *Davidson v. Phillips*, 9 Yerger 93. To constitute a forcible entry and detainer, it is not necessary that violence and outrage upon persons or property should be resorted to. If the actual possession of another be taken and held, under circumstances which show that it will not be surrendered without a breach of the peace, it is a forcible entry and detainer: *Childress v. Black*, 9 Yerg. 317. See *State v. Ross*, 4 Jones (Law) 315.

speeches as plainly imply a purpose of using force against those who shall make any resistance.(z) And there is no necessity that any one should be assaulted; for if the entry be with such number of persons and show of force as is calculated to deter the rightful owner from sending them away, and resuming his own *427] *possession, that is sufficient.(a) But a forcible entry is not proved by evidence of a mere trespass, there must be proof of such force, or at least such a show of force, as is calculated to prevent any resistance.(b) And though a man enter peaceably, yet if he turn the party out of possession by force, or frighten him out of possession by threats, it is a forcible entry.(c) But threatening to spoil the party's goods, or destroy his cattle, or to do him any similar damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry.(d)

If a person who pretends a title to lands merely go over them, either with or without a great number of attendants, armed or unarmed, in his way to the church, or market, or for a like purpose, without doing any act which either expressly or impliedly amounts to a claim of the lands, he cannot be considered as making an entry within the meaning of the statutes: otherwise, if he make an actual claim with any circumstances of force or terror.(e) Drawing a latch and entering a house seems not to be a forcible entry according to the better opinion:(f) so if a man open the door with a key, or enter by an open window, or if the entry be without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force, these will not be forcible entries.(g)

A single person may commit a forcible entry as well as a number.(h) But all who accompany a man when he makes a forcible entry will be deemed to enter with him, whether they actually come upon the lands or not.(i) So, if several come in company where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because they come in company to do an unlawful act; but it is otherwise where one had a right of entry, for there they only come to do a lawful act, and therefore it is the force of him only who used it.(k) And he who barely agrees to a forcible entry made to his use, without his knowledge or privity, is not within the statutes, because he did not concur in or promote the force.(l)

IV. *Forcible detainer* is where a man, who enters peaceably, afterwards detains his possession by force: and the same circumstances of violence or terror which will make an entry forcible, will also make a detainer forcible. From whence it seems to follow that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, is guilty of a forcible detainer, though no attempt be made to re-enter: *428] and it has been *said that he also will come under the like construction who places men at a distance from the house in order to assault any one who shall attempt to make an entry into it; and that he is in like manner guilty who shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in.(m) This doctrine will apply to a lessee who, after the end of his term, keeps arms in his house to oppose the entry of the lessor, though no one attempt an entry; or to a lessee at will detaining with force after the will is determined:(n) and it will apply in like manner to a detaining with force by a

(z) 1 Hawk. P. C. c. 64, s. 27.

(a) *Milner v. Maclean*, 2 C. & P. 17 (12 E. C. L. R.), *Abbott, C. J.*

(b) *Rex v. Smyth*, 5 C. & P. 201 (24 E. C. L. R.), *Lord Tenterden, C. J.*; s. c., 1 M. & Rob. 155.

(c) *Dalt.* 299; *Bac. Abr. tit. Forcible Entry, §c. (B.)*.

(d) 1 Inst. 257; *Bro. tit. Duress* 12, 16; 1 Hawk. P. C. c. 64, s. 28.

(e) 1 Hawk. P. C. c. 64, ss. 20, 21.

(f) There have been different opinions upon this point: *Noy* 136, 137; *Bac. Abr. tit. Forcible Entry, §c. (B.)*; 1 Hawk. P. C. c. 64, s. 26.

(g) *Com. Dig. tit. Forcible Entry, §c. (A.)* 3.

(h) *Id. (A.)* 2; 1 Hawk. P. C. c. 64, s. 29.

(i) 1 Hawk. P. C. c. 64, s. 22.

(k) *Bac. Abr. tit. Forcible Entry, §c. (B.)*.

(l) 1 Hawk. P. C. c. 64, s. 24.

(m) 1 Hawk. P. C. c. 64, s. 30.

(n) See *Per Park, J.*, *Rex v. Oakley*, 4 B. & Ad. 307 (24 E. C. L. R.), *ante*, p. 425.

mortgagor after the mortgage is forfeited, or to the feoffee of a disseisor after entry or claim by the disseisee. And a lessee resisting with force a distress for rent, or forestalling or rescuing the distress, will also be guilty of this offence.(o)

But a man will not be guilty of the offence of forcible detainer for merely refusing to go out of a house, and continuing therein in despite of another.(p) So that it is not a forcible detainer if a lessee at will, after the determination of the will, denies possession to the lessor when he demands it; or shuts the door against the lessor when he would enter; or if he keeps out a commoner, by force, upon his own land.(q) And it has been seen that the 8 Hen. 6, c. 9, does not apply to a person who has been in possession for three years by himself, or any other under whom he claims.(r) But a person in quiet possession for three years, and then disseised by force, and restored, cannot afterwards detain with force within three years after his restitution; for his possession was interrupted.(s)

The remedies against such as are guilty of forcible entries or detainers are either by action, by complaint to justices of the peace (who may proceed upon view or inquisition), or by indictment at the general sessions(t) And if a forcible entry or detainer be made by three persons or more, it is also a riot; and may be proceeded against as such, if no inquiry has before been made of the force.(u) Some of the points which have been determined with respect to an indictment for these offences, and also concerning the award of restitution, may be shortly noticed.(v)

The statutes seem to require that the entry should be laid in the indictment *manu forti*, or *cum multitudine gentium*: but some have holden that equivalent words will be sufficient, especially if the indictment concludes *contra formam statuti*; but it is not sufficient to say only that the party entered *vi et armis*, since that is the common allegation in every trespass.(w) No particular *technical words are necessary in an indictment at common law; all that is [*429 required is, that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace.(x)

The tenement in which the force was committed must be described with convenient certainty; for otherwise the defendant will not know the particular charge to which he is to make his defence, nor will the justices or sheriff know how to restore the injured party to his possession. Thus an indictment of forcible entry into a tenement,(y) which may signify anything whatsoever wherein a man may have an estate of freehold,(z) or into a house or tenement,(a) or into two closes of meadow or pasture,(b) or into a rood or half a rood of land,(c) or into certain lands belonging to such a house,(d) or into such a house without showing in what town it lies,(e) or into a tenement, with the appurtenances, called *Truypenny* in D.,(f) is not good.¹ But an indictment for a forcible entry *in domum mansion-*

(o) Com. Dig. tit. *Forcible Detainer* (B.) 1. (p) 1 Hawk. P. C. c. 64, s. 30.

(q) Com. Dig. tit. *Forcible Detainer* (B.) 2.

(r) *Ante*, p. 423. And by the 31 Eliz. c. 11, (*ante*, p. 423) no restitution is to be given on an indictment of forcible entry or detainer, where the party has been three years in quiet possession before the indictment found, and his estate not determined.

(s) Com. Dig. tit. *Forcible Detainer*, (B.) 2.

(t) See the statutes, *ante*, p. 422; Com. Dig. tit. *Forcible Entry*, (C.); 4 Blac. Com. 148; Burn's Just. tit. *Forcible Entry*, &c., III., IV., V.

(u) Burn's Just. tit. *Forcible Entry and Detainer*, VII. *Ante*, p. 380.

(v) As to the proceedings by justices of peace, see Burn's Just. tit. *Forcible Entry*, &c., V.; Com. Dig. tit. *Forcible Entry*, (D.).

(w) Baudé's case, Cro. Jac. 41; Rast. Ent. 324; Bac. Abr. tit. *Forcible Entry*, &c., (E.).

(x) By Lawrence, J., in *Rex v. Wilson*, 8 T. R. 362.

(y) Dalt. 15; 2 Roll. R. 46; 2 Roll. Abr. 80, pl. 8; 3 Leon. 102.

(z) Co. Lit. 6 a.

(a) 2 Roll. Abr. 80, pl. 4, 5; Roll. R. 334; Cro. Jac. 633; Palm. 277.

(b) 2 Roll. Abr. 81, pl. 4.

(c) Bulst. 201.

(d) 2 Leon. 186; 3 Leon. 101; Bro. tit. *Forcible Entry*, 23.

(e) 2 Leon. 186.

(f) 2 Roll. Abr. 80, pl. 7.

¹ An indictment for forcible entry was arrested for want of certainty, the words being "a certain messuage, with the appurtenances, for a term of years, in the district of Spartanburg." It was adjudged that "the place where was not described with sufficient legal certainty": *State v. Walker*, 2 Brev. 255.

alem sive messuagium, &c., is good, for these are words equipollent (*g*) And an indictment for an entry into a close called Serjeant Herne's close, without adding the number of acres, is good; for here is as much certainty as is required in ejectment. (*h*) And an indictment may be void as to such part of it only as is uncertain, and good for so much as is certain: thus an indictment for a forcible entry into a house and certain acres of land may be quashed as to the land, and stand good as to the house. (*i*) Upon an indictment against a wife for a forcible entry into a house, which she had originally taken in her own name, but into which her husband had afterwards entered for the purpose of giving up possession to the owner, the house is well described as the house of the husband. (*k*)

An indictment on the 8 Hen. 6, c. 9, (*l*) must show that the place was the freehold of the party grieved at the time of the force. (*m*) And in a case where the Court quashed an indictment, because it did not appear what estate the person expelled had in the premises, they said that it was absolutely necessary that this should appear, otherwise it would be uncertain whether any one of the statutes relative to forcible entries extended to the estate from which the expulsion was: the 5 Rich. 2, c. 7, the 15 Rich. 2, c. 2, and the 8 Hen. 6, c. 9, only extending to freehold estates; and the 21 Jac. 1, c. 15, extending only to estates holden by tenants for years, tenants by copy of court-roll, and tenants by elegit, statute merchant, and statute staple. (*n*) And it has been laid down as a general rule that an indictment cannot warrant a *restitution, unless it find that the party was seised *430] at the time. (*o*)¹ So also an inquisition under the 8 Hen. 6, c. 9, will not warrant a justice in restoring possession, unless it set forth the estate possessed by the party in the property. (*p*) But an indictment which charges that the defendants forcibly entered into a messuage of one W. P., he the said W. P., then and there being being seised thereof, sufficiently avers the present seisin of W. P. to warrant the Court in awarding restitution. (*q*) But in an indictment at common law, where the breach of the public peace is the gist of the offence, and the prosecutor is not entitled to restitution and damages, it appears to be sufficient to state only that the prosecutor was in possession of the premises. (*r*)

A repugnancy in setting forth the offence in an indictment on these statutes is an incurable fault: as where it is alleged that the party was possessed of a term of years, or of a copyhold estate, and that the defendants disseised him; or that the defendants disseised J. S. of land then and yet being his freehold, for it implies that he always continued in possession; and if so, it is impossible he could be disseised at all. (*s*) It seems that an indictment on 8 Hen. 6, c. 9, setting forth an entry and forcible detainer is good, without showing whether the entry was forcible or peaceable: but it must set forth an entry; for otherwise it does not appear but that the party has been always in possession, in which case he may lawfully detain it by force. (*t*) The time and place of the disseisin must be sufficiently set forth in the indictment; but it appears to be sufficient to state, that the defendant on such a day entered, &c., and disseised, &c., without adding the words *then and there*;

(*g*) Ellis's case, Cro. Jac. 633; Palm. 277.

(*h*) Bac. Abr. tit. *Forcible Entry*, §c. (E.); 1 Hawk. P. C. c. 64, s. 37.

(*i*) Ibid.

(*k*) Rex v. Smyth, 1 M. & Rob. 155; s. c., 5 C. & P. 201 (24 E. C. L. R.).

(*l*) *Ante*, p. 423.

(*m*) Rex v. Dorny, 1 Lord Raym. 210; 1 Salk. 260; Anon., 1 Vent. 89; 2 Keb. 495; Hetl. 73; Latch. 109.

(*n*) Rex v. Wannop, Say R. 142.

(*o*) Bac. Abr. tit. *Forcible Entry*, §c. (E.), where, and in 1 Hawk. P. C. c. 64, s. 38, see the cases on this subject collected. And see also Rex v. Griffith, *et al.*, 3 Salk. 169.

(*p*) Reg. v. Bowser, 8 D. & P. R. 128, Coleridge, J.

(*q*) Rex v. Hoare, 6 M. & S. 267; Rex v. Dillon, 2 Ch. R. 314.

(*r*) Rex v. Wilson, 8 T. R. 357.

(*s*) 1 Hawk. P. C. c. 64, s. 39; Bac. Abr. *Forcible Entry*, §c. (E.)

(*t*) Ibid., s. 40; Bac. Abr. Ibid. And see the statute, *ante*, p. 423.

¹ See *People v. Nostrand*, 9 Wend. 60; *People v. Reed*, 11 Wend. 158; *Yeates v. Allison*, 2 Dana, 134; *Mansfield v. Duvall*, 2 Bibb 582; *Taylor v. White*, 1 Mon. 38; *Smith v. Dedman*, 4 Bibb 192; *Beauchamp v. Morris*, Ibid. 312.

for it is the natural intendment that the entry and disseisin both happened together.^(u) A disseisin is sufficiently set forth by alleging that the defendant entered, &c., into such a tenement, and disseised the party, without using the words "unlawfully," or "expelled," for they are implied.^(v) But no indictment can warrant an award of restitution, unless it find that the wrongdoer ousted the party grieved, and also continues his possession at the time of the finding of the indictment; for it is a repugnancy to award restitution of possession to one who never was in possession, and it is in vain to award it to one who does not appear to have lost it.^(w)

If a bill, both for a forcible entry and forcible detainer, be preferred to a grand jury, and found "not a true bill" as to the entry with force, and "a true bill" as to the detainer, it will not warrant an award of restitution; but is void, because the grand jury cannot find a bill, true for part, and false for part, as a petit jury may.^(x)¹

*Upon an indictment on the 21 Jac. 1, c. 15, or 8 Hen. 6, c. 9, whereby [*431 restitution of the possession of lands entered upon by force, or holden by force, may be awarded to the respective tenants thereof; the tenant whose land has been entered upon, or withheld by force, is now a competent witness for the prosecution by the 6 & 7 Vict. c. 85, and 14 & 15 Vict. c. 99.^(y)

On an indictment at common law, the prosecutor need only prove a peaceable possession at the time of the ouster.^(z) On an indictment upon the statutes a seisin in fee or the existence of a term or other tenancy must be shown;^(a) but proof that the prosecutor holds colorably as a freeholder or leaseholder will suffice; and the Court will not, on the trial, enter into the validity of an adverse claim made by the defendant, which he ought to assert, not by force, but by action.^(b)

The same justice or justices before whom an indictment of forcible entry or detainer shall be found may award restitution: but no other justices, except those before whom the inquest was found, can award restitution, unless the indictment be removed by *certiorari* into the Court of King's Bench; and that Court, by the plenitude of its power, can restore, because that is supposed to be implied by the statute; on the ground that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. So, if an indictment be found before the justices of the peace at their quarter sessions, they have authority to award a writ of restitution, because the statute having given power to the justices or justice to reseise, it may as well be done by them in Court as out of it.^(c) But the justices of *oyer* and *terminer*, or general gaol delivery, though they may inquire of forcible entries, and fine the parties, yet cannot award a writ of restitution.^(d)

(u) Baude's case, Cro. Jac. 41; 1 Hawk. Ibid. s. 42.

(v) Bac. Abr. *Forcible Entry*, §c. (E.)

(w) 1 Hawk. P. C. c. 64, s. 41.

(x) 1 Hawk. P. C. c. 64, s. 40. But this it seems does not apply to the case of different counts in the same indictment, but only where the grand jury find "a true bill," and not a "true bill" upon different parts of one and the same charge. See *Rex v. Fieldhouse*, Cowp. 323.

(y) He was not competent formerly: *Rex v. Williams*, 9 B. & C. 549 (17 E. C. L. R.); 4 M. & R. 471; *Rex v. Beran*, R. & M. N. P. C. 242.

(z) Talf. Dickenson 377.

(a) *Reg. v. Child*, 2 Cox C. C. 102, seems the other way; but the report is too loose to deserve any great weight.

(b) Per Vaughan, B., in *Rex v. Williams*, Monm. S. A., 1828, and confirmed on a motion for a new trial: Talf. Dickenson 377; and see *Jayne v. Price*, 5 Taunt. 326.

(c) Bac. Abr. tit. *Forcible Entry*, §c. (F.)

(d) Id. Ibid. and 1 Hawk. P. C. c. 64, s. 51, where it is said that justices of *oyer* and

¹ Under an indictment for a forcible entry and detainer the jury may find the defendant guilty of a forcible detainer only: 8 Cow. 226, *People v. Rickert*. A warrant for a forcible entry or detainer is good—and an inquisition on such a warrant finding a forcible entry and detainer is valid: *M'Brayer v. Wash*, 6 J. J. Marsh. 465. The finding of either is sufficient: *Swartzwelder v. U. S. Bank*, 1 J. J. Marsh. 44. If one only is charged, the defendant cannot be found guilty of the other: *Cammack v. Macey*, 3 Mar. 297; *Sinclair v. Sanders*, 3 J. J. Marsh. 303.

Restitution ought only to be awarded for the possession of tenements visible and corporeal; for a man who has a right to such as are invisible and incorporeal, as rents or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them; and all the remedy that can be desired against a force in respect to such possessions is to have the force removed, and *432] those who are guilty of it punished, *which may be done by 15 Rich. 2, c. 2.(e) And restitution is to be awarded only to him who is found by the indictment to have been put out of the *actual possession*, and not to one who was only seised in law.(f)¹ Upon the removal of the proceedings into the Court of King's Bench by *certiorari*, that Court may award a restitution discretionally; and will so award, unless the defendant plead very soon, and take notice of trial within the term.(g) And the same principle applies to a judge of assize upon the finding of an indictment for forcible entry; namely, that the proceedings being *ex parte*, a discretion may be exercised. Where, therefore, an indictment for a forcible entry and detainer is found at the assizes, it is in the discretion of the judge whether he will grant restitution or not; and if he refuse to grant it, the Court of Queen's Bench will not inquire whether he has exercised his discretion rightly, or grant a mandamus to the judge to grant restitution.(h) But in the case of local magistrates, who are to go to the spot, and make inquiry by the inquisition of a jury, and examination of witnesses; if the jury find the facts, it is imperative on the justices to grant restitution; and the reason is that there has been a fair inquiry.(i) And where a conviction of a forcible entry was quashed in the Queen's Bench for uncertainty, but the restitution was opposed on an affidavit that the party's title (which was by lease) was expired since the conviction, the Court said they had no discretionary power in this case, but were bound to award restitution on quashing the conviction.(k)

It appears by the proviso in the 8 Hen. 6, c. 9, and also by the 31 Eliz. c. 11, that any one indicted upon these statutes may allege quiet possession for three whole years to stay the award of restitution; in the construction of which it has been holden, that such possession must have continued without interruption during three whole years next before the indictment.(l) And it has also been said that the three years' possession must be of a lawful estate; and therefore that a disseisor can in no case justify a forcible entry or detainer against the disseisee having a

terminer have no power either to inquire of a forcible entry or detainer, or to award restitution on an indictment on the statutes; because when a new power is created by statute, and certain justices are assigned to execute it, it cannot regularly be executed by any other; and inasmuch as justices of *oyer and terminer* have a commission entirely distinct from that of justices of peace, they shall not from the general words of their commission *ad inquirend de omnibus*, &c., be construed to have any such powers as are specially limited to justices of peace. But in Com. Dig. tit. *Forc. Entr.* (D. 5), it is said that justices of gaol delivery may award restitution upon an indictment before them: and Sav. 78, is cited: and afterwards Id. (D. 7), it is said that restitution shall not be by justices of assize, gaol delivery, or justices of peace, *if the indictment was not found before them*; and H. P. C. 140; Dalt. c. 44, 131, are cited; assuming here, as it should seem, that if the indictment were found before justices of assize and gaol delivery, they might award restitution: and see *infra*, Reg. v. Harland.

(e) 1 Hawk. P. C. c. 64, s. 45; Lamb. Just. 153; Co. Lit. 323.

(f) Lamb. Just. 153; Dalt. c. 83.

(g) Rex v. Marrow, Ca. temp. Hardw. 174.

(h) Reg. v. Harland, 8 Ad. & E. 826 (35 E. C. L. R.); s. c., 1 P. & D. 93; 2 M. & R. 141. See Rex v. Hake, note (a) to Rex v. Williams, 4 M. & R. 483, where a judge, upon such an inquisition, granted a writ of restitution, not as a matter of right, but in the exercise of his discretion.

(i) Ibid. per Patteson, J.

(k) Rex v. Jones, 1 Str. 474.

(l) Bac. Abr. tit. *Forcible Entry*, §c (G.); 1 Hawk. P. C. c. 64, s. 53.

¹ But naked possession without some estate or interest in the prosecutor is not enough: Burd v. Commonwealth, 6 Serg. & R. 252.

In a proceeding by inquisition for a forcible entry and detainer before a writ of restitution can be awarded, the jury must find by their verdict that the party, forcibly dispossessed, had either a freehold or a term for years in the land, of the possession of which he has been deprived: Mitchell v. Fleming, 3 Ired. 123.

right of entry, as it seems that he may against a stranger, or even against the dis-
seisee having, by his laches, lost his right of entry.(m) Wherever such possession
is pleaded in bar of a restitution, either in the King's Bench or before justices of
the peace, no restitution ought to be awarded till the truth of the plea be tried;
and such plea need not show under what title, or of what estate, such possession
was; because not the title, but the possession only, is material.(n) If the defend-
ant tender a traverse of the force (which must be in writing), no restitution ought
to be till such traverse be tried; in order to which the justice, before whom the in-
dictment is found, ought to award a *venire* for a jury; but if *such jury find [*433
so much of the indictment to be true as will warrant a restitution, it will
be sufficient, though they find the other part of it to be false.(o) Where the de-
fendant pleads three years' possession in stay of restitution, according to 31 Eliz. c.
11, and it is found against him, he must pay the costs.(p)¹

The same justices who have awarded a restitution on an indictment of forcible
entry, &c., or any two or one of them, may afterwards *supersede* such restitution
upon an insufficiency in the indictment appearing unto them: but no other justices
or Court whatsoever have such power, except the Court of King's Bench; a *cer-
tiorari* from whence wholly closes the hands of the justices of peace, and avoids
any restitution which is executed after its *teste*, but does not bring the justices into
contempt without notice.(q)

The Court of King's Bench has such a discretionary power over these matters,
from an equitable construction of the statutes, that if a restitution shall appear to
have been illegally awarded or executed, that Court may *set it aside*, and grant a
re-restitution to the defendant. But a defendant cannot in any case whatsoever,
ex rigore juris, demand a restitution, either upon the quashing of the indictment,
or a verdict found for him on a traverse thereof, &c.; for the power of granting a
restitution is vested in the King's Bench only, by an equitable construction of the
general words of the statutes, and is not expressly given by those statutes; and is
never made use of by that Court but when, upon consideration of the whole cir-
cumstances of the case, the defendant shall appear to have some right to the tene-
ments, the possession whereof he lost by the restitution granted to the prosecutor.(r)

But where a conviction for a forcible entry or detainer is quashed by the Queen's
Bench they have no discretionary power, but are bound to award re-restitution,
although the conviction be quashed for a merely technical error, and the lease of
the dispossessed person had expired during the litigation.(s)

The Court of King's Bench has been so favorable to one who, upon his traverse
of an indictment upon these statutes being found for him, has appeared to have
been unjustly put out of his possession, that they have awarded him a restitution,
notwithstanding it has been shown to the Court that, since the restitution granted
upon the indictment, a stranger has recovered the possession of the same land in
the lord's court.(t)

(m) Bac. Abr. tit. *Forcible Entry*, §c. (G.); 1 Hawk. c. 64, s. 54.

(n) 1 Hawk. c. 64, s. 56.

(o) Bac. Abr. tit. *Forcible Entry*, §c. (G.); 1 Hawk. c. 64, ss. 58, 59; Reg. v. Winter, 2
Salk. 588.

(p) Reg. v. Goodenough, 2 Lord Raym. 1036. And see the words of the statute,
ante, p. 423.

(q) Bac. Abr. Id. Ibid.; 1 Hawk. c. 64, ss. 61, 62.

(r) Id., ss. 63, 64, 65.

(s) Rex v. Jones, 1 Stra. 474; Rex v. Wilson, 3 A. & E. 817 (30 E. C. L. R.), s. p.; 5
N. & M. 164.

(t) Bac. Abr. Id. Ibid.; 1 Hawk. c. 64, s. 66.

¹ Upon an inquisition for forcible entry and detainer, the defendant is entitled to traverse
the force, or he may plead three years' possession, under the st. 31 Eliz. c. 11, and if he
tender a traverse, the justices are bound to accept it, and ought not to grant a writ of
restitution, but should return the inquisition without *certiorari*, to the Court of Sessions,
there to be tried like other indictments; otherwise that court will grant a *certiorari*, which
will be a *supersedeas* to such restitution, or after trial, a writ of re-restitution will be
awarded if the defendant be acquitted or judgment arrested: State v. Spierca, 1 Brev.
119.

The justices or justice may execute the writ of restitution in person, or may make their precept to the sheriff to do it.^(u) The sheriff, if need be, may raise the power of the county to assist him in the execution of the precept; and therefore, if he make a return thereto that he could not make restitution by reason of *434] *resistance, he shall be amerced.^(v) And it is said, that a justice of peace or sheriff may break open a house to make restitution.^(w)

If possession under a writ of restitution is avoided immediately after execution by a fresh force, the party shall have a second writ of restitution without a new inquisition: but the second writ must be applied for within a reasonable time.^(x) And where restitution is not ordered till three years after the inquisition, it is bad.^(y)

*435]

*CHAPTER THE THIRTIETH.

OF NUISANCES.

NUISANCE, *nocumentum*, or annoyance, signifies anything that worketh hurt, inconvenience, or damage. And nuisances are of two kinds: *public* or *common* nuisances, which affect the public, and are an annoyance to *all* the King's subjects; and *private* nuisances, which may be defined as anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another.^(a) Private nuisances, as they are remedied only by civil proceedings, do not come within the scope of this Treatise; but public or common nuisances, as they annoy the whole community in general, and not merely some particular person, are properly punishable by indictment, and not the subject of action; for it would be unreasonable to multiply suits by giving every man a separate right for what damnifies him in common only with the rest of his fellow-subjects.^(b) In treating of public or common nuisances, we may consider—I. Of public nuisances in general. II. Of nuisances to public highways. III. Of nuisances to public rivers. And IV. Of nuisances to public bridges.

(u) 1 Hawk. c. 64, s. 49.

(v) Id. Ibid. sec. 52.

(w) Com. Dig. tit. *Forcible Entry* (D.) 6.

(z) *Rex v. Harris*, 1 Lord Raym. 482.

(y) *Rex v. Harris*, 3 Salk. 313.

(a) 3 Blac. Com. 216; 2 Inst. 406. As to private nuisances, see *Hole v. Barlow*, 4 C. B. (N. S.) 334 (93 E. C. L. R.); *Stockport Water Works Co. v. Potter*, 7 H. & N. 160; *Bamford v. Turnley*, 2 F. & F. 231; *Cavey v. Ledbitter*, 3 Id. 14; 13 C. B. (N. S.) 470 (106 E. C. L. R.); *Walter v. Selfe*, 4 De G. & S. 315; *Beardmore v. Tredwell*, 31 Law J., Chanc. 892; *Hodgkinson v. Ennor*, 4 B. & S. 229 (116 E. C. L. R.); *Tipping v. St. Helen's Smelting Company*, 4 B. & S. 608 (116 E. C. L. R.); *Roberts v. Yardley*, 3 H. & C. 162; *Bamford v. Turnley*, 3 B. & S. 62 (113 E. C. L. R.).

(b) 4 Blac. Com. 166. There are, however, circumstances mentioned in the books upon which a party has been admitted to have a private satisfaction by civil suit for that which is a public nuisance; namely, where he has sustained some extraordinary damage by it beyond the rest of the King's subjects. As if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer an injury by falling therein; there, for this particular damage, not common to others, it has been held, that the party may have his action: Co. Lit. 56; 5 Rep. 73; 3 Blac. Com. 219. And see also *Fowler v. Sanders*, Cro. Jac. 446. But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance: Bull. N. P. 26. In *Rex v. Dewsnap*, 16 East 196, Lord Ellenborough, C. J., said, "I did not expect that it would have been disputed at this day that though a nuisance may be public, yet that there may be a special grievance, arising out of the common cause of injury, which presses more upon particular individuals than upon others not so immediately within the influence of it. In the case of stopping a common highway which may affect all the subjects, yet if a particular person sustain a special injury from it, he has an action." And in *Duncan v. Thwaites*, 3 B. & C. 584 (10 E. C. L. R.), Abbott, C. J., said, "I take it to be a general rule, that a party who sustains a special and particular injury by an act which is unlawful, on the ground of public injury, may maintain an action for his own special injury." And see *Rose v. Miles*, 4 M. & S. 101; *Butterfield v. Forester*, 11 East 60.

Sec. I.—Of Public Nuisances in General.

Public nuisances may be considered as offences against the public order and economical regimen of the state, being either the doing *of a thing to the annoyance of all the King's subjects, or the neglecting to do a thing which [436 the common good requires.(c) But the annoyance or neglect must be of a real and substantial nature; and the fears of mankind, though they may be reasonable, will not create a nuisance.(d)¹

Offensive trades and manufactures may be public nuisances. A *brewhouse*, erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance; and so in the like case may a *glasshouse* or *swineyard*. With respect to a *candle manufactory*, it has been holden that it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell; but the reasonableness of this opinion seems justly to be questionable, because, whatever necessity there may be that candles be made, it cannot be pretended that it is necessary to make them in a town.(e)

An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place; as where, upon an indictment against a tinman for the noise made by him in carrying on his trade, it appeared in evidence that the noise only affected the inhabitants of three numbers of the chambers in Clifford's Inn, and that by shutting the windows the noise was in a great measure prevented, Lord Ellenborough, C. J., held that the indictment could not be sustained, as the annoyance was, if anything, a private nuisance.(f) But an indictment for a nuisance, by steeping stinking skins in water, laying it to be committed near the highway, and also near several dwelling-houses, has been held sufficient; for if a man erects a nuisance near the highway, by which the air thereabouts is corrupted, it must in its nature, be a nuisance to those who are in the highway.(g) And an indictment was held good for a nuisance in erecting buildings, and making fires which sent forth noisome, offensive and stinking smokes, and making great quantities of noisome, offensive and stinking liquors, near to the King's common highway, and near to the dwelling-houses of several of the inhabitants, whereby the air was impregnated with noisome and offensive stinks and smells.(h) Upon the evidence it appeared that the smell was not only intolerably offensive, but also obnoxious and hurtful, and made many persons sick, and gave them head-aches; and it was held

(c) 4 Blac. Com. 166; 1 Hawk. P. C. c. 75, s. 1; 2 Roll. Abr. 83.

(d) By Lord Hardwicke, Anon; 3 Atk. 750.

(e) 1 Hawk. P. C. c. 75, s. 10. In Bac. Abr. tit. *Nuisance* (A.), it is said, "It seems the better opinion that a brewhouse, glasshouse, chandler's shop, and sty for swine, set up in such inconvenient parts of a town that they cannot but greatly incommode the neighborhood, are common nuisances;" and 2 Roll. Abr. 139; Cro. Car. 510; Hut. 136; Palm. 536; Vent. 26; Keb. 500; 2 Salk. 458, 460; 2 Lord Raym. 1163, are cited.

(f) *Rex v. Lloyd*, 4 Esp. 200.

(g) *Rex v. Pappineau*, 1 Str. 686.

(h) *Rex v. White*, 1 Burr. 333.

¹ Though an individual may be liable to a pecuniary punishment for a prohibited offence, yet the habitual practice of that offence may constitute the place or house where it is so habitually carried on, a public nuisance: *Smith v. Comm.*, 6 B. Mon. 22. Keeping a grocery at which persons are in the habit of assembling on the Sabbath and other days, and tipping and drinking, may properly be denominated a public nuisance: *Ibid.* It is only when the act or acts done by a person, or the omission to act by one who ought to act, operate to the annoyance, detriment or disturbance of the public at large, that the offender is liable to indictment at common law: *State v. Debury*, 5 Ired. 371. Where a canal company was compelled as a matter of duty by its charter, to erect and maintain bridges over the canal, wherever any public road crossed the same, and it did erect a bridge, which was decayed and unsafe, where a public road crossed, it was held that this was an indictable offence as a neglect of duty, and that the bridge was in the nature of a common law nuisance: *State v. The Morris Canal and Banking Co.*, 2 N. J. 537. Works erected by the State cannot be a nuisance though transferred to a private corporation: *Comm. v. Reed*, 10 Casey 275. A structure authorized by the legislature cannot be a public nuisance: *People v. Law*, 34 Barb. 494. When a railroad authorized by its charter to be made at one place, is made at another, it is a mere nuisance on every highway it touches in its illegal course: *Comm. v. Erie and North East R. R. Co.*, 3 Casey 339.

that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable; and further, that the existence of the nuisance depended upon the number of the houses and concourse of people, and was a matter of fact to be judged of by the jury.⁽ⁱ⁾ *But the carrying on of an offensive trade is not indictable unless it be destructive of the health of the neighborhood, or render the houses untenable or uncomfortable.^(k) If there be smells offensive to the senses that is enough, as the neighborhood has a right to fresh and pure air.^(l)

The presence of other nuisances will not justify any one of them, or the more nuisances there were the more fixed they would be.^(l) Upon an indictment for a nuisance in carrying on the trade of a varnish-maker, it was proved that offensive smells proceeded from the defendant's manufactory, to the annoyance of persons travelling along a public road, the defence was, first, that the smells were not injurious to health; and, secondly, that in the immediate neighborhood there were several houses for slaughtering horses, a brewery, a gas manufactory, a melter of kitchen stuff, and a blood boiler; and that although the accumulation of all the smells was offensive, yet that the defendant's alone would not have been so, and therefore was no nuisance; but Abbott, C. J., said, "It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, knackers, melters of kitchen stuff, &c.; but the presence of other nuisances will not justify any one of them; or the more nuisances there were the more fixed they would be; however, one is not the less subject to prosecution because others are culpable. The only question, therefore, is this: is the business, as carried on by the defendant, productive of smells offensive to persons passing along the public highway?"^(m)

It appears to have been ruled, that a person cannot be indicted for setting up a noxious manufactory in a neighborhood in which other offensive trades have long been borne with, unless the inconvenience to the public be greatly increased.⁽ⁿ⁾ Where the business of a horse-boiler, which is one of the most offensive description, had been carried on, on the same premises, for many years before the defendants came to them, but its extent was much greater under them than it had been before; but the neighborhood in which it was carried on was full at the time when they commenced the business, and long before, of establishments for carrying on trades of the most offensive character, and evidence was given that the defendants carried on their trade in so improved a manner that there was very little difference in the nuisance from what it was when they came there; it was held that this trade was, in its nature, a nuisance; but, considering the manner in which this neighborhood had always been occupied, it would not be a nuisance unless it occasioned more inconvenience as it was carried on by the defendants than it had done before. If in consequence of the alleged improvements in the mode of conducting the business there was no increase of the annoyance, though the business itself had increased, the defendants were entitled to an acquittal; if the annoyance had increased, this was an indictable nuisance.^(o)¹

(i) *Rex v. White*, 1 Burr. 337, where see also that the word "noxious" not only means hurtful and offensive to the smell, but includes the complex idea of insalubrity and offensiveness.

(k) *Rex v. Davey*, 5 Esp. 217. See the cases cited in note (a), *ante*, p. 435.

(l) *Rex v. Neil*, 2 C. & P. 485 (12 E. C. L. R.), Abbott, C. J. See *Rex v. Watts*, *ibid.* 486.

(m) *Rex v. Neil*, *supra*.

(n) *Rex v. Neville*, Peake 91.

(o) *Rex v. Watts*, Moo. & M. 281, Lord Tenterden, C. J.; *Rex v. Neville*, Peake N. P. C. 91, was cited for the defendants.

¹ Carrying on an offensive business for more than thirty years in a place removed from dwellings and public roads does not authorize the owner to continue it after houses have been built and roads laid out in the vicinity, if it is then found to be a nuisance: *Ashbrook v. Comm.*, 1 Bush. 139; *Wise's Appeal*, 24 P. F. Smith 230. On the trial of an indictment for establishing a noxious trade near certain dwellings, the defendant may prove

The 3 & 4 Will. 4, c. 90, which provides for the lighting parishes with gas, expressly enacts (sec. 54) that nothing in the Act shall prevent any person from proceeding by indictment against any of the officers, servants, or workmen of the body corporate or other persons supplying any gas, in respect of any works or other means employed by them, as a public nuisance.

A certificate and license, under the 26 Geo. 3, c. 71, s. 1, authorizing a person to keep a house for the slaughtering of horses is no defence; and even if it were a license from all the magistrates in the county to the defendant to slaughter horses at the very place, it would not entitle the defendant to continue the business there one hour after it became a public nuisance to the neighborhood. (*p*)

It has been held that a person cannot be indicted for continuing a noxious trade which has been carried on at the same place for nearly fifty years. (*q*) But this seems hardly to be reconcilable with the doctrine, subsequently recognized, that no length of time can legalize a public nuisance, although it may supply an answer to the action of a private individual. (*r*) It should seem that in judging whether a thing is a public nuisance or not, the public good it does may, in some cases, where the public health is not concerned, be taken into consideration, to see if it outweighs the public annoyance. (*s*) With respect to offensive works, though they may have been originally established under circumstances which would *prima facie* protect them against a prosecution for a nuisance, it seems that a wilful neglect to adopt established improvements, which would make them less offensive, may be indictable.

If a noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it, that the carrying on the trade becomes a nuisance to the persons using the road, the party would be entitled to continue his trade, because his trade was legal before the erection of the houses and the making of the road. (*t*)

An indictment alleged that the defendant near divers public highways and dwelling-houses did work certain quarries of stone, and did unlawfully send, throw, and discharge divers large pieces of rock and stones into and upon the said dwelling-houses, and in and upon the said highways, whereby the dwelling-houses were injured and the inhabitants put in fear and danger, and the highways were rendered unsafe for passengers, &c. Evidence was given of stones having fallen into two houses, and also of stones having fallen in the public highway, one of which hit a horse drawing a cart on the highway; and that these stones had been thrown from the prisoner's quarry by blasting the rock; and there was evidence that powder had been used in too large quantities. The jury were directed that, if they were of opinion that in working the quarry stones were thrown out upon the houses and roads, and that the use of the houses or the traffic of the roads was rendered unsafe to such a degree that persons inhabiting the houses or using the roads, of ordinary courage, might reasonable apprehend injury or danger, that was a nuisance,

(*p*) *Rex v. Cross*, 2 C. & P. 483 (12 E. C. L. R.), *Abbott, C. J.*

(*q*) *Rex v. Neville*, *Peake* 93.

(*r*) *Weld v. Hornby*, 7 East 199; *Rex v. Cross*, 3 Campb. 227, and see *post*, 456.

(*s*) No authority was referred to in the former edition for this position; and although *Rex v. Russell*, 6 B. & C. 566 (13 E. C. L. R.), 9 D. & R. 566, might have warranted it, *Rex v. Ward*, 4 A. & E. 384 (31 E. C. L. R.), shows that it is no defence to an indictment for a nuisance by erecting an embankment in a harbor that although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port; and see *Rex v. Morris*, 1 B. & Ad. 441 (20 E. C. L. R.); *Rex v. Tindall*, 6 A. & E. 143 (33 E. C. L. R.); 1 N. & P. 719. See these cases, *post*.

(*t*) Per *Abbott, C. J.*, *Rex v. Cross*, 2 C. & P. 483 (12 E. C. L. R.).

in bar of the prosecution under the general issue, that the dwelling-house in the vicinity of the place was built after the establishment of the alleged nuisance: *Ellis v. State*, 7 Blackf. 534. It is not necessary that offensive smells should produce disease: *Ashbrook v. Comm.*, 1 Bush. 139. In cases of nuisances, the jury are to look at the acts proved and their natural consequences, even though there be a conflict of evidence as to whether they caused annoyance to the neighbors: *Garrison v. State*, 14 Ind. 287. See *Comm. v. Upton*, 6 Gray 473; *State v. Wetherall*, 5 Harring. 487.

and that, if the defendant had committed the act by which the stones were thrown upon the houses and road, they might find him guilty; and they were directed to find whether, in the manner of working the quarry, the defendant had been guilty of negligence. The jury found the defendant guilty, and that he had worked the quarry negligently; and, on a case reserved on the question whether, upon the facts proved, the defendant was properly convicted on this indictment, the conviction was affirmed, as there was abundant evidence for the jury.^(t) The summing up was too favorable for the defendant; for people have a right to travel on a public road without any impediment whatever; and in such a case it was perfectly immaterial whether the defendant had acted negligently or not, as no man can justify a nuisance on the ground that he acted without negligence. See *Scott v. Frith*, 4 F. & F. 349, an action for a nuisance caused by a rolling mill fitted up with steam hammers.

Upon an indictment for burning arsenic whereby divers unwholesome smells arose, so that the air was greatly corrupted, evidence is admissible that particles of arsenic were carried off in the vapor, and deposited in the adjoining fields, and thereby the cattle and trees were poisoned, and that several cattle had died.^(u)

*439] Where the alleged nuisance was at Liverpool, and certain effects there produced were, by the prosecution, attributed to the fumes from the defendant's manufacture; the defence was that those effects were attributable to other local causes. To meet this, Coleridge, J., admitted evidence that the same effects were found in the neighborhood of the defendant's similar manufacture carried on in the country, where these local causes did not exist, and that the defendant had paid compensation for them; for this was clearly good evidence of the tendency of the manufacture to produce such effects.^(v) But on an indictment in 1857 for a nuisance in carrying on an offensive trade, a conviction in 1855 of the defendant before justices of the peace for carrying on the same trade upon the same premises so as to occasion noxious and offensive effluvia without using the best practicable means for preventing the same, contrary to the 16 & 17 Vict. c. 128, s. 1, but before the period comprised in the indictment, is not admissible, though the manufacture may appear to have been carried on for some years in the same manner.^(w)

Erecting *gunpowder* mills, or keeping *gunpowder* magazines near a town, is a nuisance by the common law, for which an indictment or information will lie.^(x)¹ And the making, keeping, or carrying, of too large a quantity of *gunpowder*, percussion caps, &c., at one time, or in one place or vehicle, is prohibited by the 23 & 24 Vict. c. 139,^(y) under heavy penalties and forfeiture.

Where a count stated that the defendants unlawfully did deposit in a warehouse belonging to them near to divers streets, highways, and dwelling-houses, divers large and excessive quantities of a dangerous ignitable and explosive fluid, called wood naphtha, and unlawfully did keep in the said warehouse, and near to the said streets, highways and houses the said fluid in such large, excessive and dangerous quantities, whereby the Queen's subjects passing along the said streets and highways and residing in the said houses were in great danger of their lives and property, and were kept in great alarm and terror; it was held that the count was

^(t) *Reg. v. Muttons*, 10 Cox C. C. 6.

^(u) *Reg. v. Garland*, 5 Cox C. C. 165.

^(v) Anonymous, cited in *Reg. v. Fairie*, 8 E. & B. 486 (92 E. C. L. R.).

^(w) *Reg. v. Fairie*, *supra*. It was so held on the ground, 1st, that the offence of which the defendant had been convicted was not necessarily a nuisance; 2d, that even if it had been an offence precisely similar, except that it was anterior, it would not have been admissible; but Wightman, J., did not concur in this latter point.

^(z) *Rex v. Williams*, E. 12, W., an indictment against Roger Williams for keeping 20 barrels of gunpowder near the town of Bradford, and he was convicted. And in *Reg. v. Taylor*, 15 Geo. 2, the Court granted an information against the defendant as for a nuisance on affidavits of his keeping great quantities of gunpowder near Maldon in Surrey, to the endangering of the church and houses where he lived: 2 Str. 1167. See *Reg. v. Lister*, *infra*; Burn's Just. tit. *Gunpowder*, where it is said, "or rather it should have been expressed to the endangering the lives of his Majesty's subjects."

^(y) Amended by the 24 & 25 Vict. c. 130, and 25 & 26 Vict. c. 98.

¹ *Bradley v. People*, 56 Barb. 72; *People v. Sands*, 1 Johns. 78.

good; for though the count did not state that any noxious effluvia issued from the naphtha, or that the air was corrupted by it, or that any bodily harm was done by it to any one; yet to deposit and keep such a substance in such quantities in a warehouse so situate, to the danger of the lives and property of the Queen's subjects, is an indictable offence. The substance must be of such a nature, and kept in such large quantities and under such local circumstances, as to create real danger to life and property. The well founded apprehension of danger, which would alarm men of steady nerves and reasonable courage, passing through the street in which the house stands, or residing in adjoining houses, is enough to show that something has been done which the law ought to prevent by pronouncing it a misdemeanor. (z)

The evidence on the trial of the above count was, that the defendants kept and stored large quantities of wood naphtha and rectified spirits of wine in a warehouse in the city of London; the quantities stored were from 4000 to 5000 gallons of naphtha, and from 40,000 to 50,000 gallons of spirits of wine. The two were mixed together upon the premises. For this purpose there were two large vats erected; each of them capable of holding 2000 gallons of the mixture. The vats were covered over entirely at the top, except an aperture in the centre of the cover, in which was fixed a hopper, with a sliding panel of wood. When it was necessary to mix, the spirits of wine first and the naphtha afterwards were poured through the hopper into the vat below, where, by their chemical action upon each other, they became intermixed, and were drawn off at the bottom by a cock, and carried away for the purposes of commerce. The naphtha was kept in the warehouse in carboys holding twelve gallons each, and carefully stocked till required for the purpose of being thus mixed. It is a product of the distillation of wood, and is very inflammable, more so than spirits, or even gunpowder itself, passing into vapor on the application of a heat of 140° Fahrenheit, and, if inflamed, water could not put out the fire arising from it, and there was no dispute that practically a fire arising and communicating with the quantity kept upon these premises could not be quenched, and would produce very disastrous consequences to the neighborhood; but it was the practice in the warehouse never to allow any candles or fire or gas-light to enter therein, and so long as that continued the storing of the naphtha and the spirits could not produce danger; but it was contended on the part of the Crown that to keep articles so liable to accident and so dangerous in the result, if an accident happened, to a populous neighborhood was a public nuisance, as fire might incautiously be introduced, or a fire arising in an adjoining house might communicate therewith, and that the existence of such a manufactory, therefore, was a just ground for alarm to the surrounding neighborhood; and, upon a case reserved upon the point, whether, when the manufacture, as carried on (which was carefully) produced in the opinion of the scientific men no danger, its liability to danger *ab extra* made it a public nuisance, it was held that it did. The supposed safety from within depended on the care of the defendants' servants in not allowing any candles, fire or gas-light to enter the warehouse, and it was only so long as this care continued that the naphtha could not produce danger; but the law takes notice that occasional carelessness may be reckoned upon, and forbids that to be done which, on the recurrence of carelessness, will in all probability prove destructive to life and property. As to the question whether when such a manufacture is carried on so carefully as in the opinion of scientific men to produce no danger, its liability to danger *ab extra* makes it a public nuisance; there is no doubt that its liability to danger *ab extra* may make it a public nuisance. Upon the trial of such indictments it is a question of fact for the jury whether the keeping and depositing, or the manufacturing of such substances, really does create danger to life and property as alleged; and this must be a question of degree depending upon the circumstances of each particular case. And in this case the jury were properly directed that if the depositing and keeping of the naphtha in the manner described, coupled with its liability to ignition *ab extra*,

(z) Reg. v. Lister, D. & B. C. C. 209.

created danger to life and property to the degree alleged, they might find a verdict of guilty. (a)

So also, there can be no doubt that to keep such a large quantity of materials for making fireworks in a building near a street and dwelling-houses as is calculated to endanger the lives of the persons passing by and living there, is a common nuisance. (b)

It appears, that persons putting on board a ship an article of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, will be guilty of a misdemeanor. The case did not come before the Court of King's Bench directly upon its criminal nature: but that Court, in adverting to the conduct imputed to the defendants, declared it to be criminal; and said, "in order to make the putting on board *wrongful* the defendants must be conscious of the dangerous quality of the article put on board; and if, being so, they yet gave no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous article on board, for which they are criminally liable, and punishable as for a misdemeanor at least." (c)

An indictment charged the defendant with keeping certain inclosed lands, near to the King's highway and to certain houses, for the purpose of persons frequenting such grounds, and meeting therein to practice rifle shooting, and to shoot at pigeons with guns, and that he did unlawfully cause divers persons to meet there for that purpose, and did unlawfully suffer and cause a great number of idle and disorderly persons armed with guns to assemble in the streets and highways and other places near the said premises, discharging firearms and making a great noise and disturbance, by means whereof the King's subjects were disturbed and put in peril: the defendant had converted some land, about 100 feet from a public road, into a shooting ground, where persons came to practice with rifles, and to shoot at pigeons; and as the pigeons which were fired at often escaped, it was the custom *442] for idle persons to collect outside the grounds, and in the neighboring* fields to shoot at the birds as they strayed, by which a great noise and disturbance was created; it was objected that the defendant was not responsible, as he neither committed the nuisance in his own person, nor was it his object to induce others to commit it; nor was it a necessary and inevitable consequence of any act of his, being done by persons beyond his control: and those persons being themselves amenable to punishment for it; but it was held that the evidence supported the allegation that the defendant caused such persons to assemble, and that the defendant was liable to be indicted for a nuisance; for if a person collects together a crowd of people to the annoyance of his neighbors, that is a nuisance for which he is answerable; and although it may not be his object to create a nuisance, yet if it be the probable consequence of his act, he is answerable as if it were his actual object: if the experience of mankind must lead any one to expect the result, he will be answerable for it. (d)

All *disorderly inns* or *ale-houses*, *bawdy-houses*, *gaming-houses*, *play-houses*, unlicensed or improperly conducted booths and stages for *rope-dancers*, *mountebanks*, and the like, are public nuisances, and may therefore be indicted. (e)

The keeper of an *inn* may, by the common law, be indicted and fined as being guilty of a public nuisance, if he usually harbor thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hindrance of other ancient and well-governed inns, or keep it in a place in respect of

(a) *Reg. v. Lister*, *supra*. Pollock, C. B., agreed as to the point of law with the other judges; but thought that the defendants were improperly convicted upon evidence of a dangerous use of the article in mixing it with another article to make a very combustible material.

(b) See *Reg. v. Bennett*, Bell C. C. 1, *post*, *Manslaughter*.

(c) *Williams v. The East India Company*, 3 East 192, 201.

(d) *Rex v. Moore*, 3 B. & Ad. 184 (23 E. C. L. R.).

(e) 4 Blac. Com. 167.

its situation wholly unfit for such a purpose.(f) And it seems also clear that if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same,(g) he is not only liable to render damages to the party in an action, but may also be indicted; and it is also said, that he may be compelled by the constable of the town to receive and entertain such a person as his guest; and that it is in no way material whether he have any sign before his door or not, if he make it his common business to entertain passengers.(h) But a traveller is not entitled to select a particular apartment, or to insist upon occupying a bedroom for the purpose of sitting up all night, if the innkeeper offers to furnish him with a proper room for that purpose.(i) It is no defence to an indictment for not receiving a traveller that he did not tender a reasonable sum for his entertainment, if no objection be made on that ground: nor that the guest was travelling on a Sunday: nor that it was at a late hour of the night after the innkeeper and his family were gone to bed; for an innkeeper is bound to admit a traveller at whatever hour of the night he may arrive: nor that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing *them: but if [443 the guest be drunk or behave in an indecent or improper manner, the innkeeper is not bound to receive him.(k) The keeping of an inn is no franchise, but a lawful trade when not exercised to the prejudice of the public; and therefore there is no need of any license or allowance for such erection.(l) But if an inn use the trade of an alehouse, as almost all innkeepers do, it will be within the statutes made concerning ale and beer houses.(m)

The keeping of a *baudy-house* is a common nuisance, as it endangers the public peace by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness.(n) And it has been adjudged that this is an offence of which a feme covert may be guilty as well as if she were sole, and that she, together with her husband, may be convicted of it; for the keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband; and in this she is presumed to have a considerable

(f) 1 Hawk. P. C. c. 78, s. 1. And see in Bac. Abr. tit. *Inns*, &c. (A.), that as inns from their number and situation may become nuisances, they may be suppressed, and the parties keeping them may at common law be indicted and fined. And see also as to exorbitant prices: *Id.* (C.) 2.

(g) 10 Hen. 7, 8; 39 Hen. 6, 18, 19.

(h) 1 Hawk. P. C. c. 78, s. 2.

(i) *Fell v. Knight*, 8 M. & W. 269.

(k) *Rex v. Ivens*, 7 C. & P. 213 (32 E. C. L. R.), Coleridge, J. In the preceding case, Lord Abinger, C. B., said, notwithstanding *Rex v. Ivens*, "I am inclined to think that the declaration is bad for want of an allegation of a tender of the amount to which the innkeeper would be reasonably entitled for the entertainment furnished to his guest; it is not sufficient for the plaintiff to allege that he was willing to pay; he should state further that he offered to pay. There may be cases where a tender may be dispensed with; as, for instance, where a man shuts up his doors or windows so that no tender can be made; but I rather think these facts ought to be stated in the indictment or declaration; and I have, therefore, some doubt as to the complete correctness of the judgment in the case cited." In 39 Hen. 6, 19, Danby said an innkeeper is not bound to give provender to the horse of his guest until he is paid in the hand; for the law does not compel him to put trust in his guest for the payment—which fully supports Lord Abinger's opinion. See *Hawthorn v. Hammond*, 1 C. & K. 404 (47 E. C. L. R.), where the plaintiff had knocked at an inn door for some minutes in the night without obtaining admission; and Parke, B., left it to the jury whether the defendant heard the noise, and if so, whether she ought to have concluded that the person knocking required to be admitted as a guest or was a drunken person, who had come there to make a disturbance.

(l) *Dalt. c. 56*; *Blackerby* 170; *Burn. Just. tit. Alehouses*; 1 Bac. Abr. tit. *Inns*, &c. (A.)

(m) *Burn's Just. tit. Alehouses*, where those statutes are collected. Before the 5 & 6 Edw. 6, c. 25 (repealed, 9 Geo. 4, c. 61), it was lawful for any one to keep an alehouse without license, for it was a means of livelihood which any one was free to follow. But if it was so kept as to be disorderly, it was indictable as a nuisance: 1 Salk. 45; 1 Hawk. P. C. c. 78, s. 52, in marg.

(n) 3 Inst. c. 98, p. 204; 1 Hawk. P. C. c. 74, and c. 75, s. 6; Bac. Abr. tit. *Nuisances* (A.); *Burn's Just. tit. Lewdness and Nuisance*.

part, as those matters are usually managed by the intrigues of her sex.(o) If person be only a lodger, and have but a single room, yet if she make use of it to accommodate people in the way of a bawdy-house, it will be a keeping of a bawdy-house as much as if she had a whole house.(p) But an indictment cannot be maintained against a person for being a common bawd, and procuring men and women to meet together to commit fornication; the indictment should be for keeping a bawdy-house.(q) For the bare solicitation of chastity is not indictable but cognizable only in the Ecclesiastical Courts.(r)¹

All common *gaming-houses* are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other *corrupt practices; and incite to idleness, and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community.(s) As to the keeping a common gaming-house, and for lucre and gain unlawfully causing and procuring divers idle and evil-disposed persons to frequent and come to play together at a game called "*rouge et noir*," and permitting the said idle and evil-disposed persons to remain playing at the same game for divers large and excessive sums of money, is an indictable offence at common law.(t). It has also been adjudged, that it is an offence for which a feme covert may be indicted; for, as she may be concerned in acts of bawdry, as has been observed above, so she may be active in promoting gaming, and furnishing the guests with conveniences for that purpose.(u) As an indictment for keeping a gaming-house is an indictment for a public nuisance, and not for any matter in the nature of a private injury, if the prosecutor forbears bringing the case to trial, another person may proceed with the indictment.(v) In a similar case where a prosecution had been discontinued, the Court directed the attorney-general to proceed.(w) There are certain penalties imposed by statutes upon the offence of keeping a common gaming-house;(x) and by 3 Geo. 4, c. 114, hard labor may be added to any imprisonment which the Court may award.(y)¹

(o) Reg. v. Williams, 1 Salk. 383, *ante*, 38.

(p) Rex v. Pierson, 2 Lord Raym. 1197; 1 Salk. 382.

(q) Id. *Ibid*.

(r) 1 Hawk. P. C. c. 74; Burn's Just. tit. *Lewdness*.

(s) Bac. Abr. tit. *Nuisances* (A.); 1 Hawk. P. C. c. 76, s. 6; Rex v. Dixon, 10 Mod. 331. See the 2 & 3 Vict. c. 47, s. 48, as to the power of the police within the metropolitan district to enter into gaming-houses, and the penalties to which the owner, keeper, or manager thereof are liable, and that no person shall be proceeded against both by indictment and also under that Act.

(t) Rex v. Rogier, 1 B. & C. 272 (8 E. C. L. R.); 2 D. & R. 431. And Holroyd, J., said that in his opinion it would have been sufficient merely to have alleged, that the defendants kept a common gaming-house. And see Rex v. Taylor, 3 B. & C. 502 (10 E. C. L. R.).

(u) Rex v. Dixon, Trin. 2 Geo. 1; Bac. Abr. tit. *Nuisances* (A.); 10 Mod. 335; 1 Hawk. P. C. c. 92, s. 30, and see *ante*, p. 38.

(v) Rex v. Wood, 3 B. & Ad. 657 (23 E. C. L. R.).

(w) Rex v. Oldfield, *Ibid*. note (a); Rex v. Fielden, *Ibid*.; Rex v. Constable, *Ibid*.

(x) 1 Hawk. P. C. c. 92, s. 14, *et seq*. And see 25 Geo. 2, c. 36, s. 5; 42 Geo. 3, c. 11. And see *post*, p. 453, as to Lotteries and Little-goes.

(y) See the section, *ante*, p. 405.

¹ To conduct a house so as to disquiet the neighbors, or to carry on its business so as to tend to the corruption of public morals, is a nuisance: People v. Carey, 4 Parker (R. 238; State v. Wright, 6 Jones (Law) 25. A bawdy-house need not be a dwelling State v. Powers, 36 Conn. 77.

As to the liability of the landlord, see State v. Williams, 1 Vroom 102; Comm. v. Johnson, 4 Clark 398; Brockway v. People, 2 Hill 558.

² A bowling-alley kept for *gain* or *hire* is a public nuisance at common law, though gambling be expressly prohibited: Tanner v. Trustees of Albion, 5 Hill 121; Comm. v. Goding, 3 Metc. 130. The keeping in a public house of "a certain common, ill-governed and disorderly room" and procuring and suffering for lucre disorderly persons to meet and remain therein by night and by day, "drinking, tippling, cursing, swearing, quarrelling, making great noises, rolling bowls, in and at a game commonly called ten-pins," is a public nuisance and is indictable: Bloomhaff v. State, 8 Blackf. 205.

A ten-pin alley is not of itself a public nuisance: State v. Hall, 3 Vroom 158.

For cases upon statutes against gaming, see Windham v. State, 26 Ala. 69; McCall,

An indictment against a defendant for that he did keep a common, ill-governed, and disorderly house, and in the said house for his lucre, &c., certain persons of ill-name, &c., to frequent and come together, did cause and procure, and the said persons in the said house to remain *fighting of cocks, boxing, playing at cudgels, and misbehaving themselves*, did permit, has been held to be good.^(z) And it seems that the keeping of a *cockpit* is not only an indictable offence at common law, but that a cockpit is considered as a gaming-house within the 33 Hen. 8, c. 9, s. 11,^(a) which imposes a penalty of forty shillings per day upon such houses; and therefore, on a conviction on an indictment at common law, the Court will measure the fine by inflicting forty shillings for each day, according to the number of days such cockpit was kept open.^(b)

It seems to be the better opinion that playhouses, having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, *are not nuisances in their own nature, but may [*445 only become such by accident; as, where they draw together such numbers of coaches or people, &c., as prove generally inconvenient to the places adjacent; or, when they pervert their original institution by recommending vicious and loose characters, under beautiful colors, to the imitation of the people, and make a jest of things commendable, serious, and useful.^(c) Theatres are now put under salutary regulations by the 6 & 7 Vict. c. 68. And places of public entertainment in the neighborhood of London, if not properly licensed, are to be deemed *disorderly houses* by the 25 Geo. 2, c. 36,^(d) which, reciting the multitude of places of entertainment for the lower sort of people as a great cause of thefts and robberies, enacts, "that any house, room, garden, or other place, kept for public dancing, music, or other public entertainment of the like kind in the cities of London and Westminster, or within twenty miles thereof," without a license from the last preceding Michaelmas quarter sessions, under the hands and seals of four of the justices, "shall be deemed a disorderly house or place." The Act then particularizes the mode of granting the license, makes it lawful for a constable or other person, authorized by warrant of a justice, to enter such house or place, and to seize every person found therein; and makes every person keeping such house, &c., without a license liable to a penalty of £100, and otherwise punishable as the law directs in cases of disorderly houses.^(e) In the first place, the house or room must

^(z) *Rex v. Higginson*, 2 Burr. 1233.

^(a) This statute is partly repealed by the 8 & 9 Vict. c. 109, but it is not easy to say how much.

^(b) *Rex v. Howell*, 3 Keb. 510; 1 Hawk. P. C. c. 92, s. 29. See the 2 & 3 Vict. c. 47, s. 47, which subjects persons keeping houses, &c., for baiting lions, bears, badgers, cocks, dogs, or other animals to £5 penalty, or a month's imprisonment. The Act extends to the metropolitan police district.

^(c) *Bac. Abr. tit. Nuisances (A.)*; 1 Hawk. P. C. c. 75, s. 7. And as to the performance of an obscene play, see *ante*, p. 335, note (k).

^(d) Made perpetual by the 28 Geo. 2, c. 19.

^(e) See also 2 & 3 Vict. c. 47, s. 46, which gives power to enter unlicensed theatres, and

v. State, *Ibid.* 135; *Dale v. State*, 27 *Ibid.* 31; *Shihagan v. State*, 9 Texas 430; *Purcell's Case*, 14 Gratt. 679; *Burnett v. State*, 30 Ala. 19; *Hoffman v. State*, *Ibid.* 532; *Wilson v. State*, 31 *Ibid.* 371; *Skinner v. State*, 30 *Ibid.* 524; *Moore v. State*, *Ibid.* 550; *Bentley v. State*, 32 *Ibid.* 596; *Reddett v. State*, 17 Texas 610; *Burden v. State*, 25 Ala. 60; *Sherrod v. State*, *Ibid.* 78; *Lockhart v. State*, 10 Texas 275; *Rice v. State*, *Ibid.* 545. The statute against gaming "at any faro bank or any other table or bank of the same or like kind, under any denomination whatsoever," includes the game called "thimble, or thimbles and balls." *State v. Red*, 7 Rich. 8. The law cannot be evaded by changing the name of a game: *Smith v. State*, 17 Texas 191. To wager or bet on an unlawful act is indictable: *Myers v. State*, 3 Sneed 98.

A house in which a faro table is kept for the purpose of common gambling, is *per se* a nuisance, and it is not necessary to constitute it such, that there should be proof of frequent affrays and disturbances committed there: *State v. Door*, Charl. 1.

The keeping of a common gaming-house is indictable at common law on account of its tendency to bring together disorderly persons, to promote immorality, and to lead to breaches of the peace: *People v. Jackson*, 3 Denio 101.

be kept with the defendant's knowledge; secondly, it must be kept for the purposes prohibited by the statute; there must be something like an *habitual* keeping of it, which however need not be at stated intervals; thirdly, it must be public, which all persons have a right to go, whether gratuitously or on payment of money, no matter whether paid to the defendants or not, if he knows of the payment. (c) Where, therefore, the defendant was a publican, and music, dancing, and masquerades had occasionally been held at his house, where, from its vicinity to the Great Synagogue, Jewish marriages were frequently celebrated, but no money was taken at the door or elsewhere by the defendant for admission, and the rooms were let to a dancing master, and to other persons, who sold tickets and received money for admission at the door; but there was no direct evidence that the defendant knew of this practice; it was held, that there was evidence for the jury of keeping the house for the purposes mentioned in the Act. (g) A *mere temporary or occasional use of a room for music and dancing is not a keeping it within this Act, but the room need not be kept exclusively for those purposes, nor need money be taken at the door. Where, therefore, the defendant kept a public house and on repeated occasions, during a space of three or four months, the tap-room was frequented at night by numbers of sailors, soldiers, boys, and prostitutes, who danced there to a violin played by a person on an elevated platform, but no money was taken for admission, it was held that the case was within the Act. (h) On an indictment for unlawfully keeping a room for public music and dancing with twenty miles of London and Westminster without a license, it was proved that nightly entertainments were there given, when music and dancing took place, the public being admitted on paying money at the door. There were often from 200 to 300 visitors, who conducted themselves in an orderly manner, and no impropriety of conduct was permitted or practised: the Recorder held, that this room required a license under the Act, and that, after this proof, it lay on the defendant to prove that it was licensed. (i)

It seems also to be the better opinion, that all *common stages for rope-dances* &c., are nuisances, not only because they are great temptations to idleness, but also because they are apt to draw together numbers of disorderly persons, which cannot be very inconvenient to the neighborhood. (k)

The proceedings in respect of prosecutions against persons keeping bawdy-house, gaming-houses, or other disorderly houses, are facilitated by the 25 Geo. 2, c. 3 by which it is enacted, that if two inhabitants of any parish or place, paying rate and lot, give notice in writing to the constable, of any person keeping a bawdy house, gaming-house, or any other disorderly house, in such parish or place, the constable shall go with such inhabitants to a justice, and shall, upon such inhabitants making oath before the justice that they believe the contents of the notice to be true, and entering into a recognizance in twenty pounds each to give material evidence against the person for such offence, enter into a recognizance in the sum of thirty pounds to prosecute with effect at the next sessions or assizes as to the justice shall seem meet. And provision is also made for the payment by the overseers of the charges of prosecution to the constable, and ten pounds on conviction.

subjects persons letting houses, &c., for the purpose of being used as unlicensed theatres to a penalty of not more than £20, or two months' imprisonment; and subjects persons performing or being therein without lawful excuse, to a penalty of 40s.; and a conviction under the Act is not to exempt the owner, keeper, or manager of any such house from any penalty for keeping a disorderly house, or for the nuisance thereby occasioned. The Act extends to the metropolitan police district. By sec. 3 of 25 Geo. 2, c. 36, the Act does not extend to the theatres in Drury Lane and Covent Garden, or the King's Theatre in the Haymarket; nor to performances and public entertainments carried on under letters patent, or license of the crown, or license of the Lord Chamberlain.

(f) Per Parke, B., *Marks v. Benjamin*, 5 M. & W. 564.

(g) *Marks v. Benjamin*, *supra*.

(h) *Gregory v. Tuffs*, 6 C. & P. 271 (25 E. C. L. R.); 4 Tyrw. 820; *Gregory v. Taverner*, 6 C. & P. 280.

(i) *Reg. v. Wolf*, 3 Cox C. C. 578.

(k) Bac. Abr. tit. *Nuisances* (A.); 1 Hawk. P. C. c. 75, s. 6. And see *ante*, p. 379, note (h), as to stage players being indicted for a riot and unlawful assembly.

tion to each of the two inhabitants.(l) The person keeping such bawdy-house, &c., is also to be bound over to appear at the sessions or assizes.(m)

Sec. 8, reciting that by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, &c., it is difficult to prove who is the real owner or keeper, enacts, "that any person who shall appear, act, or behave as master or mistress, or as the person having the care, government, or management, of any *bawdy-house, gaming-house, or other disorderly house, shall be deemed [447 and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not, in fact, be the real owner or keeper thereof." Sec. 9, any person may give evidence upon such prosecution, though an inhabitant of the parish or place, and though he may have entered into the before-mentioned recognizance. Sec. 10, no indictment shall be removed by *certiorari*, but shall be tried at the same sessions or assizes where it shall have been preferred (unless the Court shall think proper, upon cause shown, to adjourn the same), notwithstanding any such writ or allowance. This clause has been decided not to restrain the crown from removing the indictment by *certiorari*; there being nothing in the Act to show that the legislature intended that the crown should be bound by it.(n) And where an indictment for keeping a disorderly house has been removed from the sessions into the Central Criminal Court under the 4 & 5 Will. 4, c. 36, s. 16, either by the prosecutor or defendant, the opposite party may remove it into the Court of Queen's Bench.(o) But the power of that Court to grant a *certiorari* at the defendant's instance to remove an indictment for keeping such a house found at the Middlesex Sessions, is taken away by the 25 Geo. 2, c. 36, s. 10, whether the prosecution be under that Act or in the ordinary course.(p)

Any number of persons may be included in the same indictment for keeping different disorderly houses, stating that they "severally" kept, &c., such houses.(q) It seems that it is necessary to state where the house is situate, and the time, so as to make a particular statement of the offence, which is the *keeping* of the house.(r) But particular facts need not be stated; and though the charge is thus general, yet at the trial evidence may be given of particular facts, and of the particular time of doing them.(s) It is not necessary to prove who frequents the house, for that may be impossible: but if any unknown persons are proved to be there behaving disorderly, it is sufficient to support the indictment.(t)

The 8 & 9 Vict. c. 109, s. 2, declares and enacts that, "in default of other evidence proving any house or place to be a common gaming-house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming-house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favorable to all the players, including among the players the banker or other person by whom the game is managed, or *against [448 whom the other players stake, play, or bet; and every such house or place shall be deemed a common gaming-house such as is contrary to law, and forbidden

(l) Sec. 4. See *Burgess v. Boetefeur*, 7 M. & G. 481 (49 E. C. L. R.), an action on this section.

(m) See the 58 Geo. 3, c. 70, s. 7, by which a copy of the notice served on the constable is also to be served on one of the overseers, and the overseers may enter into a recognizance, and prosecute instead of the constable.

(n) *Rex v. Davies*, 5 T. & R. 626.

(o) *Reg. v. Brier*, 14 Q. B. 568 (68 E. C. L. R.).

(p) *Reg. v. Sanders*, 9 Q. B. 235 (58 E. C. L. R.).

(q) 2 Hale 174, where it is said, "It is common experience at this day that twenty persons may be indicted for keeping disorderly houses or bawdy-houses; and they are daily convicted upon such indictments, for the word *separaliter* makes them several indictments." And in *Rex v. Kingston and others*, 8 East 41, it was held that it is no objection on *demurrer* that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the Court to quash the indictment.

(r) By Buller, J., in *J'Anson v. Stuart*, 1 T. R. 754.

(s) By Lord Hardwicke, in *Clarke v. Periam*, 2 Atk. 339.

(t) *J'Anson v. Stuart*, 1 T. R. 754, by Buller, J.

to be kept by the said Act of King Henry the Eighth, and by all other Acts containing any provision against unlawful games or gaming-houses.”(u)

By the 16 & 17 Vict. c. 119, s. 1, “No house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management or in any manner conducting the business thereof betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, keeper, or person as aforesaid as or for the consideration for any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race,(uu) or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid; and every house, office, room, or other place opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law.”

Sec. 2. “Every house, room, office, or place opened, kept, or used for the purposes aforesaid, or any of them, shall be taken and deemed to be a common gaming-house within the meaning of an Act of the session holden in the eighth and ninth years of Her Majesty, chapter one hundred and nine, “to amend the law concerning Games and Wagers.”(v)

The 17 & 18 Vict. c. 38, contains additional provisions for the suppression of gaming-houses, and sec. 1 imposes penalties on persons obstructing the entry of constables into suspected houses.

Sec. 2. “Where any constable or officer authorized as aforesaid to enter any house, room, or place is wilfully prevented from or obstructed or delayed in entering the same or any part thereof, or where any external or internal door or means of access to any such house, room, or place so authorized to be entered shall be found to be fitted or provided with any bolt, bar, chain, or any means or contrivance for the purpose of preventing, delaying, or obstructing the entry into the same or any part thereof of any constable or officer authorized as aforesaid, or for giving an alarm in case of such entry, or if any such house, room, or place is found fitted or provided with any means or contrivance for unlawful gaming, or with any *449] means or contrivance for concealing, *removing, or destroying any instruments of gaming, it shall be evidence, until the contrary be made to appear, that such house, room, or place is used as a common gaming-house within the meaning of this Act and of the former Acts relating to gaming, and that the persons found therein were unlawfully playing therein.”(w)

Upon an indictment for keeping two bawdy-houses, the evidence, in addition to the proof of the nature of the houses, was that the defendant owned the houses, which he let to weekly tenants, and that he had been repeatedly remonstrated with as to the manner in which the houses were conducted, and called upon to interfere so as to abate the nuisance; of these warnings he took no notice, and some months

(u) The Act also contains provisions for searching houses where gaming is suspected to be carried on, and for the summary conviction of owners, keepers, and managers of gaming-houses, &c., &c.

(uu) See *Reg. v. Crawshaw*, Bell C. C. 303.

(v) Sec. 3 makes the owner, occupier, &c., of a house, &c., used for the purposes mentioned in the previous sections liable to be summarily convicted. Sec. 4 makes the owner, occupier, &c., of any such house, &c., who receives any money as a deposit on any bet on condition of paying any money on the happening of any event liable to be summarily convicted. Sec. 7 imposes a penalty on persons exhibiting placards or advertising betting houses. Sec. 11 empowers justices to authorize houses to be searched; and sec. 12 empowers commissioners of police to do the same. See *Doggett v. Catterns*, 17 C. B. N. S. 669 (112 E. C. L. R.), as to the meaning of “other place” in 16 & 17 Vict. c. 119, s. 1; and see the same case in error where the decision of the C. P. was reversed, 12 Law T. 355.

(w) Sec. 3 imposes a penalty on any person apprehended for giving a false name or address. Sec. 4 imposes penalties on persons keeping gaming-houses. Sec. 5 enables justices to examine on oath any persons who have been apprehended. And sec. 6 exonerates persons so examined, who make a full discovery, from all penalties.

before the prosecution he was served with a notice to the like effect; he, however, took no steps to stop the nuisance, but continued to go to the houses, and receive the rent every week; but it was not proved that the defendant obtained any additional rent by reason of the nature of the occupation; and it was held that the defendant was not really the keeper of the bawdy-houses in point of law: but was simply the owner of the houses, letting them to other persons who used them for an immoral purpose.(x)

A recorder of a borough has jurisdiction to try an indictment under the 23 Geo. 2, c. 36, s. 5, for keeping a disorderly house within the borough.(y)

The punishment for keeping a common bawdy-house, a common gambling-house, or a common ill-governed and disorderly house, is fine, or imprisonment, or both, and by the 3 Geo. 4, c. 114, hard labor in addition to such imprisonment.(z)

On an indictment for keeping a bawdy-house, it appeared that the house was inhabited entirely by women, who lived by prostitution openly carried on, and whose conduct was often riotous and grossly indecent, so as to be a scandal to the neighborhood. The defendant owned the house, but occupied no part of it, did not keep the key, and had no right of entry. The apartments were let to weekly tenants, who occupied separately, under distinct takings, each lodger having her own room, her own key, and a door opening into the street, or into a passage communicating with the street. The defendant had nothing whatever to do with the management of the house (if indeed a house thus divided into separate holdings can be said to be managed as a house), or of any part of it. He received no share of the earnings of the women, nor did he derive any benefit therefrom, except so far as he may be said to have done so incidentally, from their ability to pay their rent being thereby increased. He had no control over the tenants, except such as might arise indirectly from his power as landlord to determine the tenancy from one week to another. He only went to the house to collect the weekly rent from the different lodgers, or, when being pressed by the complaints of the neighbors (as sometimes happened), to endeavor to prevail on the inmates to be more orderly in their behavior. But it was abundantly clear that he knew the use to which the apartments were applied by the several lodgers, and that he let the apartments with a full knowledge that they would be applied to the purposes of prostitution, and with a perfect assent on his part to their being so applied. Upon a case reserved upon the question whether, under the circumstances, the defendant could be considered as having "*kept*" the house in the legal sense of that term, it was held that he could not. The house was not kept by him. He had no power to admit any one whom he desired to enter the house, or to exclude any one whom he wished not to enter. In fact, he was not the keeper of the house.(zz) With all deference to the learned judges, it may well be doubted whether this decision, as well as *Reg. v. Barrett*, be not erroneous. The contract in each case was clearly illegal, as it is plain that the letting was for the purposes of prostitution.(aa) That being so, the defendant was in point of law the occupier of the house, and the residents in the house merely his agents or servants in carrying on the purposes in question. But even if they were the occupiers, they were guilty of the offence, and the part he took would have made him an accessory before the fact, if the offence were felony, and it made him a principal, as it was only a misdemeanor, and he might have been convicted on an indictment charging him with keeping the house.(bb) Besides, the law is clear that, if a man lets a house with a nuisance upon it, he is indictable, and *a fortiori* if he lets a house for the very purpose that a nuisance may be created by its use.

In general, all open lewdness grossly scandalous is punishable by indictment at

(x) *Reg. v. Barrett*, 9 Cox C. C. 255; s. c. L. & C. 263. See *post*, p. 455.

(y) *Reg. v. Charles*, L. & C. 90.

(z) See the section, *ante*, p. 405.

(zz) *Reg. v. Stannard*, L. & C. 349.

(aa) *Crisp v. Churchill*, 1 Selw. N. P. 68, 7th edit.; *Girarday v. Richardson*, 1 Esp. N. P. C. 13, Lord Kenyon, C. J.

(bb) See my note, p. 128 of Vol. I.

the common law: and it appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor.(a)¹

Therefore any unlawful exposure of the private parts of an individual in a public place and in the sight of divers persons is indictable. In one case it was held that in order to constitute such an offence, it was not essential that the exposure should actually be seen by more than one person, if it were so made that it might be seen by other persons if they had looked in that direction. A French master was tried on an indictment for indecently exposing his person, and it appeared that he was seen from an opposite window by a maid-servant, but there was no evidence that any one in the street saw him, but only that persons going along the street might have seen him; Parke, B., directed the jury to consider whether he was in such *450] a situation that the *passers by in the street could have seen him had they happened to look, and if they were of that opinion to find him guilty.(b)

In order, however, to render a person indictable for indecently exposing his person, it is not sufficient that he expose his person to one female only. The indictment charged that the prisoner in a certain public and open place, called Paddington Churchyard, in the sight and to the view of Lydia C., did wilfully expose his private parts; and the Court of Queen's Bench arrested the judgment, on the ground that the nuisance must be public, that is to the injury or offence of several.(c) So where an indictment charged that the prisoner in a certain public place, within a certain alehouse, indecently did expose his private parts in the presence of Mary A., and of divers other the liege subjects of the Queen, and the prisoner had conducted himself in an offensive manner in the public passage from the entrance door of the public-house to the bar, but not amounting to an indecent exposure, and whilst so doing several persons passed to and fro, and he then took out and exposed his private parts to Mary A.; but there was no one in sight but herself at that time; it was held that, assuming the indictment to be sufficient, the averment respecting "divers others" was material, and was not proved, as the exposure was only proved to have been made in the presence of one person.(d)

(a) 1 Hawk. P. C. c. 5, s. 4; Burn's Just. tit. *Lewdness*; 4 Blac. Com. 65, (n); 1 East P. C. c. 1, s. 1. See 5 Geo. 4, c. 85, s. 4, and 1 & 2 Vict. c. 38, which make persons guilty of the indecent exposure of obscene prints, pictures, wounds, deformities, &c., punishable as rogues and vagabonds.

(b) Rex v. Rouverard, cited in Reg. v. Webb, *infra*. Query, whether this case be not shaken by that and subsequent cases. And yet it seems to rest on very sound reason. Suppose a man exposes himself in a window facing a street, whilst there are a number of females there who might see him, with intent to insult them, is he guilty of no offence because they happen not to see him? To hold that he is not, is to make the offence depend on a mere accident over which the offender has no control, instead of on the act and guilty intent of the offender himself.

(c) Reg. v. Watson, 2 Cox C. C. 376.

(d) Reg. v. Webb, 1 Den. C. C. 338; 2 C. & K. 933 (61 E. C. L. R.). No notice was taken of the question whether the place was a public place. The indictment alleged the exposure "in the presence of M. A. and divers others," &c., and the judges doubted whether it was not bad for not adding "in their view," and also whether "divers others" was sufficient.

¹ State v. Avery, 7 Conn. Rep. 267. See a case of indictment for frequenting houses of ill-fame: Brooks v. State, 2 Yerger 482. In a prosecution for open and notorious lewdness, it need not be proved to have taken place in the street or under the immediate observation of strangers. It is enough if the parties lived together unmarried, and that fact was generally known throughout the neighborhood: Grishan v. State, 2 Yerg. 589; *contra*, Comm. v. Catlin, 1 Mass. 8. A woman cannot be indicted for keeping a bawdy-house merely because she is unchaste, lives by herself, and habitually admits one or many to an illicit cohabitation with her: State v. Evans, 5 Ired. Rep. 603. *Quere*. Is adultery or fornication indictable as a common law offence in this country, except in cases of open lewdness, amounting to nuisance? Comm. v. State, 16 Ark. 566. Public obscene language is indictable: State v. Appling, 25 Mo. 315. See *contra*, McMakins v. State, 10 Ind. 140. Profane swearing and cursing in public is indictable as a public nuisance: State v. Graham, 3 Sneed 134. Exhibiting stud horses in a town is a nuisance: Nolin v. Mayor of Franklin, 4 Yerg. 163. Whatever act openly outrages decency and is injurious to public morals, is a misdemeanor at common law, and indictable as such: State v. Rose, 32 Mo. 560.

But where an exposure was charged on a certain public common in the presence and sight of divers persons, and the prisoners had committed fornication in open day on the said common; but there was no evidence that it was committed within the sight of any one except the witness; but it could have been seen without difficulty by other persons on the common, and the case did not state that there were any other persons on the common; the judges, after argument, differed in opinion, and no judgment was delivered.(e)

Where an indictment charged the prisoners with an indecent exposure in a public place called Farringdon Market, and it was proved that the place in question was an enclosure of Portland stone, with divisions or boxes like the urinals at railway stations, and open to the public for certain proper purposes, but otherwise enclosed, and there was an aperture in the stone-work to enable persons to look through and watch the proceedings inside; it was held that, although the place was in Farringdon Market, it was not a public place for the purpose of this indictment.(f) But where a passenger in a public omnibus for hire exposed his person for a considerable distance whilst the omnibus was passing along a street in the presence of three or four females who were *passengers therein, and saw such exposure, it was held that this was a public place.(g) [*451

On an indictment for indecent exposure, it appeared that the prisoner, while several female servants of a club-house were going to bed, exposed himself on the roof of a house exactly opposite the window of the room where the females were. On the following night the prisoner again exposed himself in a most indecent manner, remaining on the roof about ten minutes. The head waiter and a policeman were sent for, both of whom saw the exposure, making, with five females, seven persons before whom on this occasion the exposure took place. The house out of which the prisoner came, as well as the club, were situate in public streets, but his acts could not be seen by persons passing along the streets, but they could be seen from the back windows of houses in these streets. Upon a case reserved, it was held that there was an abundant publicity in this case.(gg)

Where an indictment for indecent exposure alleged the offence to have been committed on a certain public and common highway, it was held, on a case reserved in Ireland, that evidence that it was committed on a piece of land near the highway did not support the indictment. And a count having been amended so as to state the offence to have been committed "on a place in view of a public highway," and there being no evidence that any one could have seen the prisoner except one female, it was held that no offence was proved; for an exposure seen by one person only, and being capable of being seen by one person only, is not an offence at common law; but if the prisoner had been seen by one person only, and there had been evidence that others might have seen him, the case would have been different(hh) No opinion was expressed as to the propriety of the amendment.

Where an indictment alleged that the two defendants in a certain open and public place called Kew Gardens, frequented by divers of the liege subjects, unlawfully did meet together for the purpose and with the intent of committing with each other openly, lewdly, and indecently in the said public place, divers nasty, wicked, filthy, lewd, beastly, unnatural and sodomitical practices, and then unlawfully, wickedly, openly, lewdly, and indecently did commit with each other, in the

(e) Reg. v. Elliott, L. & C. 103.

(f) Reg. v. Orchard, 3 Cox C. C. 248, Cresswell and Erle, JJ.

(g) Reg. v. Holmes, Dears. C. C. 207. On an indictment for indecent exposure in a certain room in a dwelling-house, it appeared that the prisoners had gone into a parlor in a public-house, and committed the acts alleged, and that a maid-servant had witnessed what was done through the window of another room, and had gone for assistance, and in consequence of her representations a policeman and another witness went, and they also saw sufficient to constitute the crime. The servant was not called as a witness; and the Recorder left it to the jury whether this was a place in which such practices occurring they were likely to be witnessed by others, and there was a conviction: Reg. v. Bunyan, 1 Cox C. C. 74. This case has never been cited in any subsequent case, and seems very questionable.

(gg) Reg. v. Thallman, L. & C. 326.

(hh) Reg. v. Farrell, 9 Cox C. C. 446.

sight and view of divers of the liege subjects, in the said public place passing and being, divers such practices as aforesaid, the Court of Queen's Bench arrested the judgment on the ground that the indictment did not state so distinct and specific a charge as on legal principles was sufficient.^(h) So where a count alleged that A. in a certain public place did lay his hands on the private parts of B., with intent to stir up in his own mind and B.'s mind unnatural and sodomitical desires and inclinations, and to incite B. to the committing with A. divers unnatural and sodomitical acts, and that B. in the said public place did permit A. so to lay his hands, and was then aiding and assisting A. in the said acts, with the like intent; the count was held bad for not describing an incitement to commit a felony in proper terms.⁽ⁱ⁾

In one case it was held to be an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he might be distinctly seen; although the houses had been recently erected, and, until their erection, it had been usual for men to bathe in great numbers at the place in question. McDonald, C. B., ruled, that whatever place becomes the habitation of civilized men, there the laws of decency must be enforced.^(k) And to show a being of unnatural and monstrous shape for money is a misdemeanor.^(l)

By the 20 & 21 Vict. c. 83, justices are empowered to issue a warrant to search for any obscene books, papers, writings, prints, pictures, drawings or other representations kept in any house, &c., for the purpose of sale or distribution, exhibition for the purpose of gain, lending upon hire, or being otherwise published for the purpose of gain, if any of such articles are of such a description that the publication of them would be a misdemeanor; and if any such articles are found the justices may order them, except such as may be necessary as evidence in some further proceeding, to be destroyed.

A count which charges the keeping obscene prints with intent to utter them is bad, as it alleges no act done; but a count which charges the procuring obscene prints with the like intent is good, as procuring is an act done.^(m)

By the 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any public and indecent exposure of the person, or any public selling or exposing for public sale or to public view of any obscene book, print, picture, or other indecent exhibition, the Court may sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labor during the whole or any part of such term of imprisonment.

An indictment charged the prisoner with having, in a house situate in a public street, exposed divers filthy, offensive, and disgusting pictures in the windows of the house, in such a position as to attract the attention of persons passing along the street. The defendant was a herbalist, and had exhibited in his shop-window in the High Street at Chatham two large colored pictures of the size of life, each of them representing the half length of a man naked to the waist, and one of them covered with sores. There was no indecency, but the effect was disgusting to the last degree. The other represented a cure. He had done this to exhibit the effect of a medicine he vended. Willes, J., held that there was no doubt that the exhibition of the picture in a highway was a nuisance.^(mm)

Eaves droppers, or such as listen under walls or windows, or the eaves of a

(h) Reg. v. Rowed, 3 Q. B. 180 (43 E. C. L. R.).

(i) Reg. v. Orchard, 3 Cox C. C. 248, Cresswell and Erle, JJ.

(k) Rex v. Crunden, 2 Campb. 89. And the Court of King's Bench, when the defendant was brought up for judgment, expressed a clear opinion that the offence imputed to him was a misdemeanor, and that he had been properly convicted. In Rex v. Sir Charles Sedley, Sid. 168, 1 Keb. 620, s. c., the defendant being indicted for showing himself naked from a balcony in Covent Garden to a great multitude of people, confessed the indictment; and was sentenced to pay a fine of 2000 marks, to be imprisoned a week, and to give security for his good behavior for three years.

(l) Harring v. Walrond, 2 Cha. Ca. 110, the case of a monstrous child that died, and was embalmed to be kept for show, but was ordered by the Lord Chancellor to be buried—(cited in Burn's Just. tit. Nuisance). See per Pollock, C. B., contra in Reg. v. Webb, C. & K. 938 (61 E. C. L. R.).

(m) Reg. v. Dugdale, Dears. C. C. R. 64, ante, p. 86.

(mm) Reg. v. Grey, 4 F. & F. 73.

house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the Court Leet; or are indictable at the sessions, and punishable by fine and finding sureties for their good behavior.(n)

A *common scold*, *communis rixatrix* (for our law confines it to the feminine gender), is a public nuisance to her neighborhood, and may be indicted for the offence; and, upon conviction, punished by being placed in a certain engine of correction called the trebucket, or cucking stool.(o)¹ And she may be convicted without setting forth the particulars in the indictment;(p) though the offence must be set forth in technical words, and with convenient certainty; and the indictment must conclude not only against the peace, but to the common nuisance of divers of his Majesty's liege subjects.(q) It is not necessary to give in evidence the particular expressions used; it is sufficient to prove generally that the defendant is always scolding.(r)

A defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighborhood: which the Court held to be a nuisance.(s)

The exposing in public places persons infected with contagious disorders, so that the infection may be communicated, is a nuisance, and has been already treated of in a preceding chapter (t)

It is said that a *mastiff* going in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to his Majesty's subjects, seems to be a common nuisance; and that, *consequently, the owner may be indicted for suffering him to go at large.(u) [*453]

There are also some offences which are declared to be nuisances by the enactments of particular statutes, and where a statute declares a particular thing to be a common nuisance, it is indictable as such. An Act of Parliament prohibited the erection of any building within ten feet of a road, and declared that if any such building should be erected, it should be deemed a common nuisance. By another clause, justices were empowered to convict the proprietor and occupier of such building; it was held that the party who erected a building contrary to the Act might be indicted for a nuisance.(v)

The 23 & 24 Vict. c. 139, s. 8, prohibits the sale of fireworks without a license, and sec. 9 imposes a penalty on persons throwing fireworks in any thoroughfare or public place.

By the 10 & 11 Will. 3, c. 17, all *lotteries* are declared to be public nuisances; and all grants, patents, and licenses, for such lotteries to be against law. But for

(n) 4 Blac. Com. 167, 168; Burn's Just. tit. *Eaves Droppers*.

(o) 1 Hawk. P. C. c. 75, s. 14; 4 Blac. Com. 168; Burn's Just. tit. *Nuisance*, III. *Cuck*, *guck*, in the Saxon language (according to Lord Coke) signifies to scold or brawl; ken from the bird *cuckhow*, or *guckhaw*; and *ing* in that language signifies water, because scolding woman, when placed in this stool, was for her punishment soused in the water: Inst. 219.

(p) 2 Hawk. P. C. c. 25, s. 59.

(q) *Rex v. Cooper*, 2 Str. 1246.

(r) By Buller, J., in *J'Anson v. Stuart*, 1 T. R. 754.

(s) *Rex v. Smith*, 1 Str. 704. And see a precedent of an indictment for keeping dogs which made noises in the night: 2 Chit. Crim. Law 647.

(t) *Ante*, p. 167, *et seq.*

(u) Burn's Just. tit. *Nuisance*, 1. And see a precedent of an indictment for this offence: Chit. Crim. Law 643. It should be observed, however, that the offence seems to be stated too generally in the authority from which the text is taken. To permit a *ferocious* mastiff or bull-dog to go at large and unmuzzled may be a nuisance; but those dogs are frequently quiet and gentle in their habits, except when incited by their owners; and it can hardly be said to be a nuisance to permit them to go at large and unmuzzled, because some of their breed are ferocious.

(v) *Rex v. Gregory*, 5 B. & Ad. 555 (27 E. C. L. R.). See this case as to the meaning of the term "building," in such an Act.

¹ *James v. Comm.*, 12 Serg. & R. 220. So a common brawler: *Comm. v. Foley*, 99 Mass. 49; or a common drunkard: *Comm. v. Conley*, 1 Allen 6.

many years it was found convenient to the government to raise money by the means of them; and accordingly different state lottery Acts were passed to license and regulate offices for lotteries.^(w) But the 42 Geo. 3, c. 119, declares all games or lotteries, called *Little-goes*, to be public nuisances, and provides for their suppression; and also imposes heavy penalties upon persons keeping offices, &c., for lotteries not authorized by Parliament.^(x) An indictment lies on sec. 1 of each of these Acts for keeping a lottery.^(xx)

It is laid down in the books that any one may pull down, or otherwise destroy, a common nuisance; and it is said that if any one, whose estate is, or may be, prejudiced by a private nuisance, may justify the entering into another's ground and pulling down and destroying such nuisance, surely it cannot but follow *a fortiori* that any one may lawfully destroy a common nuisance.^(y) And it is also said that it seems that in a plea justifying the removal of a nuisance, the party need not show that he did as little damage as might be;^(z) but this may, perhaps, be doubted, as, even where there is a judgment to abate a nuisance, it is only to abate so much of the thing as makes it a nuisance.^(zz)¹

It has since been held, that if there be a nuisance in a highway a private individual cannot of his own authority abate it, unless it does him special injury, and he can only interfere with it as far as is necessary to exercise his right of passing ^{*454} along the highway, and he cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if avoiding it, he might have passed on with reasonable convenience.^(a)

It is also stated as the better opinion, that the Court of King's Bench may, by a mandatory writ, *prohibit* a nuisance, and order that it shall be abated; and that the party disobeying such writ will be subject to an attachment.^(b) Such writs appear to have been granted in some cases; and the proceeding in one case was that the judges, upon view, ordered a record to be made of the nuisance, and sending for the offender, ordered him to enter into a recognizance not to proceed; but he refusing to comply, the Court committed him for the contempt, issuing a writ to the sheriff on the record made to abate the building, and ordered the offender to be indicted for the nuisance.^(c)

But the more usual course of proceeding in cases of nuisances is by indictment, in which the nuisance should be described according to the circumstances; and it should be stated to be continuing, if that be the fact.^(d) An indictment for carrying

^(w) See the Acts collected, Burn's Just. tit. *Gaming*, III.

^(x) The 6 & 7 Will. 4, c. 66, imposes penalties on advertising foreign or illegal lotteries; and by the 8 & 9 Vict. c. 74, they must be sued for by the law officers of the crown.

^(xx) Reg. v. Crawshaw, Bell C. C. 303. As to lotteries within the 42 Geo. 3, c. 119, see *Morris v. Blackman*, 2 H. & C. 912.

^(y) 1 Hawk. P. C. c. 75, s. 12; Bac. Abr. tit. *Nuisance* (C.).

^(z) *Id.* *Ibid.*

^(zz) *Post*, p. 456.

^(a) *Dimes v. Petley*, 15 Q. B. 276 (69 E. C. L. R.); *Mayor of Colchester v. Brooke*, 7 Q. B. 339 (53 E. C. L. R.); *Bateman v. Bluck*, 18 Q. B. 870 (83 E. C. L. R.). And see *Ellis v. The London and S. W. R. Co.*, 2 H. & N. 424.

^(b) Bac. Abr. tit. *Nuisance* (C.).

^(c) *Rex v. Hall*, 1 Mod. 76; 1 Vent. 169, s. c. And Hale, C. J., mentioned another case in 8 Car. 1, of a writ to prohibit a bowling-alley erected near St. Dunstan's church.

^(d) *Rex v. Stead*, 8 T. R. 142; otherwise there will not be judgment to abate it.

¹ *Hart v. Mayor of Albany*, 9 Wend. 571; *Gates v. Blincoe*, 2 Dana 158. If a party in abating a nuisance does more injury to another than is necessary to effect the legitimate object, he is liable to an action: *Ibid.* The destruction of a building in which disorderly persons assemble for unlawful purposes, cannot be justified as the abatement of a nuisance; nor can an assault upon one who resists the destruction of his property for such a cause be justified; for it is not the house, but the disorderly conduct permitted in it, that constitutes the nuisance: *Gray v. Ayres*, 7 Dana 375. A house of ill-fame is a nuisance, but its destruction is unlawful: *Ely v. Niagara County*, 36 N. Y. 297. Where it is the wrongful use of a building that constitutes a nuisance, the remedy is to stop such use, not to tear down or demolish the building: *Barclay v. Comm.*, 1 Casey 503.

A judgment that a nuisance be abated will only be rendered when it is alleged that the nuisance is continued at the finding of the indictment: *State v. Noyes*, 10 Foster 279.

ing on offensive works may state them to be carried on at such a parish. It is not necessary to state that they were carried on in a town or village; (e) stating them to be carried on *near* a common King's highway, and *near* the dwelling-houses of several persons, to the common nuisance of passengers and of the inhabitants, is sufficient: it need not be stated how near the highway or houses they were carried on. (f) The offence should formerly have been charged to be done *ad commune nocumentum*, "to the common nuisance of all the liege subjects," &c. (g) But the want of such a conclusion is cured by the 14 & 15 Vict. c. 100, s. 24. (h)

In some cases it is no defence to show that the premises, out of which the nuisance arises, are in the occupation of a tenant, for the receipt of the rent is an upholding of the nuisance.

If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term. So he is if he let a building, which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant. (i) If a man purchase premises with a nuisance upon them, though there be a demise for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance. But if, after the reversion is *purchased, [455] the nuisance be erected by the occupier, the reversioner incurs no liability; yet in such a case, if there were only a tenancy from year to year, or any short period, and the landlord choose to renew the tenancy after the tenant had erected the nuisance, that would make the landlord liable. (k) Where, therefore, the defendant was in the receipt of the rents of some dwelling-houses, let for short periods to tenants, and two privies and a sink belonging to them were used in common by the occupiers of the houses; it did not appear whether any of the present tenants commenced occupying the houses before the defendant began to receive the rents; but the privies and sink were used by the tenants of those premises before his time; there was no distinct proof of any actual demise of the privies and sink, but they had regularly been cleansed by the persons occupying the houses, until the time of the nuisance, when the cleansing had been neglected; the nuisance had arisen since the defendant began to receive the rents; it was held that the defendant was liable to be indicted for the nuisance. (l) This case underwent great consideration in a recent case where the Court said, "If *Rex v. Pedley* is to be considered as a case, in which the defendant was held liable because he had demised the buildings when the nuisance existed; or because he had relet them after the user of the buildings had created a nuisance; or because he had undertaken the cleansing and had not performed it; we think the judgment right. But if it is to be taken as a decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised; we think it goes beyond the principle to be found in any previously decided cases, and cannot assent to it;" for, "if a landlord lets premises, not in themselves a nuisance, but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not, the landlord cannot be made responsible for the acts of the tenant; and *a fortiori* he would not be liable if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving a right to enter and abate a nuisance if created." (m)

(e) Burr. 333.

(f) Id. Ibid.

(g) Vin. Abr. tit. *Indictment* (Q), *Nuisance*, 13; Prat v. Stearn, Cro. Jac. 382; Rex v. Hayward, Cro. Eliz. 148; Anon., 1 Ventr. 26; 2 Roll. Abr. 83; 1 Hawk. P. C. c. 75, ss. 3, 4, 5. And see Bac. Abr. tit. *Nuisance* (B.); Rex v. Reynell, 6 East 316.

(h) Reg. v. Holmes, Dears. C. C. 207.

(i) Rex v. Pedley, 1 A. & E. 822 (28 E. C. L. R.); 3 N. & M. 627. See Russell v. Shenton, 3 Q. B. 449 (43 E. C. L. R.). The duty of cleansing and repairing drains and sewers, is *prima facie* that of the occupier, and does not devolve on the owner merely as such.

(k) Per Littledale, J., Ibid.

(l) Rex v. Pedley, *supra*.

(m) Per Curiam, Rich v. Basterfield, 4 C. B. 783 (56 E. C. L. R.), where it was held that

Where a dangerous grating had existed over the area of a house for five years, and the rent for it had been paid quarterly, but there was no further evidence of the terms of the holding; it was held that the landlord was liable for an accident caused by the state of the grating, on the ground that his permitting the tenant to remain in occupation year after year, without taking steps for the termination of the tenancy, is equivalent to a new letting at the end of each year.*(mm)* Error is pending on this judgment, and, as it did not appear that the defendant had any knowledge of the nuisance, the decision seems very questionable.

It is no defence for a master or employer that a nuisance is caused by the acts of his servants, if such acts are done in the course of their employment; for if persons for their own advantage employ servants to conduct works, they are answerable for what is done by those servants.*(n)*

It will be no excuse for the defendant that the nuisance, for which he is indicted, *456] has been in existence for a great length of *time, as, however twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances though of longer standing.*(o)* It has been held that a party could not defend the putting his wood-stack in the street before his house, on the ground that it was according to the ancient usage in the town, leaving sufficient room for passengers; for it is against law to prescribe for a nuisance.*(p)* And Lord Ellenborough, C. J., said, in one case, "It is immaterial how long the practice may have prevailed, for *no length of time will legitimate a nuisance*. The stell fishery across the river at Carlisle had been established for a vast number of years, but Buller, J., held that it continued unlawful, and gave judgment that it should be abated."*(q)* But in some cases length of time may concur with other circumstances in preventing an obstruction from having the character of a nuisance: as where, upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used for a market for the sale of clothes for above twenty years, and that the defendant put the bags there for the purpose of sale; Lord Ellenborough, C. J., said, that after twenty years' acquiescence, it appearing to all the world that there was a fair or market kept at the place, he could not hold a man to be criminal who came there under the belief that it was such a fair or market, legally instituted.*(r)*⁴

If the indictment be so general that it does not convey sufficient information to the defendant to enable him to prepare his defence, the Court will order the prosecutor to give the defendant a particular of the several acts of nuisance he intends

a landlord, who let a shop with a chimney in it to a tenant who made fires, the smoke from which issued from the chimney, and caused a nuisance, was not responsible for it. It has since been held that an action lies against a person who lets premises with a ruinous chimney upon them, which afterwards falls and injures an adjoining building, on the ground that if the wrong causing the injury arises from the nonfeasance or misfeasance of the lessor, the party suffering the injury may sue him: *Todd v. Flight*, 7 C. B. N. S. 377 (97 E. C. L. R.). See *Reg. v. Barrett*, *supra*, p. 449.

(mm) *Ganby v. Jubber*, 5 B. & S. 78 (117 E. C. L. R.).

(n) *Rex v. Medley*, 6 C. & P. 292 (25 E. C. L. R.), Lord Denman, C. J. See *ante*, p. 169.

(o) *Weld v. Hornby*, 7 East 199; and see *post*, sec. 3.

(p) *Fowler v. Sanders*, Cro. Jac. 446. In *Dewell v. Sanders*, Cro. Jac. 490, the Court referred to this case as deciding that "none can prescribe to make a common nuisance, for it cannot have a lawful beginning by license or otherwise, being an offence at common law;" and per Montague, C. J., "Neither the King nor the lord of a manor can give any liberty to erect a common nuisance."

(q) *Rex v. Cross*, 3 Camp. 227.

(r) *Rex v. Smith and others*, 4 Esp. 111. See *Bliss v. Hall*, 4 B. N. C. 183 (33 E. C. L. R.); *Rex v. Montague*, 4 B. & C. 598 (10 E. C. L. R.), *post*, 531.

⁴ *Mills v. Hall et al.*, 9 Wend. 215. No length of time renders a nuisance lawful, or estops the state from abating it, and punishing the person who creates such a nuisance: *Elkins v. State*, 3 Humph. 543.

A party cannot defend an indictment for nuisance by showing its continued existence for such a length of time as would establish a prescription against individuals: *People v. Cunningham*, 1 Denio 524.

to prove.(s) And where the indictment is for the obstruction or non-repair of highways which are described generally, a particular of the several highways obstructed or out of repair may be obtained (t)

All common nuisances are regularly punishable by fine and imprisonment: but, as the removal of the nuisance is usually the chief end of the indictment, the Court will adapt the judgment to the nature of the case. Where the nuisance, therefore, is stated in the indictment to be *continuing*, and does in fact exist at the time of the judgment, the defendant may be commanded by the judgment to remove it at his own costs:(u) but only so much of the thing as causes the nuisance ought to be removed; as if a house be built too high, only so much of it as is too high should be pulled down; and if the indictment were for keeping a dye-house, or carrying on any other stinking trade, the judgment would not be *to pull down the building where the trade was carried on.(v) So in the case of a [*457 glass-house, the judgment was to abate the nuisance, not by pulling the house down, but only by preventing the defendant from using it again as a glass-house.(w) But where the indictment does not state the nuisance to be continuing, a judgment to abate it would not be proper. In a case where this point arose, Lord Kenyon, C. J., said, "When a defendant is indicted for an existing nuisance, it is usual to state the nuisance and its continuance down to the time of taking the inquisition; it was so stated in *Rex v. Pappineau, et adhuc existit*; and in such cases the judgment should be that the nuisance be abated. But in this case it does not appear in the indictment that the nuisance was then in existence; and it would be absurd to give judgment to abate a supposed nuisance which does not exist. If, however, the nuisance still continue, the defendant may be again indicted for continuing it."(x)

The 5 Will. & M. c. 11, s. 3 enacts, that if a defendant prosecuting a writ of *certiorari* (as mentioned in the Act) be convicted of the offence for which he is indicted, the Court of King's Bench shall give reasonable costs to the prosecutor if he be the *party grieved*, or be a justice, &c., or other civil officer, who shall prosecute for any fact that concerned them as officers to prosecute or present. Upon this clause it was decided, that persons dwelling near to a steam-engine, which emitted volumes of smoke affecting their breath, eyes, clothes, furniture, and dwelling-houses, and prosecuting an indictment for such nuisance, are *parties grieved* entitled to their costs, the defendants having removed the indictment from the sessions by *certiorari*, and been afterwards convicted.(y)

The 1 & 2 Geo. 4, c. 41, reciting the great inconvenience and injury sustained from the improper construction and negligent use of furnaces employed in the working of engines by steam, and that though such nuisance, being of a public nature, is abateable as such by indictment, the expense had deterred parties suffering thereby from seeking the remedy given by law, enacts that "it shall and may be lawful for the Court by which judgment ought to be pronounced, in case of conviction on any such indictment, to award such costs as shall be deemed proper and reasonable to the prosecutor or prosecutors, to be paid by the party or parties so convicted as aforesaid; such award to be made either before or at the time of pronouncing final judgment, as to the Court may seem fit."

Sec. 2, if it shall appear to the Court by which judgment ought to be pronounced that the grievance may be remedied by altering the construction of the furnace, it shall be lawful for the Court, without the consent of the prosecutor, to make such

(s) *Rex v. Curwood*, 3 A. & E. 815 (30 E. C. L. R.).

(t) *Rex v. Marquis of Downshire*, 4 A. & E. 698 (31 E. C. L. R.); *Reg. v. Inhabitants of Pembridge*, June 26, 1841, Patteson, J., at chambers; and no affidavit is necessary, as the necessity for particulars appears on the face of the indictment: *Reg. v. Probert*, Dears. C. C. 32 (s); *Reg. v. Flower*, 7 D. P. C. 665.

(u) 2 Roll. Abr. 84; 1 Hawk. P. C. c. 75, s. 14; *Rex v. Pappineau*, 1 Str. 686.

(v) *Rex v. Pappineau*, *supra*; 9 Co. 53; Godb. 221.

(w) Co. Ent. 92 b.

(x) *Rex v. Stead*, 8 T. R. 142. A strong opinion was intimated upon the point when the same case was previously brought before the Court in another shape: *Rex v. The Justices of Yorkshire*, 7 T. R. 468.

(y) *Rex v. Dewsnap*, 16 East 194.

orders as shall be by the Court thought expedient for preventing the nuisance in future, before passing final sentence on the defendant.

*458] *Sec. 3, the provisions relating to the payment of costs and the alteration of furnaces, shall not extend to the owners or occupiers of any furnaces or steam-engines, erected solely for the purpose of working mines of different descriptions, or employed solely in the smelting of ores and minerals, or in the manufacturing the produce of ores or minerals, on or immediately adjoining the premises where they are raised.

The 16 & 17 Vict. c. 128, 18 & 19 Vict. cc. 116, 121, and 23 & 24 Vict. c. 77, contain numerous excellent provisions for the removal of nuisances and the prevention of diseases, but they do not fall within the scope of this work.

Sec. II.—Of Nuisances to Public Highways.

In treating of nuisances to *public highways*, we may consider, in the first place, what is a public highway; secondly, of nuisances to a public highway by obstruction; and, thirdly, of nuisances to a public highway by the neglect, on the part of those who are liable, to put it in repair.

The word highway originally denoted a public way, which was raised above the level of the lands through which it ran. Such ways are of extreme antiquity. When the Israelites asked leave to pass through Edom, they said, (a) "We will go by דרך," the raised road or highway. (b) And it is very remarkable that the same way is called just before, (c) דרך המלך, the king's track (d) or way. So that here we have the well-known expression, "the king's highway," which in our old records is *alta regia via*, (e) and in our year books *haut chemin le Roy*. (f) Long ago, however, highway has been applied not only to every public way on land but also on water.

Highway is said to be the *genus* of all public ways; (g) of which there are three kinds: a footway; (h) a foot and horseway, which is also a pack and prime-way; and a foot, horse and cartway. (i) Whatever distinctions may exist between these ways, it seems to be clear that any of them, when common to all the King's subjects, whether directly leading to a market-town, or beyond a town as a thoroughfare to other towns, or from town to town, may properly be called a highway; and that the last, or more considerable of them, has been usually called the *King's highway*. (k) But a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, is not a highway, because it belongs not to all the King's subjects, but only to some particular persons, each of whom, as it seems, may have an action on the case for a nuisance therein. (l) But in a case, (m) where a public footway was

(a) Numb. xx. 19.

(b) Isai. lxii. 11, shows this to be the correct meaning of the word.

(c) Numb. xx. 17.

(d) The English word "track" is either from the Hebrew word, d being changed into t, or from the Arabic, which is from the Hebrew with a similar change.

(e) 2 Inst. 701.

(f) 33 Hen. 6, 26.

(g) Reg. v. Saintiff, 6 Mod. 255.

(h) Where a perambulator, eighteen inches wide and fourteen pounds weight was pushed along a public footway leading from a road into a square, Byles, J., left it to the jury to say whether this was a usual accompaniment of a large class of foot passengers, and so small and light as neither to be a nuisance to other passengers or injurious to the soil: Reg. v. Mathias, 2 F. & F. 570. The jury were discharged.

(i) Co. Lit. 56 a.

(k) Id. Ibid. 1 Hawk. P. C. c. 76, s. 1; Bac. Abr. tit. *Highways* (A.) And in a case where the *terminus ad quem* was laid to be a public highway, and it appeared in evidence that it was a public footway, it was held that the description was sufficient: Allen v. Ormond, 8 East 4.

(l) 1 Hawk. P. C. c. 76, s. 1. So by Hale, C. J., in Austin's case, 1 Vent. 189. A way leading to any market town, and common for all travellers, and communicating with any great road, is a highway: but if it lead only to a church, or to a house or village, or to fields, it is a private way.

(m) Rex v. Marchioness of Downshire, 4 A. & E. 232 (31 E. C. L. R.); 5 N. & M.

scribed as leading to a parish church, it appeared that the way led to an inclosure containing the site of the old parish church, which had been pulled down, and the new parish church, and that the path formerly went to the old church, and a new path led from it to the new church, and it was left to the jury whether the path up to the new church had been dedicated to the public, a verdict found for the crown, and no objection was made on the ground that there could not be a public way to a church. And where a road led to the house of the vicar of a parish and of three other persons, and to the parish church, but terminated there, and was not a thoroughfare, and the justices made an order under the 5 & 6 Will. 1, c. 50, s. 73, to remove a quantity of rubbish from it; it was held that they had jurisdiction to determine whether this was a highway or not.⁽ⁿ⁾ In one case, a very learned judge said, he had great difficulty in conceiving that there can be a public highway which is not a thoroughfare, because the public at large cannot well be in the use of it.^(o) It has been held, that where there never was a right of thoroughfare a jury might find that no public way existed; but it has never been settled that, where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage by a legal order of justices. If the stoppage were legally made, that would not make the remaining passage not public.^(p) And where a public footway extended into two parishes, it was held that certain inclosure commissioners might stop up so much of the footway as lay in one of the parishes, and it seems to have been considered that the part which lay in the other parish remained a public way.^(q)

It has since been expressly held, that there may be a public way over a place which is not a thoroughfare, and that it is a question for the jury whether it does exist or not. Where therefore a court opening into a public street had no thoroughfare through it, but contained fourteen or fifteen houses, and had been paved by commissioners under the 12 Geo. 3, c. 68, and always lighted by the parish, and the jury found that it was a *public highway; it was held that here might be a highway under these circumstances.^(r) So a large square [*460 with only one entrance, or a promenade, the owner of which has, for many years, permitted all persons to go into and round it, may become a public highway.^(s)

462. See also Williams's case, 5 Co. 72 b; 2 Roll. 84, pl. 15; *Rex v. Reynell*, 6 East 15.

(n) *Williams v. Adams*, 2 B. & S. 312 (110 E. C. L. R.).

(o) By Abbott, C. J., in *Wood v. Veale*, 5 B. & A. 454 (7 E. C. L. R.).

(p) Per Patteson, J., *Rex v. Marquis of Downshire*, 4 A. & E. 698 (31 E. C. L. R.); 6 T. & M. 92.

(q) *Gwyn v. Hardwicke*, 1 H. & N. 49.

(r) *Bateman v. Bluck*, 18 Q. B. 870 (83 E. C. L. R.).

(s) Per Lord Campbell, C. J., *Ibid.* In *Campbell v. Lang*, 1 Macq. Sco. App. Cas. 451, a public way terminating at the interior of the confluence of two rivers was claimed, and it was held that such a way might exist, as it might go further on so as ultimately to reach a good terminus; but Lord Cranworth, C., doubted whether there could be "a public right of way from a given public place, but neither terminating in a public place nor leading to a public place" by the law of Scotland "any more than it is by the law of England." In *Young v. Cuthbertson*, 1 Macq. Sco. Ap. C. 455, on the trial of an issue whether there existed a public right of way from Burntisland through the appellant's land to Staleyburn and Aberdour, after a verdict for the respondents, it was objected that the judge was wrong in holding it not necessary that a public way should terminate in a public place. Lord Cranworth, "Suppose a right of way from Hyde Park Corner to the Addison Road. It would not be necessary to prove that the Addison Road had been a public place for forty years. It would be enough to show that the way was public to Addison Road. Besides, it may not always be indispensable to show an exit. The way may terminate in a *cul de sac*, such as Connaught Place;" and in giving judgment his Lordship added, "then it is said that the issue was objectionable for this reason, that Staleyburn is not a public place; but even supposing that Staleyburn is not a public place, still if the right of way went beyond it, that would be sufficient. If, indeed, Staleyburn had been a mere private house, to which the public had been in the habit of going from Burntisland and returning back again, I believe the case would not have properly come within the description of a public right of way; for the owner might destroy the house, and shut up the way, and then there would be an end of it. But here the right of way extended further, it had a public terminus at each end." No authority is referred to in either of these cases. See *Reg. v. Hawkhurst*, *post*, p. 466.

A custom for the freeman and citizens of a town on a particular day in the year to enter upon a close for the purpose of holding horse-races thereon, is a good custom.^(ss)

There are many towns in which the market-places are large, and the public have clearly the right of passing backwards and forwards, over each and every part of them; and it should seem that an indictment alleging a right in the public to pass and repass in, over, and across each and every part of such a place would be valid.

A question here presents itself whether there may not exist a public right of walking over a close in every direction, though there be but one entrance to the close. There certainly may be such a private right. A plaintiff alleged a right of private way over and along the terrace walk, and a user of that way for many years was proved, and also a grant of the free liberty, use, benefit and privilege of the terrace walk with other inhabitants; it was objected that the right proved was not a right of way, but a right to use the walk for pleasure only. That the right was altogether different from the right of way claimed. It was like the privilege which the builder of a square, who reserves the centre for a garden common to all the houses, grants to the tenants of the houses of walking about the garden; but the objection was overruled. Patteson, J., "I do not understand the distinction that has been contended for between a right to walk, pass and repass, forwards and backwards over every part of a close, and a right of way from one part of a close to another. What is a right of way but a right of way to go forwards and backwards from one place to another?" Wightman, J., "The right proved is a right of passage backwards and forwards over every part of the close; the right claimed is less than this; but it is included in it, being a right of way from one part of the close to another."^(t) In an old case a defendant prescribed that all the inhabitants of a vill from time immemorial had been used to dance in a close at all times of the year at their free will for their recreation, and it was held that this was a good custom.^(u) Now coupling these decisions with those as to public highways—
*461] where there are no thoroughfares, it may fairly be inferred that the public may in point of law have a right of passing and repassing over every part of a close, whatever its shape or size may be.

It is not to be understood by the term *cart-way*, that the way is to be used only with the particular vehicle called a *cart*; for if it is a common highway for carriages, it is a highway for all manner of things.^(v) Many public highways, however, as a footway, are to be used only in a particular mode. Thus, though a towing-path is to be used only by horses in towing vessels, yet it is a common highway for that purpose.^(w) And where a railway or tram-road was made under the authority of an Act of Parliament, by which the proprietors were incorporated, and by which it was provided that the public should have the beneficial enjoyment of it, such railway or tram-road was taken to be a public highway.^(x)

The public have only a right to use the land over which a public road passes for the purpose of passage, and therefore a person cannot justify using a highway for the purpose of racing upon it.^(xx)

The number of persons who may be entitled to use the way, or may be obliged to repair it, will not make it a public way, if it be not common to all the King's subjects. Thus, where the commissioners under an inclosure Act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, it was held that no indictment could be supported against those six parishes for not repairing it, because it did not concern the public. It was argued, amongst other reasons in support of the indictment, that there was no other remedy, for there were not less than 250 persons who were liable

(ss) *Mounsey v. Ismay*, 1 H. & C. 729.

(t) *Duncan v. Louch*, 6 Q. B. 904 (51 E. C. L. R.).

(u) *Abbott v. Weekly*, 1 Lev. 177, cited by Lord Cranworth, C, *Young v. Cuthbertson*, *supra*.

(v) *Rex v. Hatfield*, Cas. temp. Hardw. 315; s. c., 8 East. R. 6 (a).

(w) Per Bayley, J., in *Rex v. Severn and Wye R. Co.* 2 B. & A. 648.

(x) *Rex v. Severn and Wye R. Co.*, 2 B. & A. 646.

(xx) *Sowerby v. Wadsworth*, 3 F. & F. 734.

to the repair of the road, and that the difficulty of suing so many persons together was almost insuperable. But the Court said that, however convenient it might be that the defendants should be indicted, there was no legal ground on which this indictment could be supported; that the known rule was that those matters only which concerned the public were the subject of an indictment; that the road in question, being described to be a private road, did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it; and that the question was not varied by the circumstance that many individuals were liable to repair, or that many others were entitled to the benefit of this road.^(y)

Though a highway is said to be the King's, yet this must be understood as meaning that in every highway the King and his subjects may pass and repass at their pleasure; for the freehold and all the profits as trees, mines, &c., belong to the lord of the soil, or to the owner of the land on both sides the way.^(z) The rights, however, of the owner of the soil will be subject to those of the public as to their exercise of the right of way in its full extent. Thus it seems to be established, that if a common highway is so foundrous and out of repair as to become impassable, or even dangerous to be travelled over, or incommodious, the public *have a right to go upon the adjacent ground; and that it makes no difference whether such ground be sown with grain or not.^(a) But it is a right [*462 of passage only which is given up by the owner of the soil, even where the way is dedicated by him to the public. Thus where in an action of trespass, a case was made that the place where the supposed trespass was committed was formerly the property of the plaintiff, who some years ago had built a street upon it, which had ever since been used as a highway, that the defendant had lands contiguous, parted only by a ditch, over which he had laid a bridge, the end of which rested on the highway; and it was insisted, for the defendant, that by the plaintiff's having made this a street, it was a dedication of it to the public, and that he could not therefore sue as for a trespass on his property; the Court held that though it was a dedication to the public, so far as the public had occasion for it, which was only for a right of passage, it never was understood to be a transfer of the absolute property of the soil.^(b)

A way may become a public highway by a *dedication* of it by the *owner* of the soil, to the public use. Thus where the owners of the soil suffered the public to have the free passage of a street in London, though not a thoroughfare, for eight years, without any impediment (such as a bar set across the street, and shut at pleasure, which would show the limited right of the public), it was held a sufficient time for presuming dedication of the way to the public.^(c) So where a street, communicating with a public road at each end, has been used as a public road for four or five years, it was held the jury might presume a dedication.^(d) And though if the land had been under lease during that time, or even for a much longer period, the acquiescence of the tenant would not have bound the landlord, without evidence of his knowledge^(e) yet it was held, that where a way had been used by the public

(y) *Rex v. Richards*, 8 T. R. 634.

(z) *Bac. Abr. tit. Highways* (B.); *Com. Dig. Chemin* (A.) 2. *The Marquis of Salisbury v. Great N. R. Co.*, 5 C. B. N. S. 174 (94 E. C. L. R.). The presumption, that the soil of a road *usque ad medium filum viæ* belongs to the owners of the adjoining lands, applies to both public and private roads: *Holmes v. Bellingham*, 7 C. B. N. S. 329 (97 E. C. L. R.); *Beridge v. Ward*, 10 C. B. N. S. 400 (100 E. C. L. R.); *Smith v. Howden*, 14 C. B. N. S. 398 (108 E. C. L. R.); *Reg v. The Strand Board of Works*, 4 B. & S. 526 (116 E. C. L. R.).

(a) 1 *Roll Abr.* 390 (A.) pl. 1, and (B.) pl. 1. *Absor v. French*, 2 *Show.* 28; *Taylor v. Whitehead*, *Dougl.* 749.

(b) *Sir John Lade v. Shepherd*, 2 *Str.* 1004.

(c) *Trustees of the Rugby Charity v. Merryweather*, 11 *East* 375, in the note. Lord Kenyon also said, "In a great case, which was much contested, six years was held sufficient." But some observations were made upon this doctrine; and it was somewhat shaken in the case of *Woodyer v. Hadden*, 5 *Taunt.* 125 (1 E. C. L. R.), *post*, p. 463, note (o).

(d) *Jarvis v. Dean*, 3 *Bing.* 447 (11 E. C. L. R.), the street was neither paved nor lighted, but highway and paving rates had been paid.

(e) *Trustees of the Rugby Charity v. Merryweather*, 11 *East* 375; *Wood v. Veal*, *post* p. 464.

for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public might be presumed, although he was never in the actual possession of the close himself, and was not proved to have been near the spot.^(f) And it was also held in this case that where a way had been so used, notice of the fact to the steward is notice to the landlord.^(g) In a case where it appeared that a passage, leading from one part to another of a public street (though by a very circuitous route) made originally for private convenience, had been open to the public for a great number of years, without any bar or chain across it, and without any interruption having been given to persons passing through it, it was ruled, that this must be considered as a way dedicated to the public.^(h) But the erection of a bar to prevent the passing of *463] carriages, rebuts the *presumption of a dedication to the public; although the bar may have been long broken down: and though such a bar do not impede the passing of persons on foot, no public right to a footway is acquired, as there can be no partial abandonment to the public.⁽ⁱ⁾ And it has been ruled that the owner of the soil may replace the bar after it has been taken away for twelve years.^(k) Where land is vested in fee in trustees for certain public purposes, they may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them. Commissioners for drainage, being authorized by an Act to make drains and dispose of the earth in forming banks on the sides thereof, made a drain, and with the earth taken from it made a bank on one side of it, which had been used for twenty-five years, as a public highway: it not appearing that the cleansing of the drains or any other purpose of the Act had been or was likely to be interfered with by such user of the soil, it was held that a dedication might be made by the commissioners.^(l) So a canal company may dedicate a way to the public, as other persons or corporate bodies may do. They are the masters of their own property; and though they may be answerable to the rest of the proprietors for failure of duty, there is no reason why the public may not by user gain a right of way against them as well as against any other individuals.^(m) But it seems that there must be some owner who can dedicate the way to the public, otherwise the road will not become a public way.⁽ⁿ⁾ In every case the facts must be such as are sufficient to show that the owner meant to give the public a right of way over his soil, before a dedication by him will be presumed. Thus in a case, where the plaintiff erected a street leading out of a highway across his own close, and terminating at the edge of the defendant's adjoining close, which was separated by the defendant's fence from the end of the street for twenty-one years, during nineteen of which the houses were completed, and the street publicly watched, cleansed and lighted, and both footways and half the horseway paved at the expense of the inhabitants: it was held, that this street was not so dedicated to the public, that the defendant, pulling down his wall, might enter it at the end adjoining to his land, and use it as a highway.^(o) And nothing done by a lessee without the consent of the owner of the fee

(f) *Rex v. Barr*, 4 Camp. 16.

(g) *Id. ibid.*

(h) *Rex v. Lloyd*, 1 Camp. 260.

(i) *Roberts v. Karr*, *cor. Heath, J.*, Kingston Lent Ass. 1808; 1 Campb. 261, note (d); but see *post*, p. 469.

(k) *Lethbridge v. Winter*, Somerset Spr. Assiz. 1808, *cor. Marshall, Serjt.*, 1 Campb. 63, in the note.

(l) *Rex v. Leake*, 5 B. & Ad. 469 (27 E. C. L. R.) 2 N. & M. 583.

(m) *The Surrey Canal Co. v. Hall*, 1 M. & G. 392 (39 E. C. L. R.). See this case, *post*, p. 468.

(n) *Rex v. Edmonton*, 1 M. & Rob. 24. See the case, *post*, p. 507.

(o) *Woodyer v. Hadden*, 5 Taunt. 125, *Chambre, J., dissent.* In this case Mansfield, *J.*, said, "No one can respect Lord Kenyon more than I do; but I always thought, as to the Rugby case (*ante*, note (c)), there was reason to doubt. I never could discover when the dedication began; he says that during the lease there was no dedication, but that six years' acquiescence afterwards were sufficient; he says that in another case, six years were held to be enough, not naming the case;—if six, why not one? Why not half a year? It would then become necessary for every reversioner, coming into possession of his estate after a lease, instantly to put up fences all round his property, to prevent dedication." And see *Rex v. Hudson*, 2 Str. 909.

will give a right of way to the public. Thus in a case of an action of trespass, and a justification under a public right of way, the facts *were that the place in question, which was not a thoroughfare, had been under lease from 1719 to [*464 1818; but had been used by the public, as far back as living memory could go; and had been lighted, paved and watched, under an Act of Parliament, in which it was mentioned as one of the streets of Westminster; and that the plaintiff, who inclosed it after 1818, had previously lived for twenty-four years in its neighborhood. But it was held, that even under these circumstances the jury were well justified in finding that there was no public right of way, inasmuch as there could be no dedication to the public by the tenants for ninety-nine years, nor by any one, except the owner of the fee.(p) There cannot be a public way by dedication, unless there be some evidence to show, that the owner has consented to the use of the way; the consent of the lessee is not sufficient, because it cannot bind the owner of the inheritance. A public footway over crown land was extinguished by an inclosure Act, but for twenty years after the inclosure took place the public continued to use the way; it was held that this use was not evidence of a dedication to the public, as it did not appear to have been with the knowledge of the crown.(q) If there be an old way running along the side of my land, and, by my fences decaying, the public come on my land, that is no dedication.(r)

In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*—of which the user by the public is evidence and no more; and a single act of interruption by the owner is of much more weight upon a question of intention to dedicate than many acts of enjoyment.(s) but it is sufficient to show that there has been such a user by the public as satisfies the jury that a dedication to the public was intended by the owner, whoever he might be. Thus where a road had originally been set out under a private inclosure Act over part of the waste of a manor, and had been used by the public generally ever since it had been so set out, being a period of fifty years, and a portion of the waste, had been allotted to the lord in respect of his interest in the soil, it was contended that the soil of the road had been taken out of the lord, and transferred to no other person, and that therefore there was no owner or none against whom a dedication could be presumed; for that there must have been an owner who knew that he was so, or his consent to the public user could not be presumed; and that if the crown were the owner, stronger evidence would be necessary to raise a presumption of a dedication than if the owner had been a private person. But the Court of Queen's Bench held that a dedication might be presumed even against the crown from long acquiescence in public user, and that the jury were rightly directed to consider whether the *owner, whoever he might be, had consented to the public [*465 user in such a manner as to satisfy the jury that he intended to dedicate a highway to the public.(t)

On an indictment for obstructing a highway it appeared that the way had been laid out as a projected street in 1827, and used as a highway till 1836, when the defendants began to obstruct it, and soon after enclosed a part of the road. The owners of the soil of the greater part of the road brought ejectment; and, after negotiations between them and the defendants, the latter agreed to open the road, but finally in 1853 broke off the negotiations, assigning as a reason that they had, since the negotiations commenced, acquired the fee of another part of the road, on

(p) *Wood v. Veal*, 5 B. & A. 454 (7 E. C. L. R.). The case was decided independently of the fact of there not being a thoroughfare.

(q) *Harper v. Charlesworth*, 4 B. & C. 574 (10 E. C. L. R.); 6 D. & R. 572. And as the user of a way while the land is in lease is no evidence against the reversioner, he cannot maintain an action against a person claiming a right to use the way: *Baxter v. Taylor*, 4 B. & Ad. 72 (24 E. C. L. R.); 1 N. & M. 13.

(r) *The Trustees of the British Museum v. Finnis*, 5 C. & P. 460 (24 E. C. L. R.), *Paterson, J.*

(s) *Per Parke, B. Poole v. Huskinson*, 11 M. & W. 827.

(t) *Reg. v. East Mark*, 11 Q. B. 877 (68 E. C. L. R.), *per Lord Denman, C. J.* "Enjoyment for a great length of time ought to be sufficient evidence of dedication, unless the state of the property has been such as to make dedication impossible."

which was the obstruction in question. It was shown that that spot had been part of an estate settled in strict settlement in 1823, on a tenant for life, with power to grant building leases, and for the trustees of the settlement to sell with the consent of the tenant for life. The first tenant in tail was an infant at the time of the trial. The tenant for life proved that in 1828 the whole of the property had been sold by his trustees, and that he had had nothing to do with it since. The jury were told that there was evidence that the way had been for several years actually used by the public, from which user a dedication might be inferred, and were asked whether they inferred that there was a dedication, and at what time and by whom; and they found that there was a dedication in 1829 by whoever was then owner of the fee. And it was held that this direction was right; for when there is satisfactory evidence of such a user of a road, as to time, manner and circumstances, as would lead to the inference that there was a dedication by the owner of the fee, if it was shown who he was, it is not necessary to inquire who the individual was from whom the dedication, necessarily inferred from such user, first proceeded; and when such user is proved the onus lies on the person who seeks to deny the inference from it, to show negatively that the state of the title was such that that dedication was impossible, and that no one capable of dedicating existed. That here the statement of the defendants that they acquired the fee in 1853, and of the tenant for life that he had had nothing to do with the property since 1828, was evidence that the fee was not subject in 1829 to the settlement, and therefore there was nothing to rebut the inference from the public user at that time.(u)

It is not enough, however, to establish the right of the public, that the persons using the way *reasonably believed*, from the conduct of the owner, that they had acquired a right to it; an *actual intention* on the part of the owner to dedicate must be shown.(v)

Where it appeared that a road ran from a highway to the lodge of a park as a carriage-way, but there was no road through the park but a bridleway leading to *466] another highway; the park gates were sometimes locked, but persons on foot and on horseback were allowed to pass through the park; but after rain, when the road was liable to be cut up, carriages were refused admission there was no actual thoroughfare beyond the park gates, but there were private roads leading from the road to two farms; the surveyor of highways had been in the habit of taking stone from the park to repair the road, and had, after supplying other stone, used the whole for the purpose of repair; the parish, in conjunction with the adjoining parish, had done the repairs from time immemorial; and the road was used by every one who thought fit to use it, but there had not been any user of the road by the public except for the purpose of going to the park to seek admission there; and it was held that this was not such a dedication as would make the road a public highway.(w)

Where the question was as to a right of way over a farm, it was not disputed that the road was a footway or a bridleway. A former lessee of the farm had made it for his own use. Persons had been allowed to pass along it on foot and on horseback, but heavy carts had been turned back, and there had always been gates. In 1838 permission had been asked to use the road, and in 1848 the defendant had agreed to pay something yearly for leave to use it, it was alleged, but as he said only to repair it. The parish had never repaired it. The way was claimed as a public way to Croham Hurst, an eminence which commands a pleasant prospect, and is therefore a resort for parties of pleasure. Bailiffs of former tenants, going back fifty or sixty years, gave evidence of the user of the right, and absence of all obstruction. Erle, J., told the jury that the question was whether they were satisfied that there had been a dedication of the road to the public by the owner. If

(u) Reg. v. Petrie, 4 E. & B. 737 (82 E. C. L. R.)

(v) Hall v. Crawford, Q. B. E. T. 1860. Bateman's Highway Acts 23, from which the text is an accurate copy.

(w) Reg. v. Hawkhurst, 7 Law T. 268. Cockburn, C. J., thought the facts explained the user; and Wightman, J., thought the repairs might be referred to the bridleway. It was not doubted that there might be a highway, which was not a thoroughfare. See ante, p. 459.

all the Queen's subjects had used the way at their free will at all times, that was strong evidence of such a dedication as a highway. But the evidence of such a user was to be well weighed, with reference to gates, to repairs, to permission, and the like. It was a matter of common experience that there were many farm roads which, as means of communication, were of great convenience, and which many persons used a long time before it became worth the owner's while to resort to any measures to prevent it. On the other hand, the fact of payment for the user would not be conclusive against the right, for it might be that a man was not in a position to enforce the right. Still it was a strong piece of evidence against the right. The strongest evidence in favor of the right was that of the bailiffs of former owners; for it would be within their province to prevent trespasses. Easy-minded men would not, however, be prepared to contest every user; and it was matter for the jury whether the evidence tended to show a farm road, or a highway for all the world, and whether the user as a highway had been submitted to by the owners. Beyond all doubt there might be user of a highway for purposes of pleasure. It was very material that there had been no repair by the parish, though this was not conclusive.(x)

*Upon an indictment for stopping up a highway, witnesses, chiefly seafaring people, having proved that they had used the way without interruption for a great number of years; it was proposed to prove that the directions of the predecessor of the defendant to his servants were to allow seafaring men and pilots to make use of the way for purposes connected with their calling, but to turn back other persons. Pollock, C. B., "Even supposing these instructions to have been given and acted on, yet, unless it can be proved that they were communicated to the persons who used the path, and that they did so by virtue thereof, and not of right, their user was a user by the public, and the right of the way has been gained, if the user has been long enough. I do not think that such evidence, taken alone, would be relevant (y) Where there was a piece of garden ground in front of a house, with the fence on the side of a footpath and a road respectively, and there was a gate, which was kept bolted, at the footpath side, leading to the door of the house, and also gate-posts, but no gate near to the house at the road side, and people had frequently passed across the garden, but the defendant swore that they had no right to go that way, and that he had repeatedly sent persons back; it was held that there was no evidence to go to the jury of a public way.(z)

In determining whether or not a way had been dedicated to the public, the intention of the proprietor must be considered. If it appear only that he has suffered a continual user that may prove a dedication: but such proof may be rebutted by evidence of acts showing that he contemplated a license only resumable in a particular event. Thus where the owner of land agreed with the Thorncliffe Iron Company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land should be open to carriages, that the company should pay him £5 a year, and supply cinders for the repair of the road, and that the hamlet should lead and spread them, and from that time the road was used as a carriage-road without obstruction for nineteen years, when disputes arose, and the passage along the road with carriages was interrupted, and the interruption acquiesced in for five years: it was held that the evidence showed no dedication, but only a license to use the road, resumable on breach of the agreement.(a) So where in order to show that a road is a public highway evidence is given that repairs have been done to it by the surveyor of highways, it is competent to prove an agreement between the surveyor and an agent of a landowner, which tends to explain such repairs, and to show that the road had not been repaired as a parish road, but under a private bargain.(b)

Where the owner of the soil has been under a compulsory obligation to permit a

(x) *Mildred v. Weaver*, 3 F. & F. 30.

(y) *Reg. v. Broke*, 1 F. & F. 514. *Sed quære*; for it is strong evidence to show that there was no *animus dedicandi*. See *Hall v. Crawford*, *ante*, p. 465.

(z) *Stone v. Jackson*, 16 C. B. 199 (81 E. C. L. R.).

(a) *Barraclough v. Johnson*, 8 Ad. & E. 99 (35 E. C. L. R.); 3 N. & P. 233.

(b) *Ferrand v. Milligan*, 7 Q. B. 730 (53 E. C. L. R.).

qualified passage over his soil, the circumstance of a general passage having been used by the public for many years will not lead to the conclusion of a dedication to the public. Thus where a road was set out by commissioners under a local Act, *468] and certain persons only were by the Act to use it, but *in fact it had been used by the public for nearly seventeen years, it was held, that this was not sufficient evidence of a dedication to the public.(c) But where a canal company were required to make and maintain bridges over a canal for the use of the owners and occupiers of adjoining lands, and also where the canal was carried across any highway, bridleway or footpath; and in 1804 the company erected a swivel bridge at a spot where there was a public bridleway and footway, which bridge, as a carriage-way, was intended to be for the exclusive accommodation of the tenants of an adjoining estate. From 1810 to 1822 the public occasionally used the bridge with carriages. In 1822 a church was built near to the canal, streets were formed, and the neighborhood became very populous. From 1822 to 1832 the bridge was used by the public as a carriage-way, without interruption. In 1832 the company began to exact a toll from persons not tenants of the adjoining estate crossing the bridge with carriages, and in 1834 they removed the swivel bridge, and built a stone bridge in its stead. It was held that the evidence warranted the jury in finding that there had been a dedication. The fact of the public having the uninterrupted use of the way from 1822 to 1832 was a strong ground for inferring an intention on the part of the company to dedicate the way to the public. But if the matter rested on what took place since 1834, it could not be said that there had been a dedication to the public; but the previous period must be looked at, and if the public had acquired a right of way along the swivel bridge, the circumstance of the company erecting the stone bridge in its place could not have the effect of destroying that right.(d) Upon an indictment for encroaching upon a public highway, it appeared that in 1771, commissioners under an inclosure Act had been empowered to set out public and private roads, the former to be repaired by the township, the latter by such persons as the commissioners should direct. The public roads were to "be and remain sixty feet in breadth between the fences." The road in question was described in the award as a private road, and the width of eight yards; but in fact a space of sixty feet was left between the fences till the time of the alleged encroachment. The centre of this space was commonly used by the public as a carriage-road, and had been repaired by the township for eighteen years before the encroachment. The space said to be encroached upon was at the side of this road, and there was a diversity of evidence as to the use made of this space by the public, and its condition since the time of the award. The commissioners, in their award, directed that the township should repair as well the public as the private ways. Park, J., in summing up, observed that the commissioners had exceeded their authority in awarding that a private road should be repaired by the township;(e) but he left it to the jury to decide, whether the road, though originally meant to be a private one, had not subsequently been dedicated to the public, and they found a verdict of guilty, and it was held, that the case was for the jury, and that they had found a proper verdict.(f)

*469] *It seems that there may be a partial dedication of a way, although doubts have been entertained upon the subject. Where the owner of an estate permitted the public to use a road for several years for all purposes except that of carrying coals, Bayley and Holroyd, JJ., thought there might be such a partial dedication.(g) So where an indictment for non-repair of a bridge used "at all such times as and when it has been or is dangerous to pass through the river on the side of the bridge," was objected to because it did not show the bridge to be a public bridge, but only a bridge to be used on particular occasions, which could not

(c) *Rex v. St. Benedict*, 4 B. & A. 447 (6 E. C. L. R.).

(d) *Surrey Canal Company v. Hall*, 1 M. & G. 392.

(e) *Rex v. Cottingham*, 6 T. R. 20, *post*, p. 507.

(f) *Rex v. Wright*, 3 B. & Ad. 681 (23 E. C. L. R.). See this case also, *post*, p. 490 -

(g) *Marquis of Stafford v. Coyney*, 7 B. & C. 257 (14 E. C. L. R.), *Littledale, J., doubted*. And see *Cowling v. Higginson*, 4 M. & W. 245, where the Court seems to have been of opinion that there might be a partial dedication.

be if it were a public highway, for according to the language of Heath, J., in *Roberts v. Karr*, (h) there could not be a partial dedication to the public; Lord Ellenborough, C. J., said, though it must be an absolute dedication to the public, still it might be definite as to time, and the Court overruled the objection.(i)

The correct distinction in cases of this kind appears to be that there may be a dedication of a way to the public for a limited purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public, as to the inhabitants of a parish and persons resorting to their houses.(k) Thus there may be a dedication of a highway, subject to a partial interruption during the continuance of a fair or market for a certain limited and not unreasonable time.(l) So where in front of a line of houses there was a footway; then a space of thirty-three feet wide between the footway and a carriageway, and the occupiers of the houses had always made use of so much of the intermediate space as was opposite to their respective houses, in such manner as suited their trades or occupations; but the public had at all times passed over the intermediate space as of right subject to such use of it by the occupiers; the Court of Queen's Bench seem to have been of opinion that this was a dedication to the public, subject to such use by the occupiers.(m) So where there had been a public highway over a quay in front of certain houses, and as far as living memory went there had been a user by the occupiers thereof to deposit anchors and other incumbrances thereon, the Court of Exchequer thought that in point of law a dedication might have been made subject to such user.(n)

A highway may be dedicated with obstructions or impediments which, if made in an existing highway, would be a nuisance. Thus where a cellar had an opening into a footway, which was open during the day, but shut at night with a flap which slightly projected above the footway, and this state of things had existed as far as living memory went, it was held that the jury ought to *draw the conclusion that it had existed as long as the footway, and that the dedication of the way to the public was with the reservation of the flap being continued there, and accepted by them subject to the inconvenience arising from it: and that such a dedication might lawfully be made, and consequently that the flap was no nuisance; though it would have been otherwise if it had been placed in an existing footway.(o)

Where a private right of way already exists, the owner of the land over which it runs can only dedicate that land to the public subject to such private right; for he can give nothing but what he himself has, i. e., a right of user not inconsistent with the private easement;(p) and the acquiring a right of way by the public does not destroy a previously existing private right of way over the same line.(q)

But there can be no dedication of a way by an individual to the public for a limited time, whether certain or uncertain, and if dedicated at all by an individual, it must be dedicated in perpetuity.(r)

(A) 1 Camp. N. P. C. 262, n.

(i) *Rex v. Northampton*, 2 M. & S. 262. See *Rex v. Marquis of Buckingham*, 4 Camp. N. P. 189.

(k) *Poole v. Huskinson*, 11 M. & W. 827.

(l) *Elwood v. Bullock*, 6 Q. B. 383 (51 E. C. L. R.).

(m) *Le Neve v. Vestry of Mile End Old Town*, 8 E. & B. 1054 (92 E. C. L. R.).

(n) *Morant v. Chamberlin*, 6 H. & N. 541.

(o) *Fisher v. Prowse*, 2 B. & S. 770 (110 E. C. L. R.); s. p., as to projecting steps, *Cooper v. Walker*, *Ibid.* See *Robbins v. Jones*, 15 C. B. (N. S.) 221 (109 E. C. L. R.), fully adopting *Fisher v. Prowse*.

(p) *Reg. v. Chorley*, 12 Q. B. 515 (64 E. C. L. R.).

(q) *Duncan v. Louch*, 6 Q. B. 904 (51 E. C. L. R.).

(r) *Reg. v. Lordsmere*, *post*, p. 471; *Dawes v. Hawkins*, 8 C. B. (N. S.) 848 (98 E. C. L. R.); in this case an ancient way over a common was, without authority or interference from the owner of the soil, diverted by an adjoining proprietor, who substituted a new road for it, which was used for more than twenty years by the public, and then the original road was reopened to the public and used by them; and Erle, C. J., and Byles, J., held that these facts afforded no reasonable evidence of a dedication of the substituted road to the public, the public user thereof being referable to the right of the public to deviate on the adjoining land in consequence of the old road being stopped up. *Williams, J., dissentiente.*

Public roads are frequently created by Acts of Parliament, but in these cases the road will only continue to be a public road so long as the Act continues in force, and the performance of statute duty upon the road during the continuance of the Act is no adoption of the road so as to render the parish liable to repair it after the Act has expired. A road was made by the trustees appointed under the 45 Geo. 3, c. 7, which was to continue in force for twenty-one years, and from thence to the end of the then next session of Parliament, and which required the inhabitants to do statute duty upon the road: it was held that when the Act ceased to be in operation, the road made pursuant to its provisions was no longer a public road, and as, during the time the Act continued in force, the several parishes through which the road passed were compelled by the Act to do statute duty, there was no adoption of the road by those parishes during that period. As soon as the Act expired or was repealed, the several parishes, through which the road passed, could only be liable to repair by reason of common law obligation. Now a road becomes public by reason of a dedication of the right of passage to the public by the owner of the soil, and of an acceptance of the right by the public or the parish; and in this case the facts did not furnish any ground for presuming an adoption by the public.^(s)¹

*471] Upon an indictment for non-repair of a common Queen's highway, it appeared that the road was made under a turnpike Act, which was to continue in force for twenty-one years, and had been kept in force by subsequent Acts till the finding of the indictment. It was opened in 1850 for general traffic, a stage-coach had run along it, and it had been used by carts and carriages. It was proposed to prove in defence that the trustees had never put the road in good repair, and that it had never been properly fenced or finished so as to fulfil the requisitions of the Act; but as it had been so far completed as to have been used along the whole line for several years, Patteson, J., rejected the evidence as tending to prove what was immaterial. It was contended, after a verdict of guilty, that the township was not liable to repair a temporary turnpike road; that the way was improperly described, as it was not described as a way for a limited time, and that the evidence was improperly rejected, as unless the road had been completed by the trustees, the township had not become liable to repair. But it was held that this was a common Queen's highway at the time the bill was found, and that the township was liable to repair it, at least as long as the Act continued in force, and that there was no misdescription, and that after the road had been opened and used for many years, it was much too late to raise any objection to its not having been fully completed.^(t) Where a road was made by turnpike trustees under a temporary Act which expired in 1848, but the whole line authorized by the Act had never been completed: for twenty-eight years it had been used by the public, and rate had been made, during that time, at the parish meetings, for the repair of the road, and the road had on many occasions been repaired, and the surveyor had been paid for such repairs, but during such time portions of the road were frequently not kept in sufficient repair, and in one part there was a hole a yard deep made by persons employed to repair the road in order to obtain materials, but vehicles could pass between that and the hedge, and the parish had not attempted to fill it up. Two or three bars or chains were put up shortly after the making of the road, and toll demanded and sometimes refused; but the chain and bars had been removed for more than twelve years. On an appeal against a conviction in 1857 for obstructing this road, the sessions confirmed the conviction, subject to the opinion of the Court of Queen's Bench, whether there was evidence that the said road ever became a highway compulsorily repairable by the parish; and that Court

^(s) *Rex v. Mellor*, 1 B. & Ad. 32 (20 E. C. L. R.). See the remarks of Patteson, J. in *Reg. v. Lordsmere*, *infra*, that this decision proceeded on the old notion that an adoption was required, which was overruled in *Reg. v. Leake*, *post*, p. 496; *Rex v. Winter*, 8 B. & C. 785 (15 E. C. L. R.); 3 M. & R. 433.

^(t) *Reg. v. Lordsmere*, 15 Q. B. 689 (69 E. C. L. R.).

¹ All roads laid out by public authority must be regarded as public roads in the observation of which nuisance may be committed: *State v. Mobley*, 1 M'Mullan 44.

held that there was such evidence, and that, though the fact that the road was originally made under the turnpike Act, might explain away such evidence in fact, it did not conclusively rebut it in law.(u)

Where an ancient highway is turned into a turnpike road the imposition of tolls does not prevent its continuing to be repairable by the parish.(v)

Where by an Act of Parliament trustees are authorized to make a road from one point to another, the making of the entire road is a condition precedent to any part becoming a highway repairable by the public. Trustees, being empowered to make a turnpike road to extend twelve miles in length, completed only [472 eleven miles and a half of the road, to a point where the new road intersected another public road, leaving half a mile at the extremity of the intended road unmade: it was held that the trustees not having completed the road which the Act authorized them to make, the burden of repairing it could not be thrown on the public.(w) And in a subsequent case the same decision was made, although the part had been made from twenty to thirty years, and repaired from time to time by the public.(x) And although in one case(y) where trustees were authorized to make a turnpike road and several branch roads from it, two learned judges expressed an opinion that each road, as soon as it was completed, and certified by two justices so to be, became a public highway, because the Act required the justices to certify as to each road respectively; yet it has since been held in a similar case(z) that not only the principal road but all the branch roads must be completed before the public can be made liable to repair any part. Acts of this kind are bargains made on behalf of the public, not on the great line of road merely, but on every part of the roads, for the branches may have been the consideration upon which consent was given to the making of the main road.

Where a highway has once existed no interruption or cesser of user will prevent its continuance as a highway. Where a highway was proved to have existed for forty years before 1827, and then to have been interrupted for more than twenty years, it was contended that such an interruption acquiesced in by the public was sufficient in law to exclude such right of way on behalf of the public; but it was held that the fact that a person had for more than twenty years prevented the public from doing what they had done before for forty years, did not destroy the right. An interruption for such a period was evidence that no right ever existed, but it might be met by counter evidence.(a)

By the common law an ancient highway cannot be changed without the King's assent first obtained upon a writ of *ad quod damnum*, and an inquisition thereon and that such a change will not be prejudicial to the public: and it is said that to change a highway without such authority, he may stop the new way whenever he pleases; and it seems that the King's subjects have not such an interest in such a way as will make good a general justification of their going in it as in a common way; but that in an action of trespass, brought by the owner of the land, against those who shall go over it, they ought to show specially, by way of excuse, that the old way was obstructed, and the new one set out. And it is also said, that inhabitants are not bound to keep watch in such new way, or to make amends for any robbery therein committed, or to repair it.(b)

It is certain that a highway may be changed by the act of God; and therefore it has been holden that if a water, which has been an ancient highway, by [473

eg. *v. Thomas*, 7 E. & B. 399 (90 E. C. L. R.).

g. *v. Lordsmere*, *supra*.

h. *v. Cumberworth*, 3 B. & Ad. 108 (23 E. C. L. R.); *Rex v. Hepworth*, *Ibid.* 110; *Block*, B., York Lent Ass. 1829.

i. *v. Edge Lane*, 4 Ad. & E. 723 (31 E. C. L. R.).

j. *v. W. R. Yorkshire*, 5 B. & Ad. 1003 (27 E. C. L. R.); *Littledale and Taun-*

v. Cumberworth, 4 Ad. & E. 731 (31 E. C. L. R.). See per Lord Eldon in *Blake v. Glamorganshire Canal Company*, 1 M. & K. 162; and *Reg. v. The Eastern Railway Co.*, 10 A. & E. 531 (37 E. C. L. R.).

k. *v. Cuthbertson*, 1 Macq. Sco. App. Cas. 455.

l. P. C. c. 76, s. 3; *Burn's Just. tit. Highways*, s. 11. The writ of *ad quod damnum* virtually abolished by the new Highway Act, s. 84, *infra*, p. 475. See Highway Act 112.

degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel as it previously was in the old.(c) But it may well be doubted whether this position can be applied to roads, and it seems clearly inapplicable to a case where a public road is washed away by the sea. An indictment alleged that a certain part of a public highway, which had existed from time immemorial, was out of repair, and that the defendant was liable to repair it by reason of the tenure of his lands, and it was found by a special verdict that the sea had from time to time made incroachments upon the said lands, and carried away the soil and earth of the same, so that part of the space occupied by the said lands was occupied by the sea; and that there was an ancient highway as stated in the indictment, part whereof passed over the said lands, and that the incroachments of the sea had from time to time extended unto and over the said ancient highway, so that a portion of the said highway was covered by the sea and impassable, wherefore those, whose estate the defendant had, had, from time to time, gradually removed the same highway, and appropriated other parts of the said land for the site thereof, so that the public had had the uninterrupted use of a road for the purposes of the said highway, and that the same road had always been repaired by the defendant and those whose estate he had in lieu of so much of the ancient highway, and that the sea had made an incroachment in the month of March last, upon the part of the highway mentioned in the indictment; and carried away large quantities of the soil thereof, and that the highway was thereby rendered impassable. And it was held by the Court of Queen's Bench, that the defendant was entitled to be acquitted.(d) So where an indictment described a road as leading from a street to the German Ocean, and alleged that part of it was in great decay for want of due reparation, and it appeared that the road had formerly sloped gradually down towards the sea, but had been washed away from time to time by the incroachments of the sea, and at the time when the indictment was preferred the termination of the road had become a perpendicular cliff twenty feet high, which rendered it impossible for any cart or carriage to get down to the beach, but the surface of the existing road was in good repair up to where the same had been swept away by the destruction of the cliff; it was held that there did not exist any legal obligation upon the parish to provide an available carriage-road down to the beach. The indictment alleged that there was a highway, and that it was out of repair; but it is found that that part of the road alleged to be out of repair has been washed away by the sea, so that the subject of repair is not in existence; and in order to create an obligation to repair, there must be something in existence capable of being repaired.(e)

So where upon an indictment for non-repair of a highway *it appeared *474] that the highway alleged to be out of repair had passed along the top of a quay, which was a thick wall of solid masonry of considerable height, and the surface of it was composed of large pieces of granite mortared together, and had been used by persons going on foot and on horseback and with small carts used by fishermen, and two or three years before the sea had washed away a considerable portion of the quay leaving a gap, which completely broke off the communication. Maule, J., held that the defendants were entitled to be acquitted. Whatever might be the duty of the parish as to the road whilst the quay existed, they were not defaulters on this evidence. The interruption of the passage was not from the want of repair, but from the sea having washed away the wall, and there was no longer anything for them to repair.(f)

By the 5 & 6 Will. 4, c. 50, s. 80, the surveyor shall make every public cartway, leading to any market town, twenty feet wide at the least, and every public horseway eight feet wide at the least, and every public footway by the side of any carriageway three feet at the least, if the ground between the fences inclosing the same will admit thereof.(g) And by sec. 82, where it shall appear, upon the view

(c) 1 Hawk. P. C. c. 76, s. 4.

(d) Reg. v. Bamber, 5 Q. B. 279 (48 E. C. L. R.).

(e) Reg. v. Hornsea, Dears. C. C. 291. See Reg. v. Leigh, 10 A. & E. 398 (37 E. C. L. R.), as to sea walls washed away by an extraordinary tempest.

(f) Reg. v. Paul, 2 M. & Rob. 307.

(g) 1 Hawk. P. C. c. 76, s. 16. The surveyor has no authority to pare away the bank

of two justices, that any highway is not of sufficient breadth, and may be widened and enlarged, the said justices shall order such highway to be widened and enlarged in such manner as they shall think fit, so that the said highway, when enlarged and diverted, shall not exceed thirty feet in breadth; and that neither of the said powers do extend to pull down any house or building, or to take away the ground of any garden, lawn, yard, court, park, paddock, planted walk, plantation, or avenue to any house or any inclosed ground set apart for building ground, or as a nursery for trees. The statute then proceeds to empower the surveyor to agree with the owners of the ground wanted for such purposes for their recompense; and provides, that if they cannot agree, the same may be assessed by a jury at the quarter sessions; and, after directing the proceedings in such event, it enacts that, "upon payment or tender of the money so to be awarded and assessed, to the person, body politic or corporate, entitled to receive the same, or leaving it in the hands of the clerk of the peace of such limit, in case such persons, &c., cannot be found, or shall refuse to accept the same, for the use of the owner of or others interested in the said ground, the interest of the said person, &c., in the said ground shall be for ever divested out of them; and the said ground, after such agreement or verdict as aforesaid, shall be esteemed and taken to be a public highway, to all intents and purposes whatsoever."(*h*)

Sec. 84. "When the inhabitants in vestry assembled shall *deem it expedient that any highway shall be stopped up, diverted, or turned, either [475 entirely or reserving a bridleway or footway along the whole or any part or parts thereof, (*i*) the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorize him to pay all the expenses attending such view, and the stopping up, diverting or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this Act; provided nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, (*k*) by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid for the purposes aforesaid; and in such case the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this Act; and the said surveyor is hereby required to make such application as aforesaid."

Sec. 85. "When it shall appear upon such view (*l*) of such two justices of the

of a fence by the side of a road under this clause: *Alston v. Scales*, 9 Bing. 3 (23 E. C. L. R.). See *Lowen v. Kaye*, 4 B. & C. 3 (10 E. C. L. R.); 6 D. & R. 20.

(*h*) Sec. 82. It was decided that a similar power thus given to two justices by the 13 Geo. 3, c. 78, to order any highway to be widened extended to roads reparable *ratione tenuræ*; and that upon disobedience to such order the party might either be proceeded against summarily under the statute, or by an indictment as for an offence at common law: 1 Hawk. P. C. c. 76, s. 57; *Rex v. Balme*, Cowp. 648. Sec. 83 provides for the costs of the proceedings at the sessions.

(*i*) This provision seems to have been introduced to get rid of the doubts entertained in *Rex v. Winter*, 8 B. & C. 785 (15 E. C. L. R.), as to whether justices could divert a road for carriages and continue it for foot passengers. An order for stopping up half the breadth of a highway under the 55 Geo. 3, c. 68, was bad, although the other half was not within the division of the justices who made the order: *Rex v. Milverton*, 5 A. & E. 841 (35 E. C. L. R.); 1 N. & P. 179.

(*k*) This seems virtually to do away with the writ of *ad quod damnum*, as the clause is imperative on the party desiring to stop up a highway to proceed under this section. C. S. G.

(*l*) Actual inspection being the foundation of the jurisdiction of the justices, an order must have distinctly stated that the justices acted upon view. An order stating the view thus, "we having upon view found," *Rex v. Justices of Cambridgeshire*, 4 A. & E. 111 (31 E. C. L. R.); 5 N. & M. 449; or "we having upon view found, and it appearing to us," *Rex v. Milverton*, 5 A. & E. 841 (35 E. C. L. R.); 1 N. & P. 179, was good: but an order thus, "we having particularly viewed the public roads and footway hereinafter described, and we not being interested in the repair of the said roads and footway, and being satisfied that the highways," &c., was bad, because the clause containing the original and material

peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned, either entirely or subject as aforesaid, so as to make the same *nearer or more commodious to the public, and the owner *476] of the lands or grounds through which such new highway so proposed to be made shall consent thereto by writing under his hand, (m) or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of Schedule (No. 19) to this Act annexed in legible characters, at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up, either entirely or subject as aforesaid, and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be diverted and turned, or stopped up, either entirely or subject as aforesaid (as the case may be) shall lie, for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid, or any part thereof, shall lie, on four successive Sundays next after the making such view; and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them at the same time particularly describing the old and the proposed new highway, by metes, bounds, and admeasurement thereof, which plan shall be verified by some competent surveyor, the said justices shall proceed to certify (n) under their hands the fact of their having viewed the said highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public; and if nearer, the said certificate shall state the number of yards or feet it is nearer, or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary; and the said certificate of the said justices, together with the proof and plan so laid before them as aforesaid, shall, as soon as conveniently may be after the making of the said certificate, be lodged with the clerk of the peace for the county in which the said highway is situated, and shall (at the quarter sessions which shall be holden for the limit

allegation of a "view" was separated in a very marked manner from that wherein the satisfaction of the justices, and the grounds of it were contained; and the justices might, consistently with a reasonable construction of the order, have been influenced by other proof than the view: *Rex v. Marquis of Downshire*, 4 A. & E. 698 (31 E. C. L. R.); 6 N. & M. 92. So an order, "we having upon view found, or it appearing unto us," was bad: *Rex v. Justices of Worcestershire*, 8 B. & C. 244 (15 E. C. L. R.); and see *Rex v. Justices of Kent*, 10 B. & C. 477 (21 E. C. L. R.); *Reg. v. Jones*, 12 A. & E. 684 (40 E. C. L. R.); *Reg. v. Newmarket R. Co.*, 15 Q. B. 702 (69 E. C. L. R.), that the order must have stated, on the face of it, that the justices had viewed the new line of road. The view by justices under the 55 Geo. 3, c. 68, s. 2, was not sufficient, unless it was a joint view, and unless the finding that the way was unnecessary was the result of that view: but it was held to be no objection that previously to their view the road had been stopped up *de facto* by the owner of the adjoining land without authority, as they might properly state in their order that they had viewed the old road if they had viewed the ground over which the right of way was: *Rex v. Justices of Cambridgeshire*, 4 A. & E. 111 (31 E. C. L. R.); 5 N. & M. 440. Where a person, over whose land a highway led, opened another road over his own land, between the same points, which the public used, and they ceased using the former road, it was held that nine years afterwards an order for stopping up the old road a unnecessary might be made under the 55 Geo. 3, c. 68, and that it was not necessary to proceed as in case of diverting a highway under the 13 Geo. 3, c. 78, s. 16, *Ibid.*

(m) There must be the consent of the person who is the owner of the estate, at the time when the order is made. An order stated that the new road was to pass through the lands of the late T. Jones, Esq., and that the justices had received evidence of the consent of the said T. Jones in his lifetime. But it was held that this order was bad, because it did not thereby appear that T. Jones was the owner of the estate at the time when the order was made: *Rex v. Kirk*, 1 B. & C. 21 (8 E. C. L. R.). And an assent to the turning of a road, given under the hand and seal of the solicitor and agent of the party through whose ground the new road is to pass, is not sufficient: *Rex v. Justices of Kent*, 1 B. & C. 722 (8 E. C. L. R.).

(n) As to the requisites of the certificate, see *Reg. v. Worcestershire*, 3 E. & B. 477 (11 E. C. L. R.).

within which the highway so diverted and turned, or stopped up, either entirely or subject as aforesaid, shall lie, next after the expiration of four weeks from the day of the said certificate of the said justices having been lodged with the clerk of the peace as aforesaid),^(o) be read by the said clerk of the peace in open court; and the said *certificate, together with the proof and plan as aforesaid, as well as the consent in writing of the owner of the land through which the new [*477 highway is proposed to be made, shall be enrolled by the clerk of the peace amongst the records of the said court of quarter sessions; provided always, that any person whatever shall be at liberty, at any time previous to the said quarter sessions, to inspect the said certificate and plan so as aforesaid lodged with the said clerk of the peace, and to have a copy thereof, on payment to the clerk of the peace, at the rate of sixpence per folio, and a reasonable compensation for the copy of the plan."

Sec. 86. "In any case where it is proposed to stop up or divert more than one highway, which highways shall be deemed to be so connected together as that they cannot be separately stopped or diverted without interfering one with the other, it shall be lawful to include such different highways in one order or certificate."^(p)

Sec. 87. "In the event of any appeal being brought against the whole or any part or parts of any order or certificate for diverting more highways than one, it shall be lawful for the Court to decide upon the propriety of confirming the whole or any part or parts of such order or certificate, without prejudice to the remaining part or parts thereof."

Sec. 88. "When any such certificate shall have been so given as aforesaid, it shall and may be lawful for any person who may think that he would be injured or aggrieved^(q) if any such highway should be ordered to be diverted and turned or stopped up, either entirely or subject as aforesaid, and such new highway set out and appropriated in lieu thereof as aforesaid, or if any unnecessary highway should be ordered to be stopped up as aforesaid, to make his complaint thereof by appeal to the justices of the peace at the said quarter sessions, upon giving to the surveyor ten days^(r) notice in writing of such appeal, together with a statement in writing of the grounds of such appeal, who is hereby required, within forty-eight hours after the receipt of such notice, to deliver a copy of the same to the party by whom he was required to apply to the justices to view the said highway; [*478 *provided that in all cases where the said surveyor shall have been directed by the inhabitants in vestry assembled to apply to such justices as aforesaid, then the said surveyor shall not be required to deliver a copy of such notice to any party; provided also, that it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been so given

(o) See *Rex v. Justices of Kent*, 1 B. & C. 622 (8 E. C. L. R.), as to the mode of computing the time from the giving the notices under the 55 Geo. 3, c. 68, s. 2.

(p) Before this Act there must have been a separate order for each road: *Rex v. Milverton*, 5 A. & E. 841 (31 E. C. L. R.); 1 N. & P. 179. So a road could not be diverted and stopped up by the same order: *Rex v. Justices of Middlesex*, 5 A. & E. 626 (31 E. C. L. R.); 1 N. & P. 92; *Rex v. Justices of Kent*, 10 B. & C. 477 (21 E. C. L. R.).

(q) The notice of appeal must state that the party is injured or aggrieved: *Rex v. Justices of Essex*, 5 B. & C. 431 (11 E. C. L. R.); *Rex v. Justices of West Riding of Yorkshire*, 7 B. & C. 678 (14 E. C. L. R.), or state facts from which it can be collected that he is injured or aggrieved: *Rex v. Blackawton*, 10 B. & C. 792 (21 E. C. L. R.); *Rex v. Bond*, 6 A. & E. 905 (33 E. C. L. R.). It is enough, however, to state that the appellant and his tenants, occupiers of a farm and lands near the said way, and who have heretofore used and have a right to use it, and also other persons, and the public will be put to great inconvenience: *Rex v. Justices of the West Riding of Yorkshire*, 4 B. & Ad. 685 (24 E. C. L. R.); 1 N. & M. 426. So it is sufficient to state that the appellants are aggrieved by being compelled to go a greater distance to the next market town from their residence, than they would have gone if the road intended to be stopped up were put and kept in repair; and if the notice states that they are aggrieved, it need not add that they are aggrieved by the order: *Rex v. Adey*, 4 N. & M. 365.

(r) The notice must be ten days before the sessions next after the expiration of four weeks from the lodging of the certificate with the clerk of the peace: *Reg. v. Lancashire*, 8 E. & B. 563 (92 E. C. L. R.). The days are to be calculated one day inclusive, the other exclusive, notwithstanding a rule of the sessions requiring a different computation: *Rex v. Justices of West Riding of York*, 4 B. & Ad. 685 (24 E. C. L. R.); 1 N. & M. 426; *Rex v. Justices of Cumberland*, 4 N. & M. 378; 2 A. & E. 463 (29 E. C. L. R.).

as aforesaid, nor on the hearing of such appeal to go into or give evidence of any other grounds of appeal than those set forth in such statement as aforesaid."

Sec. 89. "In case of such appeal the justice at the said quarter sessions shall, for the purpose of determining whether the proposed new highway is nearer or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions: and if, after hearing the evidence produced before them, the said jury shall return a verdict that the proposed new highway is nearer or more commodious to the public, or that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or that the party appealing would not be injured or aggrieved, then the said court of quarter sessions shall dismiss such appeal, and make the order herein mentioned for diverting and turning and stopping up such highway either entirely or subject as aforesaid, or for diverting, turning, and stopping up of such old highway, and purchasing the ground and soil for such new highway, or for stopping up such unnecessary highway either entirely or subject as aforesaid; but if the said jury shall return a verdict that the proposed new highway is not nearer or not more commodious to the public(s) or that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, or that the party appealing would be injured or aggrieved, then the said court of quarter sessions shall allow such appeal, and shall not make such order as aforesaid."(*t*)

Sec. 91. "If no such appeal be made,^(u) or being made shall be dismissed as aforesaid, then the justices at the said quarter sessions shall make an order^(v) to

(*s*) Where the jury found that the new line was "not nearer but more commodious," it was held no order could be made for diverting the road: *Reg. v. Shiles*, 1 Q. B. 919 (41 E. C. L. R.). But this case was all but overruled in *Reg. v. Wright*, 8 Law T. 455; *s. c.*, as *Wright v. Frant*, 4 B. & S. 118 (116 E. C. L. R.).

(*t*) Sec. 90. "The court of quarter sessions is hereby authorized and required to award to the party giving or receiving notice of appeal such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not, and such costs and expenses shall be paid by the surveyor or other party as aforesaid at whose instance the notice for diverting and turning or stopping up the highway, either entirely or subject as aforesaid, shall have been given, and in case the said surveyor or other party as aforesaid shall not appear in support thereof, the said court of quarter sessions shall award the costs of the appellant to be paid by such surveyor or other party as aforesaid, and such costs shall be recoverable in the same manner as any penalties or forfeitures are recoverable under this Act." See *Reg. v. W. R. of Yorkshire*, 2 B. & S. 811 (110 E. C. L. R.).

(*u*) In *Rex v. Justices of Worcestershire*, 2 B. & A. 228, it was held that the session had a right to inquire whether the order, though there was no appeal, was made by proper authority before they confirmed it. And it is the duty of the sessions to see that the certificate and proof required by the Act are regular, though there is no appeal, before they make an order under this section: *Reg. v. Worcestershire*, 3 E. & B. 477 (77 E. C. L. R.).

(*v*) An order for stopping up a footway under the 55 Geo. 3, c. 68, s. 2, must have distinctly stated in what parish or place the footway was situate: *Rex v. Kenyon*, 6 B. & C. 640 (13 E. C. L. R.). Where a road was diverted, the order must have shown on the face of it that the public had the same permanent right over the new line as they had along the old line: where, therefore, the new line passed partly over a road described in the order as a new turnpike road, it was held that as it might have been made a turnpike road only for a limited period, and if so, would subsist as a public road for that period only (see *ante*, p. 470), the order was bad; and if a permanent right was given to the public under the Turnpike Act, that ought to have been shown by the order: *Re: Rex v. Winter*, 8 B. & C. 785 (15 E. C. L. R.). An order referring to a plan annexed to the order for the description of the road to be diverted was good; but a notice published pursuant to the 55 Geo. 3, c. 68, s. 2, merely describing the road by *termini*, and the part to be stopped up as so many yards of such road, was held bad: *Rex v. Horner*, 2 B. & Ad. 156 (22 E. C. L. R.). If an order for stopping a highway were properly made and enrolled, under 55 Geo. 3, c. 68, it was unnecessary to render it effectual that an actual stoppage of the road should have taken place: *Rex v. Milverton*, 5 A. & E. 841 (31 E. C. L. R.); 1 N. & P. 179. A footway might be ordered to be stopped without being ordered to be sold: *Rex v. Glover*, 1 B. & Ad. 482. It seems to have been thought that the justices had only jurisdiction over the roads within the division of the county for which they acted, under the 55 Geo. 3, c. 68: *Rex v. Milverton*, 5 A. & E. 841 (31 E. C. L. R.); 1 N. & P. 179.

divert and turn and to stop up such highway, either entirely or subject as aforesaid, or to divert, turn, and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid, by such ways and means, and subject to such exceptions and conditions in all respects as in this Act is mentioned in regard to highways to be widened, and the proceedings thereupon shall be binding and conclusive on all persons whomsoever, and the new highway so to be appropriated and set out shall be and forever after continue a public highway to all intents and purposes whatsoever, but no old highway (except in the case of stopping up such useless highway as herein is mentioned) shall be stopped until such new highway shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof, which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the court of quarter sessions next after such order as aforesaid shall have been made pursuant to the directions hereinbefore contained."

Sec. 92. "In every case in which a highway shall have been turned or diverted under the provisions of this Act, the parish or other party which was liable to the repair of the old highway shall be liable to the repair of the new highway, without any reference whatever to its parochial locality."

Sec. 93. "The powers and provisions in this Act contained with respect to the widening and enlarging, diverting, turning, or stopping up any highway shall be applicable to all highways which any person, bodies politic or corporate, is or are bound to repair by reason of any grant, tenure, limitation, or appointment of any charitable gift, or otherwise howsoever; and that when such last-mentioned highways are so widened or enlarged, turned or diverted, the same shall and may, by an order of the justices at a special sessions for the highways, be placed under the control and care of the surveyor of the parish in which such highways may be situate, and shall be from time to time thereafter repaired and kept in repair by the said parish: provided also, that the said highways so widened, enlarged, diverted, or turned, shall be viewed by two justices of the peace, who shall make a report thereof to the justices at a special sessions for the highways, and such last-mentioned justices shall, by an order under their hands, fix the proportionate sum which shall be annually paid, or shall fix a certain sum to be paid, by such person, bodies politic or corporate, his or their heirs, successors, or assigns, to the said surveyors of the parish, in lieu of thereafter repairing the said part of the said old highway, and the order of the said last-mentioned justices shall be and continue binding on all such persons, bodies politic or corporate, their heirs, successors, or assigns, and in default of payment thereof the said surveyor shall proceed for the recovery of the same in the manner as any penalties and forfeitures are recoverable under this Act."

It frequently happened that the boundaries of parishes passed through the middle of a highway, one side of the highway being situated in one parish, and the other side of the way being situated in another parish, whereby great inconveniences arose to the parishes in setting the time and manner of repairing such highway; and it was therefore provided by the 5 & 6 Will. 4, c. 50, s. 58, that the justices, at a special sessions for the highways, upon application by the surveyor, may divide the whole of any such common highway, by a transverse line crossing it, into two equal parts, or into two such unequal parts and proportions as in consideration of the soil, waters, floods, the inequality of such highway, or any other circumstances, they think just.^(w)

Besides the methods which have been already mentioned, roads are sometimes changed or stopped, or new ones created by turnpike Acts, inclosure Acts, or other Acts of Parliament, containing specific enactments for such purposes; but such new roads may or may not be public, according to the provisions of the particular Acts; and we have seen that where a road was set out by commissioners under an

(w) The Act sets forth particularly the proceedings to be had for the purpose of such division; and afterwards enacts as to the liabilities of the parishes respectively to repair their portion after such division; see *post*, p. 498.

inclosure Act, the number of persons using or repairing it would not make it a public way, it not being common to all the King's subjects.(x)

The commissioners appointed under local inclosure Acts have power to stop up and divert public ways over lands to be inclosed by the 41 Geo. 3, c. 109, s. 8; but that section contains a proviso, that where such commissioners have power, under any inclosure Act, to stop up any old road leading through old inclosures, they shall not exercise that power without the concurrence of two justices; it follows as a necessary consequence from the proviso taken with the rest of the clause, that if no such power is given to commissioners by the particular inclosure Act, it cannot exist at all. Where, therefore, an Act gave the commissioners no power to stop up roads passing through old inclosures, and they did not mention the way in question, which ran over some old inclosures and across a few yards of waste, which they allotted: it was held that the way existed as it did before the inclosure Act (y)

Under the 47 Geo. 3, c. 109, s. 8, the commissioners are authorized to stop up or divert footways as well as carriage-roads; and the proviso at the end of the section *481] is not confined to carriage *roads, but extends to every species of way; and, therefore, where the commissioners were empowered by a local inclosure Act to stop up all ways passing over the lands to be inclosed, as well as ways passing through old inclosures in the parish, it was held that in order effectually to stop up a public footway passing partly over the lands to be inclosed and partly over an old inclosure, it was necessary for them to have the concurrence and order of two justices, and no such order or concurrence having been obtained, it was held that a footway which the commissioners ordered to be stopped up had not been effectually stopped, but continued a public footway.(z)

Where an inclosure Act provided that all ways not set out by the commissioners should be extinguished, and also authorized the stopping up of roads through old inclosures, provided that no roads should be stopped up without the order of two justices, and a road through old inclosures opened upon the waste, and at such opening joined another road, which formed a continuation of the first road, and ran entirely over waste land; and no valid order was obtained for stopping up the road, which ran through the old inclosures, and the road over the waste land was not set out or continued by the commissioners: it was held that this omission to set out or continue the road, did not extinguish the road through the old inclosures, and create a consequent stoppage of the road over the waste, but that, on the contrary, the road through the old inclosures remaining open for want of an order of justices, as a consequence the road over the waste remained open also.(a)

Upon an indictment against the township of Hatfield for non-repair of a highway, it appeared that the road was an ancient highway which passed over part of common then within Hatfield, and that by an inclosure Act (51 Geo. 3, c. 30) for inclosing Hatfield and other townships, it was directed that the allotments in respect of certain messuages should be part of the townships within which the messuages were situate, and the commissioners were to make such orders as they should think proper concerning all public roads, "in what township and place the same are respectively situate," and by whom they ought to be repaired. The commissioners by their award directed there should be the road in question, and new allotments on each side of it were declared to be in other townships than Hatfield, but it was not declared in what township the road was situate, or by whom it was to be repaired. The prescriptive liability set forth in the indictment was proved, but no certificate of justices was produced. It was held that the road continued in Hatfield, but that Hatfield could not be indicted for not repairing it for want of a certificate of justices under the 41 Geo. 3, c. 109, s. 9, declaring it to be fully completed.(b)

Upon an indictment for the non-repair of an ancient bridleway, it appeared that

(x) *Ante*, p. 461.

(y) *Thackrah v. Seymour*, 3 Tyrw. 87.

(z) *Logan v. Burton*, 5 B. & C. 513 (11 E. C. L. R.). See *Harber v. Rand*, 9 Price 58.

(a) *Rex v. Marquis of Downshire*, 4 A. & E. 698 (31 E. C. L. R.); 6 N. & M. 92.

(b) *Rex v. Hatfield*, 4 A. & E. 156 (31 E. C. L. R.), A. D. 1835.

there had been such an ancient way leading through old inclosures into and across a common, which in parts was so narrow that the bridleway might be described as passing *along a broad lane; in other parts the common opened [*482 into a broad field, across which persons using the way rode much as they pleased, so that in those parts there was no definite track. Certain commissioners under an Act 54 Geo. 3, c. 160, which incorporated the 41 Geo. 3, c. 109, were authorized "to stop up, divert, turn, or in any other way alter" any public ways over the common or old inclosures with the concurrence of two justices, and to set out new ways, which, when certified by two justices to be complete, were to be repaired by the parish, and they directed the common to be inclosed, and made no alteration in the bridleway between the old inclosures; but ordered that across the common there should be set out a road thirty feet wide as a "public bridle-road" and as a "private carriage-road" for certain persons, and directed that the road should be repaired by those persons. The road was accordingly set out, and its termini were the same as those of the old bridleway, but it did not precisely follow the track over which the public were anciently accustomed to ride. No certificate or order of justices was proved: and it was held that the cases cited(c) related to roads stopped or diverted by the commissioners or left unnoticed in their award, and so impliedly stopped or diverted; but in this case there had been no stopping or diverting of the old road; that the road set out was in effect the same road, and that the parish was bound to do such repairs as were requisite to maintain the road as a public bridle-road.(d)

Upon an indictment against a parish for the non-repair of a highway it appeared that the road indicted was an ancient highway within the parish. In 1840 the parish was inclosed under an Act which incorporated the General Inclosure Act, 41 Geo. 3, c. 109. The award was made in June 1840, and under the heading of "public carriage-roads and highways" described the road indicted as "one public carriage-road and highway of the width of thirty feet." The commissioners had before the award made some alteration in the original road by straightening and widening it; but the whole of the original road was comprehended in the road set out in the award. It was admitted by the defendants that the road indicted was a public road, and that the parish had repaired it both before and after the award; but no steps had been taken by the commissioners for putting it into complete repair, and there never was any declaration by any justices at special sessions that the road had been fully formed, completed and repaired; and no proceedings had been taken under the 5 & 6 Will. 4, c. 50, s. 23. The road passed through allottable land on both sides, except that a small portion on one side was an old inclosure. It was objected that the proviso in sec. 9 of the 41 Geo. 3, c. 109, applied to roads continued by an award as well as to roads made under it; and that as the road had not been declared by any justices at special sessions to be formed, [*483 completed and repaired, the parish were not chargeable with the non-repair; and, upon a case reserved, after a verdict of guilty, the conviction was held wrong.(e)

Where an inclosure Act authorized commissioners to stop up any old road leading between or over certain old inclosures, provided there was an order of two justices, and the award in 1814 in pursuance of the powers of the Act and "by the concurrence and order of" two justices stopped up a public footpath; but no order of justices could be found; the footpath had been stopped up in pursuance of the award, and the site of it obliterated, and a private carriage-way had been made on the site of it, and persons prevented passing along it, and one person taken before a magistrate for so doing; and it was held that there was sufficient *prima facie* evidence of the footway having been properly stopped; for the award must be

(c) *Logan v. Burton*, *supra*.

(d) *Reg. v. Cricklade*, 14 Q. B. 735 (68 E. C. L. R.), A. D. 1850. The Court pronounced no opinion on the effect of the order to repair the public bridleway further than that it did not relieve the parish from this indictment.

(e) *Reg. v. East Hagbourne*, Bell C. C. 135, A. D. 1859. No reasons for the decision were given. *Reg. v. Hatfield* was relied on for the defence, and *Reg. v. Cricklade* for the prosecution.

taken to have been rightly made, unless there were some inference to the contrary from subsequent enjoyment inconsistent with it.^(f)

Where an inclosure Act incorporated the 41 Geo. 3, c. 109, and authorized commissioners to stop up old roads, subject to the concurrence of two justices, and the commons were allotted in 1819, when a gate which had since been kept locked was put up across an old highway, but the road had since been used by foot passengers occasionally, and the award in 1830 set out new roads and directed the old roads to be stopped up, and a certificate of two justices that the new roads had been completed, under the 41 Geo. 3, c. 109, s. 9, was proved; but no order of justices for stopping the old road was proved; it was held that as there had been an inclosure of the road for about twenty-eight years, it was sufficient to warrant the Court, standing in the place of a jury, in presuming that everything was rightly done, and that an order of justices had been obtained, and that the user by foot passengers was not sufficient to rebut that presumption.^(g)

Upon an indictment against the township of Gate Fulford for the non-repair of a highway, which it was alleged to be liable to repair by virtue of an inclosure Act and award, it appeared that Gate Fulford and Water Fulford were townships in the parish of Fulford, and the inclosure Act directed commissioners to allot certain lands in the manor of Fulford which (it was contended) were shown by the context to be all in the township of Gate Fulford, and to set out public and private roads in such lands, and the public roads so set out were to be repaired by the township of Gate Fulford. The award set out some roads, which it termed public highways and roads; some which it termed public carriage-roads, and others which it termed private carriage-roads: it then set out the road in question, which it termed simply a "carriage-road," and directed that it should be repaired by "the township of Fulford aforesaid," without specifying which township was meant. Another road also termed simply a "carriage-road" appeared to be set out as a private road. It was held that it sufficiently appeared that the road in question was made a public *road. The road in question ran through what was now understood to be *484] the township of Water Fulford; the township of Gate Fulford had, however, on many occasions repaired the road, but had also repaired roads in the township which were not public roads: it was held that, assuming the commissioners had power only to award as to lands in Gate Fulford, the Court would presume that the lands, on which the road was made, lay at the time of the award in Gate Fulford.^(h)

A statute authorizing the making a new course for a navigable river, and turning the old part into a floating harbor, will not, without words for the purpose, put an end to a public towing-path upon that part; but such towing-path will be liable to be used as such for the purposes of the harbor; and it will make no difference though the river was a tide river, and at low water admitted of no navigation.

By the 43 Geo. 3, power was given to carry part of the Bristol river along a new course, and to convert the old part into a floating harbor. There had immemorially been a towing-path on the north side, and whether that continued a public towing-path along the side of the floating harbor was the question. It was urged that it did not, because this was a tide river, not navigable at low water; and the floating harbor would make it usable at all times, and therefore increase the burthen on the land. But, after taking time to consider, the Court held, that as there were no words in the Act to annihilate the right of the public, that right would continue notwithstanding the improved state of the water within the bank; that such water being still applied to navigation purposes, for the use of the public, was still in a state to derive the benefit from the path for which the path had first been given to the public: and judgment was given for the King.⁽ⁱ⁾

^(f) *Manning v. E. Counties R. Co.*, 12 M. & W. 237, A. D. 1843.

^(g) *Williams v. Eyton*, 4 H. & N. 357, affirming the decision of the Court of Exchequer in 2 H. & N. 771, A. D. 1858.

^(h) *Reg. v. Gate Fulford*, D. & B. C. C. 74. It was conceded that if any part of the road set out had been on land over which the commissioners had no jurisdiction, the award would have been bad as to the whole road.

⁽ⁱ⁾ *Rex v. Tippet*, Mich. T. 1819, 3 B. & A. 192 (5 E. C. L. R.), and MS., Bayley, J. The indictment was for an obstruction of the public path.

In some instances a highway may, it seems, be in some measure changed or confined to a particular course by a private individual; as, "where it lies over an open field, and the owner of the field turns it to another part of the field for his own convenience, or incloses the field for his own benefit, leaving a sufficient way."^(k) But in such case, as the public had clearly a right before such alteration to go upon the adjacent ground when the way was out of repair, the owner of the field can only make the alteration subject to the onus of making a good and perfect way.^(l)

*Having thus inquired concerning the different sorts of highways, and the methods by which they may be changed, widened, or stopped up, we [485 may now consider of nuisances to highways, by *obstructions*.

There is no doubt but that all injuries whatsoever to a highway, as by digging a ditch, or making a hedge across it, or laying logs of timber in it, or ploughing it up,^(m) or by doing any other act which will render it less commodious to the King's subjects, are public nuisances at common law.⁽ⁿ⁾ And if the tenant of the land plough the soil, over which another has a way, this is a nuisance to the way, for it is not so easy to him as it was before.^(o) If a man with a cart use a common pack and prime way, so as to plough it up and render it less convenient for riders, that is indictable.^(p) If there be a stile across a public footway of a certain height, and a man raises this stile to a greater height, it is a nuisance.^(q) And it is clearly a nuisance at common law to erect a new gate in a highway, though it be not locked, and open and shut freely, because it interrupts the people in that free and open passage which they before enjoyed and were lawfully entitled to; but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land, on the laying out the road, in which case the people had never any right to a freer passage than what they continue to enjoy.^(r)

It is a nuisance to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it, &c.; and an occupier, as such, though at will only, is indictable for suffering a house standing upon the highway to be ruinous; and it is said that the owner of land next adjoining to the highway ought of common right to scour his ditches; but that the owner of land, next adjoining to such land, is not bound by the common law so to do, without a special prescription:^(s) and it is also said that the owner of trees hanging over a highway, to the annoyance of travellers, is bound by the common law to lop them; and that any other person may lop them, so far as to avoid the nuisance.^(t) The general highway Act also relates to offences of this description,

(k) 3 Salk. 182. But in *Rex v. Warde*, Cro. Car. 266, to an information for obstructing a highway, the defendants pleaded that the way was so foul that passengers could not pass without danger, and that O. Sands being seised in fee laid out a more commodious way in his land adjoining the highway; and the plea was held bad, because it did not appear by what authority he did it; for it is but at his pleasure, and he may stop it when he will, and the subjects have not such interest therein that they may justify going there, nor is any one bound to repair it. And in *Rex v. Flecknow*, 1 Burr. 465, Lord Mansfield said, "An owner of land over which there is an open road may inclose it by his own authority, or alter it under a proper authority, and by a legal course;" that is by a writ of *ad quod damnum* (now abolished), as is stated immediately afterwards.

(l) 3 Salk. 182. And see the cases collected in *Rex v. Stoughton*, 2 Saund. 160, *a*, note (12). And see also *post*, as to the repair of highways.

(m) *Rex v. Griesly*, 1 Vent. 4.

(n) 1 Hawk. P. C. c. 76, s. 144; 2 Roll. Abr. *Nuisance* (B.); *Overton v. Freeman*, 11 C. B. 867 (73 E. C. L. R.).

(o) 2 H. 4; 11 Vin. Abr. tit. *Nuisance* (G.).

(p) *Per Curiam*, Reg. v. Leach, 6 Mod. 145.

(q) *Bateman v. Burge*, 6 C. & P. 391 (25 E. C. L. R.), Park, J., J. A.

(r) 1 Haw. P. C. c. 75, s. 9, and c. 76, s. 146; Com. Dig. tit. *Chemin* (A.) 3; *James v. Hayward*, Cro. Car. 184; 2 Roll. Abr. *Nuisance* (C.).

(s) See *post*, p. 506, note (v).

(t) Bac. Abr. tit. *Highways* (E.); 1 Hawk. P. C. c. 76, ss. 5, 8, 147. But the building of a house in a larger manner than it was before, whereby the street became darker, has been held not to be a public nuisance by reason of the darkening: *Rex v. Webb*, 1 Lord Raym. 737.

imposing pecuniary penalties upon persons obstructing highways by means of trees or hedges; and penalties are also imposed upon persons laying stones, timber, or other matter, or leaving any carriage, so as to obstruct the passage of any highway; and also upon persons encroaching upon them.(u) Provision is also made for the *486] punishment, by *similar penalties, of drivers of carriages who may create annoyances in the public ways by their misconduct.(v) And with the view of preventing turnpike roads from being destroyed by the narrowness of the wheels of the carriages travelling thereon, and by the excessive burdens which might be carried in them, it is enacted, that if the tire of the wheels of any wagon, &c., shall deviate more than half an inch from a specified breadth, and shall be drawn on any turnpike road, the owner shall forfeit five pounds, and the driver forty shillings, for every such offence.(w) With respect to *turnpike roads*, similar provisions are contained in the general turnpike Acts, 3 Geo. 4, c. 126, and 4 Geo. 4, c. 95.

The mere fact that a part of a public highway has been used for twenty years by an innkeeper for the standing of the vehicles of his guests is no answer to a complaint for obstructing a "highway" under the 5 & 6 Will. 4, c. 50, s. 72. If the innkeeper could have made out an immemorial right, it might be that the highway might have been dedicated subject to that right; but there was no proof that the highway was dedicated after this usage began.(ww)

It has been held, that if a carrier carries an unreasonable weight, with an unusual number of horses, it is a nuisance to the highway, by the common law.(x) And upon an information for this offence, it was adjudged, though it was stated that the carrier went "with an unusual number of horses," without setting forth what number, yet the information was good, because it was the excessive weight which he carried that made the nuisance.(y)

It appears to have been holden, that an indictment will not lie for setting a person on the footway in a street to distribute handbills, whereby the footway was impeded and obstructed;(z) nor for throwing down skins into a public way by which a personal injury is accidentally occasioned;(a) but acts of this kind, if improperly performed, might possibly be deemed nuisances, as it seems now to be well established that every unauthorized obstruction of a highway, to the annoyance of the King's subjects, is an indictable offence.(b) Thus, where a *wagoner* occupied one side of a public street in the city of Exeter, before his warehouses, in loading and unloading his wagons, for several hours at a time, both day and night, and had one wagon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot passengers were incommoded by cumbrous goods lying on the ground on the same side, ready for loading, he was held to be indictable for a public nuisance, although it appeared that sufficient space was left for two carriages to have passed on the opposite side of the street.(c) Upon the same principle it has been held to be an indictable offence for *stage-coaches* to stand plying for passengers in the public streets; and Lord Ellenborough, C. J., said, "A stage-coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time; and private premises must be procured for the coach to stop ⁱⁿ during the interval between the end of one journey and the commencement of

(u) 5 & 6 Will. 4, c. 50, ss. 64, 65, 69, 72, &c., which makes provision also for the removal of such annoyances by the surveyor and other persons. This statute does not say that every highway shall be thirty feet wide; and in a late case it was held that it did not authorize the surveyor to remove a fence in front of a house for the purpose of widening the road, which in that part was not more than twenty-four feet in breadth, such fence not being on the highway: *Lowen v. Kaye*, 4 B. & C. 3 (10 E. C. L. R.).

(v) 24 Geo. 2, c. 43, and 1 & 2 Will. 4, c. 22, as to drivers in London, Westminster, and the neighborhood; and 5 & 6 Will. 4, c. 50, s. 78, as to drivers in general.

(w) 3 Geo. 4, c. 126, s. 5. And as to furious driving, *post*.

(ww) *Gerring v. Barfield*, 16 C. B. (N. S.) 597 (111 E. C. L. R.).

(z) *Com. Dig. Chemin* (A.) 3.

(y) *Rex v. Egerly*, 3 Salk. 183.

(a) *Rex v. Sarmon*, 1 Burr. 516.

(x) *Rex v. Gill*, 1 Str. 190.

(b) *Rex v. Cross*, 3 Campb. 224.

(c) *Rex v. Russell*, 6 East 427.

another.(d) In the same *case his lordship intimated that there could be no doubt but that, if coaches, on the occasion of a rout, should wait an unreasonable length of time in a public street, and obstruct the transit of his Majesty's subjects wishing to pass through it in carriages or on foot, the person who might cause and permit such coaches so to wait would be guilty of a nuisance (e) [*487]

So it is indictable for a party to exhibit at the windows of his shop, in a public street, effigies, and thereby attract a crowd to look at them, which causes the footway to be obstructed so that the public cannot pass as they ought to do, and that it is not at all essential that the effigies should be libellous; for the gravamen of the charge is the causing the footway to be obstructed, and it seems to be immaterial whether the crowd consisted of idle, disorderly, and dissolute persons or not.(f)

Laying logs of timber in a highway has been already stated as one of the clear instances of nuisance.(g) And the party will not be excused by showing that he laid them only here and there, so that the people might have a passage through them by windings and turnings.(h) And though it is not a nuisance for an inhabitant of a town to unlade billets, &c., in the street before his house, by reason of the necessity of the case, yet he must do it promptly, and not suffer them to continue in the street an unreasonable length of time.(i) An obstruction to a public highway will not be excused on the plea of its being necessary for the carrying on of the party's business, though such obstruction be only occasional. The defendant, who was a *timber merchant*, occupied a small timber-yard close to a street, and, from the narrowness of the street and the construction of his own premises, he had, in several instances, necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there before they could be carried into his yard: and it was contended on his behalf that he had a right so to do, as it was necessary to the carrying on of his business: and that it could not occasion more inconvenience to the public than draymen taking hogsheads of beer from their drays, and letting them down into the cellar of a publican. But Lord Ellenborough, C. J., said, "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway; but this must be done with promptness. So as to the *repairing of a house*, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The rule of law upon this subject is much neglected, and great advantages would arise from a strict and steady application of it. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his *business."(k) [*488] And in repairing or rebuilding a house, care must be taken that the encroachment on the highway be not unreasonable. The owner will himself be responsible for any excess, if committed by his servants; for, according to Eyre, C. J., "suppose that the owner of a house, with a view to rebuild or repair, employ his own servants to erect a hoard in the street (which being for the benefit of the public, they may lawfully do), and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner would be guilty of a nuisance."(l)

By an old Act, an ancient highway running over the land of Lord Stourton was

(d) *Rex v. Cross*, 3 Campb. 224.

(e) *Rex v. Cross*, 3 Campb. 224.

(f) *Rex v. Carlisle*, 6 C. & P. 636 (25 E. C. L. R.), Park, J., Bolland, B., and Sir J. Cross.

(g) *Ante*, p. 485.

(h) 2 Roll. Abr. 137; 1 Hawk. P. C. c. 76, s. 145.

(i) *Id. Ibid.* and Bac. Abr. tit. *Highways* (E.).

(k) *Rex v. Jones*, 3 Campb. 230.

(l) *Bush v. Steinman*, 1 Bos. & Pul. 407, 408. And the learned judge proceeds thus: "And I apprehend there can be but little doubt that he would be equally guilty if he had contracted with a person to do it for a certain sum of money, instead of employing his own servants for the purpose; for, in contemplation of law, the erection of the hoard would be equally his act."

made a turnpike, and afterwards collieries were worked on each side of the road, and railways made from time to time across the road for the conveyance of the coals from the collieries. In the 1 & 2 Geo. 4, a new Act passed for repairing the same road. One of the former railways was continued and new railways made afterwards across the road for the same purposes as before. By a clause in this Act a penalty, recoverable on summary conviction, was imposed on any person who made any railway across the road "without the consent of the trustees or legal authority:" and it was held that the making and continuing of the railways was indictable, and that no inference could be drawn to the contrary from the facts of the case or the words of the last Act. To do the work complained of the turnpike road was dug into, but filled up again and restored to its former state, except that the railcad remained, forming a groove of wood, adapted to the wheels of the railway carriages, and so far sunk into the road that the highest part of it was on a level with the road; and, upon a special case empowering the Court to draw inferences as a jury, after a verdict of guilty, it was held that the Court could not pronounce the injury created by this work to be too slight and uncertain to be indictable.^(m)

Upon an indictment for obstructing a highway, it appeared that the defendant laid down on a highway a double line of tramways, on which omnibuses plied for hire; and these tramways and omnibuses were dangerous and inconvenient to many of the public, as the wheels of vehicles skidded when crossing the tramways, and horses which put their feet upon them were frightened; a very large number of persons used the omnibuses as a means of transit, to the great saving of their time and money, and the vestrymen of the parish through which the tramways ran had sanctioned their being made; Erle, C. J., directed the jury that, if the tramways were a source of danger and inconvenience to a portion of the public, who had a right to use the highway, they were a nuisance without reference to their being for the general convenience; and it was held that this direction was right; for supposing it possible that an arrangement for the use of a highway in a particular manner being for the advantage of the public would be an answer to an indictment for that *489] arrangement, this was not *an arrangement for the ordinary use of the highway, but was withdrawing so much of the highway from its ordinary use as such; for it was impossible to use as an ordinary part of this highway the portion taken up by the tramways.⁽ⁿ⁾ So, where, on a like indictment it appeared that telegraph posts were erected with the assent of the authorities, who were the guardians of the highways, either on the highway, or on strips of land by the side thereof; Martin, B., held that a permanent obstruction erected on a highway, without lawful authority, which renders the way less commodious to the public, is a nuisance; and if the jury believed that the defendants placed [for the purpose of profit to themselves] posts with the intention of keeping them permanently there [in order to make a telegraphic communication between distant places], and did permanently keep them there, and the posts were of such size as to obstruct the passage of carriage horses or foot passengers on the part of a road where they stood, the jury ought to find the defendants guilty; and that the circumstances that the posts were not placed on the hard part of the road, or upon a footpath formed upon it, or that sufficient space for the public traffic remained, were immaterial; and this ruling was held right; because in effect it came to this, whether there was a practical obstruction to the public in using the highway.^(o)

It is a nuisance to break up the streets in a town for the purpose of laying down gas pipes,^(p) and where certain commissioners had power to light the public streets of a town and to lay down pipes for that purpose, but no power to lay down pipes or the supply of private houses, and they transferred their powers to a company

(m) Reg. v. Charlesworth, 16 Q. B. 1012 (71 E. C. L. R.).

(n) Reg. v. Train, 2 B. & S. 640 (110 E. C. L. R.). It was also held that the Metropolitan Act, 18 & 19 Vict. c. 128, s. 98, did not justify these proceedings.

(o) Reg. v. The United Kingdom Electric Telegraph Co., 6 Law T. 378. The parts between brackets are clearly immaterial; and "permanently" is too strong a term, as an obstruction for even a day would be enough: 9 Cox C. C. 137, 174.

(p) Ellis v. Sheffield Gas Consumers Co., 2 E. & B. 767 (75 E. C. L. R.).

who had no powers as a gas company; it was held that this company was indictable for laying down pipes to private houses, but not for laying down pipes for the public lighting of the town.(q)

Wherever a public way exists, the public have a right to enjoy it with ease and security, and if a man prevents that enjoyment, even by the use of his own property, he is guilty of a nuisance.¹ If, therefore, the owner of land over which a public way passes excavates his land on each side thereof so as to leave the line of the way between two precipices, or makes an excavation so near to one side of the way that a person walking upon it might, by making a false step, or being affected by sudden giddiness, or in consequence of its being dark, or in the case of a horse or carriage way might by the sudden starting of a horse, be thrown into the excavation, this is a public nuisance; for the danger thus created may reasonably deter prudent persons from using the way, and thus the full enjoyment of it by the public, is, in effect, as much impeded as in the case of an ordinary nuisance to a highway.(r)

If an excavation be made so near a highway as to cause danger to the public using the way, it is no defence to the party who made it that other parties were under a legal obligation created by statute to fence the highway, and that they had neglected to do so.(rr)

*Nor can it be doubted that many other things may be done so near to a highway as to create a nuisance, as the running of railway locomotives,(s) [*490 erecting a windmill and the like, so near to the highway as to frighten horses travelling upon it.

It has been doubted whether a person can build a bridge over a highway.(t) But it is plain that this must be a question for a jury in every case; for a bridge may be built in such a manner as either to be no nuisance or a great nuisance to a highway.(u)

There can be no doubt that any contracting or narrowing of a public highway is a nuisance; it is frequently, however, difficult to determine how far in breadth a highway extends, as where it runs across a common, or where there is a hedge only on one side of the way, or where, though there are hedges on both sides, the space between them is much larger than what is necessary for the use of the public; in these cases it would be for a jury to determine how far the way extended.(v) It

(q) *Reg. v. Longton Gas Co.*, 8 Cox C. C. 317; s. c., 2 E. & E. 651 (105 E. C. L. R.).

(r) *Barnes v. Ward*, 9 C. B. 392 (67 E. C. L. R.); where an area was excavated close to an immemorial footway, and left unfenced, and a person passing along the way, the night being dark, without any negligence of her own, fell into the area and was killed: *Hardcastle v. The S. Yorkshire Railway and River Dun Co.*, 4 H. & N. 67; *Hounsell v. Smyth*, 7 C. B. N. S. 731 (97 E. C. L. R.).

(rr) *Wettor v. Dunk*, 4 F. & F. 298.

(s) *Vaughan v. Taff Vale R. Co.*, 5 H. & N. 679; *Rex v. Pease*, 4 B. & Adol. 30 (24 E. C. L. R.).

(t) *Hole v. Sittingbourne and Sheerness Railway Co.*, 6 H. & N. 488.

(u) See *Reg. v. Betts*, 16 Q. B. 1022 (71 E. C. L. R.), *post*, Rivers.

(v) See *Brownlow v. Tomlinson*, 1 M. & Gr. 484 (39 E. C. L. R.).

¹ A temporary occupation of part of a street or highway by persons engaged in building or in receiving or delivering goods from stores or ware-houses or the like, is allowed from the necessity of the case; but a systematic and continued encroachment upon a street though for the purpose of carrying on a lawful business, is unjustifiable: *People v. Cunningham*, 1 Denio 524. A man may throw wood into the street for the purpose of having it carried into his house; and it may lie there a reasonable time: *Comm. v. Passmore*, 1 Serg. & R. 219. Materials for building may be placed in the street, provided it be done in the most convenient manner: *Ibid.* A merchant may have his goods placed in the street for the purpose of removing them into his store in a reasonable time. But he has no right to keep them in a street for the purpose of selling them: *Ibid.* And there is no difference in this respect between a *public auctioneer*, and a private merchant: *Ibid.* A person who collects together a large crowd in the public highways and streets of a city by means of "violent and indecent language addressed to persons passing along the highway," thereby obstructing the free passage of the street, is indictable for committing a common nuisance: *Barker v. Comm.*, 7 Harris 412. So any thing which causes a crowd in a street: *State v. Buckley*, 5 Harring. 508. Spring guns, although justifiably placed to protect life or property, may constitute a nuisance if they cause actual danger to the passers by in the street: *State v. Moore*, 31 Conn. 479.

seems that in ordinary cases, where a road runs between fences, not only the part which is maintained as solid road, but the whole space between the fences is to be considered as highway. In a late case, Lord Tenterden, C. J., said, "I am strongly of opinion that when I see a space of fifty or sixty feet, through which a road passes, between enclosures set out under an Act of Parliament, that unless the contrary be shown the public are entitled to the whole of that space, although, perhaps, from economy the whole may not have been kept in repair. If it were once held that only the middle part, which carriages ordinarily run upon, was the road, you might by degrees enclose up to it, so that there would not be room left for two carriages to pass. The space at the sides is also necessary to afford the benefit of air and sun. If trees and hedges might be brought close up to the part actually used as the road, it could not be kept sound."^(w) And in a late case^(x) it was laid down by the Court that "where a highway passes through an enclosed country it is not the formed road merely (whether of pavement, gravel, or other material), but the whole space from fence to fence is the highway, and an obstruction in any part is equally the subject of indictment. The extent of a highway where it passes over a common, is frequently still more indefinite to the right and left of what may be the ordinary passage." So on an indictment for obstructing a highway by telegraph posts placed in some cases on strips of land by the side of the road, and in some cases where the strips were so broken up or covered with briars as to be practically impassable, it was held that in the case of an ordinary *491] highway, although it may be of a varying or unequal width, running between fences, one on each side, the right of passage or way *prima facie*, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not to be confined to the part which may be metalled or kept in repair for the more convenient use of carriages or foot passengers.^(y)

Upon an indictment for enclosing strips of land upon the sides of a highway, the question is, were these strips part of the highway, and used as such by the public.^(z)

Where a person laid a railway four hundred yards along the side of a turnpike road, occupying a breadth of between three and four feet, and in several parts not leaving space enough for two carriages to pass each other safely without running upon the bars of the railway, which, however, did not rise an inch above the surface of the road. The passage of coal-wagons along the turnpike was very great, and without the railroad a much larger number must have been employed to perform the same work. There also was a considerable traffic on the turnpike. The jury were told that if they thought the effect of the railway was to obstruct, hinder, and inconvenience the public, they should find a verdict of guilty, and it was held that the direction was right. "The question whether the railway was an obstruction or not was a question of fact, and properly left to the jury. It was urged that if the thing complained of furnishes upon the whole a greater convenience to the public than it takes away, no indictment lies for a nuisance. Supposing that doctrine to be sound, which I am not prepared to say, how does it apply in this case? Here is a road for carts bringing down coals to S., and it is for the convenience of an individual, who sends coal there for sale, to make a railway along the public road for their conveyance in wagons. It is said, indeed, that all persons may use this railway who will pay for so doing, but no man has a right to tell the public that they shall discontinue the use of such carriages as they have been accustomed to employ, and adopt another kind, in order to pass along a new descrip-

^(w) *Rex v. Wright*, 3 B. & Ad. 681 (23 E. C. L. R.); *ante*, p. 468. The space at the sides of roads is also particularly useful for cattle to travel upon, as they get footsore on the stoned roads. This was much relied upon in the *Pinner* case, where a mandamus was granted to the London and Birmingham Railway Company to make the approaches to a bridge as wide as the stoned road and the sides had previously been: *Reg. v. The London and Birmingham R. Co.*, 1 Car. N. & H. Railway Cases 317.

^(x) *Elwood v. Bullock*, 6 Q. B. 383 (51 E. C. L. R.).

^(y) *Reg. v. The United Kingdom Electric Telegraph Co.*, 6 Law T. 378. See this case, *ante*, p. 489.

^(z) *Reg. v. Johnson*, 1 F. & F. 657.

tion of road, paying him for the liberty of doing so. I think this furnishes no excuse for the obstruction."^(a) And it has been held that it is no defence to an indictment for a nuisance to a navigable river to prove that, although the work be in some degree a hindrance to navigation, it is advantageous in a greater degree to other uses of the river;^(b) so, it should seem, that it is no defence to an indictment for a nuisance to a highway, that the thing complained of furnishes, on the whole, a greater convenience to the public than it takes away.^(c)

But where an Act authorized the making a railroad near a highway, and the locomotive engines frightened the horses travelling on the highway, it was held that an indictment could not be sustained; for the legislature must be presumed to have *known that travellers upon the highway would, in all probability, [*492 be incommoded by the engines using the railroad, and therefore there was nothing unreasonable in supposing the legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other part of the public travelling along the railway.^(c)

But where a statute authorizes any company or persons to intermeddle with a highway provided they fulfil certain conditions, and they interfere with the highway without performing those conditions, they are liable to be indicted, and either the body corporate or the persons who cause the highway to be interfered with may be indicted.

Upon an indictment for obstructing a highway, it appeared that the Manchester and Leeds Railway Company were empowered by statute to cut through and make obstructions in public roads for the purposes of the Act, doing as little damage as might be, and subject to the provisions and restrictions therein mentioned, and a subsequent section enacted that wherever any part of any public road should be found necessary to be cut through or so much injured as to be impassable or inconvenient for passengers, the company should, before any such road should be cut through, cause a good and sufficient road to be made instead thereof as convenient for passengers and carriages as the road cut through, or as near thereto as might be. The company, when making their railway, stopped up the public highway, and made a branch restoring the communication between the termini formerly connected by that highway, but by a different line. The new road was stated to be in some respects more convenient to the public than the old, but in others less so. The levels of the adjacent land made it impracticable to give a more convenient line consistently with the regulations of the Act, unless at an expense which, it was said, would be unreasonably great, and quite disproportioned to the benefit which would accrue from it to any part of the public. Maule, J., directed the jury to find a verdict of not guilty if they thought that the company had done no more damage than was necessary, and had made the road as convenient as the former one, or as nearly so as might be: intimating, as his own opinion, that the road could not be deemed absolutely as convenient even after allowing for the advantages which the public might have gained from it. But that the company were not, in his opinion, bound to lay out enormous sums of money to procure a slight accommodation to some persons; and that the proper rule seemed to be, that, if they could not make the road as convenient as before without a very disproportionate and unwarrantable expenditure, they should make it as nearly so as they could. And he left it to them to say whether the new road was as convenient as the old, or if not as nearly so as might be. The jury found a verdict of guilty, and on a motion for a new trial it was contended that an indictment would not lie because the Act charged was one which the statute permitted. Lord Denman, C. J., "The work

(a) *Rex v. Morris*, 1 B. & Ad. 441 (20 E. C. L. R.), per Lord Tenterden, O. J. It was also held that the railway was not authorized either by 45 Geo. 3, c. lxxiv., or 44 Geo. 3, c. lv.

(b) *Rex v. Ward*, 4 Ad. & E. 384 (31 E. C. L. R.), overruling *Rex v. Russell*, 6 B. & C. 568.

(c) See *Reg. v. Train*, *ante*, p. 489.

(c) *Rex v. Pease*, 4 B. & Ad. 30 (24 E. C. L. R.); *Vaughan v. Taff Vale R. Co.*, 5 H. & N. 679.

*493] complained of as a nuisance, and undoubtedly making one, is the **cutting through* of the carriage road. Now there is no question as to their right to do this; and though they are required, when they do it, to cause another road to be set out and made instead of it, they argue that they are no longer indictable for a nuisance in doing the lawful act, however they may be for disobedience of the law in neglecting to substitute another. The prosecutors reply by referring to the section, which requires the company to cause the new road to be made before they cut through the old. But the company rejoin, that from the state of the earth there it was impossible to do this, and could not be intended by the legislature. This argument we think inadmissible, for reasons too obvious to require a full statement of them. The company have done what the Act legalizes only on a condition, which they have not performed. They stand convicted of the nuisance and show no justification. The verdict will therefore not be disturbed."(*d*)

The Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 49, enacts that when any Railway is carried over a turnpike road by a bridge, the arch shall be such as to leave a clear space of not less than thirty-five feet. Sec. 51 enacts that wherever the average available width for the passage of carriages of any existing roads is less than the width hereinbefore prescribed for bridges over the railway, the width of such bridges need not be greater than such average available width; but so that such bridges be not of less width in the case of a turnpike or public carriage road than twenty feet; that if such average available width shall be at any time increased beyond the width of such bridge, the railway company shall be bound to widen the bridge to such extent as they may be required by the trustees or surveyors of the road, not exceeding the width of the road as so widened, or the maximum width herein or in the special Act prescribed for a bridge in like case over a railway; and it has been held that the effect of this clause is that if the average available width for the passage of carriages on any road is more than thirty-five feet, the road may be narrowed to thirty-five feet under the arch; where it is less, the arch may be made the same width as the road, so that it be not less than twenty feet wide, and if the road be afterwards widened, the arch must be widened in proportion up to, but not beyond, thirty-five feet; but in this reckoning footpaths are not to be included. Therefore, where the road, including footpaths, was forty-three feet wide, but without these only twenty-eight, and the railway arch, thirty-five feet in width, stood partly upon and narrowed the footpath, but left the carriage way of its original width, it was held, on an indictment for obstructing the carriage way only, and not mentioning any footway, that the said Act and a railway Act incorporating it had been complied with, although the latter Act provided that wherever the railway crossed the road otherwise than at *494] right angles, the bridge should be made with a skew arch (which had been done) "so as not in any *manner to alter the direction of or to interfere with the line of the said roads, or the footpaths to the same."(*e*)

So an incorporated railway company may be indicted for cutting through and obstructing a highway by a bridge and other works not made according to the provisions of their Act of Parliament; for though a corporation cannot be guilty of treason, felony or other offences, which derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects, they may be guilty as a body corporate of commanding acts to be done to the nuisance of the community at large.(*f*)

(*d*) Reg. v. Scott, 3 Q. B. 543 (43 E. C. L. R.), and see Reg. v. Birmingham and Gloucester R. Co., 2 Q. B. 47 (42 E. C. L. R.), as to the construction of clauses empowering railway companies to cut through public roads, where it was held that a company could only narrow a highway as far as the width of the railway extended.

(*e*) Reg. v. Rigby, 14 Q. B. 687 (68 E. C. L. R.).

(*f*) Reg. v. The Great North of England R. Co., 9 Q. B. 315 (58 E. C. L. R.). The first four counts were in the ordinary form for cutting through and obstructing the road, and it was objected that as the defendants were authorized to cut through the road and erect the bridge, if in doing so they had not complied with the statutory provisions, they ought to have been indicted for a breach of those provisions. No express decision was pronounced on this objection, but it must have been overruled, as the Court gave judgment for the crown on the three counts. See Reg. v. The Birmingham and Gloucester R. Co.,

As a nuisance in not *repairing* highways is an offence in the nature of a nonfeasance, the principal inquiry upon this subject will be as to the persons who are liable to be called upon to keep them in repair.

The inhabitants of the parish at large are *prima facie*, and of common right, bound to repair all highways lying within it, unless by prescription, or otherwise, they can throw the burden upon particular persons. (g) And to such an extent is this obligation, that if the inhabitants of a township bound by prescription to repair the roads within the township be expressly exempted by the provisions of a road Act from the charge of repairing new roads to be made within the township, that charge must necessarily fall upon the rest of the parish. (h) And upon the same principle it was holden, that if particular persons were made chargeable to the repair of such highways by a statute lately made, and become insolvent, the justices of peace might put that charge upon the rest of the inhabitants. (i) And where a statute enacted that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose, and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held that the inhabitants of the parish were not exempted from their common law liability to keep that street in repair; that the duty of repairing might be imposed upon others, and the parish be still liable; and that the parish were under the obligation in the first instance, of seeing that the street was properly paved, and might seek a remedy over against the commissioners. (k) And where a local turnpike Act, empowering the trustees under it to take tolls, directed that the roads should from time to time be repaired by the trustees, out of the money arising by virtue of that Act, it [*495 was holden that this *only made the tolls an auxiliary fund in the hands of the trustees; and that the inhabitants of the township where the road was situate, who by prescription were bound to repair all roads within it, were nevertheless liable to be indicted for the non-repair of the road. (l) And where upon an indictment against a township for the non-repair of a highway it appeared that by the 12 Geo. 1, c. 38, s. 15, the proprietors of a navigation were ordered to make the highway in question and keep it in repair, and were made liable to indictment and fine in case of default, and the 17th section provided that nothing in the Act should excuse the inhabitants of the township from contributing to the repairs with their carts, &c., or otherwise as they were then obliged to do by law; and the jury found that the highway was an ancient highway, and therefore the liability of the township existed at the time the Act passed; the Court of Queen's Bench held that the intention to preserve the common law liability of the township was sufficiently declared, and although the probable intention was that each party should contribute to the repair, and no provision was made for adjusting the proportion of each, the difficulty of apportioning the burden did not create an exemption for either, and therefore an indictment for non-repair lay against the township, (m) and also against the company; for although the expenses of the repairs of the road had exceeded the amount of tolls received, it did not follow that the other resources of the company were not adequate, and, even if they were not, the obligation was imposed without condition, and the liability to indictment for non-repair expressly enacted. (n)

3 Q. B. 223 (43 E. C. L. R.), where it was held, that the company might be indicted by their corporate name for disobedience to an order of justices requiring them to execute works pursuant to a statute.

(g) 1 Hawk. P. C. c. 76, s. 5, 6, 7, 8; Austin's case, 1 Vent. 189; Anon., 1 Lord Raym. 725.

(h) Rex v. Seffield, 8 T. R. 106.

(i) Anon., 1 Lord Raym. 725.

(k) Rex v. St. George, Hanover Square, 3 Campb. 222.

(l) Rex v. Netherthong, 2 B. & A. 179. It was also holden that such inhabitants might, after conviction, apply by motion for relief against the trustees under the 13 Geo. 3, c. 84, s. 33. And it was holden also that the 13 Geo. 3, c. 84, s. 63, only referred to diversions under writs of *ad quod damnum*, and under 13 Geo. 3, c. 70, s. 16. As to the liability to repair, notwithstanding the Act of Parliament, see also Rex v. The Inhabitants of Oxfordshire, 4 B. & C. 194 (10 E. C. L. R.), *post*, Bridges.

(m) Reg. v. Brightside Bierlow, 13 Q. B. 933 (66 E. C. L. R.).

(n) Reg. v. Sheffield Canal Co., 13 Q. B. 913 (66 E. C. L. R.).

No *agreement* can exonerate a parish from the common law liability to repair; and a count in an indictment against the corporation of Liverpool, stating that they were liable to repair a highway, *by virtue of a certain agreement*, with the owners of houses alongside of it, was held to be bad, on the ground that the inhabitants of the parish, who are *primâ facie* bound to the repair of all highways within their boundaries, cannot be discharged from such liability by any *agreement* with others. (o)

Upon an indictment against the township of S., for not repairing a road within it, on a custom alleged and proved that all the townships in the parish repaired their own roads, it was proved that the township was adjacent to the township of N. M. in another parish, and that an agreement had been made, two hundred and fifty years before, between the then owner of the whole of S., and the then owners of the whole of N. M., whereby the boundary between the properties was marked out, and the owner of S. agreed to allow the owners of N. M., and the rest of the inhabitants of N. M., a road through S., of which the owner of S. was to repair half *496] and the owners of N. M. the other half (which was the part *indicted), and that a sufficient lawyer should make further assurance for the performance of the agreement. The owner of S. afterwards filed a bill for a specific performance, but it did not appear what the result of the suit was. As far back as living memory went, the inhabitants of N. M. had repaired the road from the boundary of the townships for the distance mentioned in the agreement within about twenty yards; it was held that this was not evidence for a jury of an instrument binding the owners of N. M. and all claiming through them. (p)

With respect to the repair of roads dedicated to the public by the owner of the soil, although it was once considered that, notwithstanding the use by the public, the parish was not liable to repair, unless there had been on their part some act of acquiescence or adoption; (q) it was afterwards expressly decided, and is now fully settled, (r) that the inhabitants of a parish were bound to repair all roads within it dedicated to and used by the public, although there were no adoption of such roads by the parish. (s)

But now by the 5 & 6 Will. 4, c. 50, s. 23, "no road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out or to be hereafter set out as a private driftway or horsepath in any award of commissioners under an inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair, unless the person, body politic or corporate, proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner, and of the width required by this Act, and to the satisfaction of the said surveyor and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required, on receiving notice from such person or body politic or corporate to view the same, and to certify that such highway has been made in a substantial manner, and of the width required by this Act, at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof, then and in such case, after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate: provided nevertheless, that on receipt of such notice as aforesaid the surveyor of the said parish shall call a vestry meeting of the inhabitants of such parish, and such vestry shall deem such high-

(o) *Rex v. The Mayor, &c., of Liverpool*, 3 East 86. And see *Bac. Abr. tit. Highways* (F.).

(p) *Rex v. Scarisbrick*, 6 A. & E. 509 (33 E. C. L. R.); 2 N. & M. 583.

(q) *Rex v. St. Benedict*, 4 B. & A. 450 (7 E. C. L. R.), per Bayley, J.

(r) *Reg. v. Horley*, 8 Law T. 382.

(s) *Rex v. Leake*, 5 B. & Ad. 469 (27 E. C. L. R.).

way not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make *the new highway to appear before the justices at the next special sessions [497 for the highways to be held in and for the division in which the said intended highway shall be situate; and the question as to the utility as aforesaid of such highway shall be determined at the discretion of such justices." (t)

This section must have a reasonable construction, and cannot be considered to extinguish roads already public by dedication; otherwise, almost all roads not being immemorial, however important and public, would become extinguished; the term "made" as used in the Act, therefore, applies to a road formed or made, but not completely dedicated by use or otherwise at the passing of the Act; but roads dedicated at that time are out of the operation of the Act. It does not, therefore, apply to a road which had been extinguished by an award under an inclosure Act in 1784, but subsequently used by the public and repaired by a tithing. (u) This section does not apply to a road made by turnpike trustees; for that is not a road made by a person or body proposing to dedicate it; but by persons who had no power to dedicate it. The legislature contemplated the case of a private person making a road for the purpose of dedicating it, or setting out a private driftway under an inclosure Act, and not the case of a turnpike road. (v) And therefore where a road was made by turnpike trustees, and continued to be used after the expiration of the Turnpike Act in 1848, it was held that this section did not apply. (w)

This section does not prevent the way from becoming public, but only exempts a parish from the liability to repair the way where the steps required by this section have not been adopted. An action, therefore, may be maintained for obstructing a way dedicated to the public and used by them, although it had never been repaired by the parish, and neither the notice of dedication had been published, nor the certificate given as required by this section. (x) And where a road has been dedicated to the public by a landowner, but the conditions of this section have not been fulfilled, if a positive obstruction be erected in it, the party causing such obstruction is liable for so doing; but if the road be simply unfit for use, from the state of the weather, or from mere want of repair, the public lose the use of it, and neither the landlord nor any one else is liable to the repair of it. (y)

Formerly it was held that if a parish lay in two counties, the inhabitants of that part of the parish in which the road charged to be out of repair lay were bound to repair it, and not the inhabitants of the whole parish. (z) But it has since been decided that if part of a parish be situate in one county and the rest in another, and a highway lying in one part be out of repair, *an indictment [498 against the inhabitants of that part only is bad: and that in such case the indictment must be against the whole parish. (a) And it appears to have been always considered that the indictment under such circumstances must be preferred in that county wherein the ruinous part of the road lies. (b) If the indictment be

(t) If the justices make an order deciding in conformity with the vestry that the way is not of sufficient utility, an appeal lies by the person dedicating the way to the sessions: *Reg. v. Derbyshire*, E. B. & E. 69 (96 E. C. L. R.). See *Rex v. The Paddington Vestry*, 9 B. & C. 456 (17 E. C. L. R.), where a somewhat similar clause in a local Act was brought in question. See *Reg. v. Dakenfield*, 4 B. & S. 158 (116 E. C. L. R.); as to the steps necessary to be taken under the 5 & 6 Will. 4, c. 50, s. 23, and the Public Health Act, 11 & 12 Vict. c. 63, s. 70, to render a road repairable by a parish.

(u) *Reg. v. Westmark*, 2 M. & Rob. 305, Maule, J. See *Reg. v. East Hagbourne*, ante, p. 483, where the decision turned on another point, and this point was not noticed.

(v) *Reg. v. Thomas*, 7 E. & B. 399 (90 E. C. L. R.).

(w) *Ibid.* See the case ante, p. 471.

(x) *Roberts v. Hunt*, 15 Q. B. 17 (69 E. C. L. R.).

(y) *Reg. v. Wilson*, 18 Q. B. 348 (83 E. C. L. R.). The fact that the landowner has done repairs since the dedication makes no difference.

(z) *Rex v. Weston*, 4 Burr. 2507.

(a) *Rex v. Clifton*, 5 T. R. 496.

(b) *Rex v. Clifton*, 5 T. R. 498; and *Rex v. Weston*, supra. In *Rex v. Clifton*, Lord Kenyon, C. J., in answer to one of the supposed difficulties of this mode of proceeding,

against that part of the parish only which lies in the county in which the indictment is preferred, it must show on what account such part only is chargeable, otherwise it will be bad in substance: and the objection may be taken, even after an issue on the point, whether the inhabitants of that part were bound to repair, and a verdict for the crown.^(c)

The 5 & 6 Will. 4, c. 50, s. 58, which, when the boundaries of parishes are in the middle of highways, gives two justices power to divide such highways by a transverse line, has been already noticed ^(d) The object of that statute was to facilitate the repairing of a highway so situated: and it enacts that the justices may order that the whole of such highway, on both sides, in one of such parts, shall be repaired by one of such parishes; and that the whole of such highway, on both sides, in the other of such parts, shall be repaired by the other of such parishes: and that they shall cause their order and plan of the highway to be filed with the clerk of the peace. Provided, nevertheless, "that in the case of any such last-mentioned highway, the repair of any part of which belongs to any body politic or corporate, or to any person, by the reason of tenure of any lands, or otherwise howsoever, the same proceedings may be adopted, but the said body politic or corporate, or person, or some one on their behalf, may appear before such justices, and object to such last-mentioned proceedings, in which case the said justices shall, before they divide such highway as aforesaid, hear and consider the objection so made, and determine the same."

Sec. 59. "After such order and plan shall be so filed with the clerk of the peace as aforesaid, such parishes and body politic or corporate, or person aforesaid respectively, shall be bound as of common right to maintain and keep in repair such parts of such highways so allotted to them as aforesaid, and shall be liable to be proceeded against for neglect of such duty, and shall in all respects whatsoever be liable and subject to all the provisions, regulations, and penalties contained in this Act, and also shall be discharged from the repair of such part of such highway as shall not be included in their respective allotment."^(e) Sec. 61, the statute shall not affect or alter the boundaries of counties, lordships, &c., nor any other division of public or private property, nor the *boundaries of parishes, otherwise than for the purpose of repairing such particular portions of the highways. [*499

Where an order was made by two justices for apportioning a highway in the form given by the 34 Geo. 3, c. 64, s. 1,^(f) it was held that such order was conclusive as to the fact that part of the highway so apportioned lay in each of the parishes, and that it was not competent for one of the parishes, upon an indictment for not repairing the part allotted to it by the order, to prove that in fact at the time the order was made no portion of such part was in that parish, and therefore the justices had no jurisdiction to make the order, on the ground that, although the statute did not require the justices to find expressly that part of the way is in either parish, yet as they are "to examine" and then "finally determine the matter," that implies that they are to be satisfied as to the situation of the highway in the respective parishes.^(g)

said, "On an indictment against a parish for not repairing a road, it is not necessary for the prosecutor to serve every individual in the parish with process; he may compel the appearance of any two, who live within the county, upon whom the whole fine may be levied; and the rest of the inhabitants must reimburse those two under the general highway Act."

^(c) *Rex v. Clifton*, 5 T. R. 498.

^(d) *Ante*, p. 480.

^(e) Sec. 60 provides for the costs in thus apportioning highways; and sec. 61 provides for the manner in which highways repairable by reason of tenure, or otherwise howsoever, may be made parish highways. See the 25 & 26 Vict. c. 61, ss. 34, 35, where there are local boards.

^(f) Which contained similar provisions to the 5 & 6 Will. 4, c. 50, s. 58, and is repealed by the latter Act.

^(g) *Reg. v. Hickling*, 7 Q. B. 880 (53 E. C. L. R.). See *Reg. v. Perkins*, 14 Q. B. 229 (68 E. C. L. R.), that to the jurisdiction under this clause the existence of a boundary on the highway to be divided is a condition precedent, and the Court quashed an order, which had been confirmed at sessions, because on the facts stated it did not appear that there was such a boundary, but this was on the ground that all the facts were brought

Where a road lay in two parishes, and no division and allotment under this statute had been made, it was held that an indictment against one of the parishes for not repairing one side of the road ought to have stated that the parish was liable to repair *ad filum viæ*; and it seems that in such case it is not sufficient to aver that a certain part of the road (setting out the length and one-half of the breadth) is out of repair, and that the inhabitants, &c., ought to repair it.^(k)

Exceptions were taken to an indictment for suffering a highway to be very muddy, and so narrow that people could not pass without danger of their lives; first, that it is no offence for a highway to be dirty in winter; and, secondly, that the parish had no power to widen it, as there was a particular power vested by Act of Parliament in justices of the peace to do so. The indictment was held bad for want of saying that the way was out of repair; and one of the judges observed, that saying that the way was so *narrow* that the people could not pass was repugnant to its being "the King's highway;" for that if it had been so narrow, the people could never have passed there time out of mind.^(l)

Where a road indicted led across a small inlet or estuary of a river not far from its mouth, and was not passable at high water, and was usually a soft sludge at ebb; Patteson, J., directed the jury that if they thought the want of repair arose from the nature of the spot over which the road passed, and was occasioned by the river flowing over it at every tide, washing away the materials placed there to form the road, and leaving in their place a deposit of mud, it would be absurd to require the parish to do repairs, which, from the nature of things, must always be *ineffectual*.^(k) And in the same case the same learned judge held that where two parishes are separated by a river the presumption is, that the [*500 boundary line is the middle line of the channel.^(k)

But though the parish is bound *primâ facie* and of common right to repair the highways within it, yet a particular subdivision of a parish, or particular individuals, may be liable to relieve them from that *onus*, by reason of prescription, or the inclosure of the land in which the highway lies.

Thus the inhabitants of a district, township, or other division of a parish, and also particular individuals, may be bound to repair a highway by *prescription*; and it is said, that a corporation aggregate may be charged by a general prescription that it ought and hath used to do it, without showing that it used to do so in respect of the tenure of certain lands, or for any other consideration; because such a corporation never dies, and, therefore, if it were ever bound to such a duty, it must continue to be so; neither is it any plea that the corporation have done it out of charity.^(l) But it is said, that such a general prescription is not sufficient to charge a private person; because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c.^(m) And a man cannot be liable to repairs merely as lord of a manor, though it is stated that the lords have repaired it from time whereof, &c.⁽ⁿ⁾ This applies to individual persons only, and not to an aggregate of persons who compose the inhabitants of a district or division in a parish or township in which the road is situate.^(o) But it has been holden in a late case, that where a parish is charged with the reparation of a highway, lying in *alienâ parochiâ*, a consideration must be stated. To an indictment against a parish for not repairing a highway lying within it, a plea that the inhabitants of another parish "have repaired, and been used and accustomed to repair, and of right ought to have repaired," was held ill, and that the plea ought to have shown a considera-

before the Court. See *Mould v. Williams*, 5 Q. B. 469 (48 E. C. L. R.), that an order to remove timber from a highway is conclusive in an action that the place is a highway.

(k) *Rex v. St. Pancras*, Peake Rep. 219.

(l) *Rex v. Stretford*, 2 Lord Raym. 1169. And it is the same as to a bridge; an indictment does not lie for not widening it: *Rex v. Devon*, 4 B. & C. 670 (10 E. C. L. R.).

(k) *Rex v. Landulph*, 1 M. & Rob. 393.

(i) 1 Hawkins P. C. c. 76, s. 8; Bac. Abr. tit. *Highways* (F.).

(m) *Id. Ibid.*

(n) Lord Raym. 792, 804. It should be laid *ratione tenuræ* of the domesnes of the manor.

(o) *Rex v. Ecclesfield*, 1 B. & A. 348.

tion. Holroyd, J., at the conclusion of his judgment, said, "I say nothing as to the form of pleading where the highway lies within a township or division of a parish which is charged with the repairs." (p)

And where the inhabitants of a county pleaded that the inhabitants of a particular township had immemorially repaired the highway at the end of a county bridge, situate within the township, the Court held that it was not necessary to state any consideration of such prescription. (q)

*501] Where, in an indictment against a township for non-repair of a road, the prescription stated and proved was that its inhabitants had been immemorially used to repair all roads situate within it, which but for such usage would be repairable by the parish at large; it was holden that this placed the township in the situation of a parish; and that it was necessary for the defendants to show, by evidence, some other persons in certainty who were liable, in order to deliver themselves from their liability to repair. (r) Where, however, the origin of a way is accounted for, the prescription is destroyed. (s)

Where to an indictment against a parish for not repairing a highway the defendants pleaded that the parish had immemorially been divided into five townships, and that each of them had immemorially repaired all the highways within it that would otherwise be repairable by the parish, and that the highway indicted was situated within one of the townships, and ought to be repaired by it; the Court of Queen's Bench held that evidence that the four other townships had immemorially repaired their own highways, that no surveyor of highways had ever been appointed for the parish, and that the township in question had repaired a highway lately formed within it, was evidence upon which the jury might find that the township in question was liable to repair all the highways within it, and that it was not necessary to prove that there were or had been any ancient highways within it. (t)

Where an extra-parochial and uninhabited district was divided into seven townships by certain Acts of Parliament, it was held that one of the townships was not liable to repair a public road situate within it, as the Acts did not expressly impose such liability upon the township, and the origin of everything (including the township and the road itself) being clearly ascertained, no inference could be raised as to the liability to repair the road by usage or prescription. (u)

The liability of a township to repair by prescription may, as we have seen, be such as to place the township on the same footing as a parish, in respect to the roads within its limits. The liability may be to repair all highways within the township, which but for the prescription and usage would have been repairable by the parish at large; and in such case the township must not only repair immemorial roads, but also any new highway which may have been made within its limits, and which the parish might have been called upon to repair in the absence of any such prescription. (v) Where an indictment against a township for not repairing part of a highway situate within the township, averred that "the inhabitants of

(p) *Rex v. St. Giles, Cambridge*, 5 M. & S. 260. And see *Rex v. Machynlleth*, *post*, p. 503. Upon an indictment against a township for the non-repair of a highway within it, in defence it was proved that the way had for many years past been repaired by another township, but it was contended that the liability to repair could not be fixed on the latter township without showing some consideration, and no evidence of this kind was given: it was answered that a consideration might be inferred from the fact of repair; but the point was not decided: *Reg. v. Denton*, 18 Q. B. 761 (83 E. C. L. R.). *Qu. whether the repair be not evidence that the road is in the township that had repaired.* See *Reg. v. Gate Fulford*, *ante*, p. 484.

(q) *Rex v. West Riding of Yorkshire*, 4 B. & A. 623 (6 E. C. L. R.).

(r) *Rex v. Hatfield*, 4 B. & A. 75 (6 E. C. L. R.). The general issue was pleaded. See *post*, p. 516.

(s) *Rex v. Hudson*, 2 Str. 909.

(t) *Reg. v. Barnoldswick*, 4 Q. B. 499 (45 E. C. L. R.), Parke, B., at the trial thought that there might be a perfectly valid custom in point of law that the inhabitants of either township should repair any highways, which from time to time became public. See *Freeman v. Reed*, 4 B. & S. 174 (116 E. C. L. R.), as to the evidence of the separate liability of a township to repair its highways.

(u) *Reg. v. Midville*, 4 Q. B. 240 (45 E. C. L. R.).

(v) *Rex v. Ecclesfield*, 1 B. & A. 348; *Rex v. Netherthong*, 2 B. & A. 179; *Rex v. Hatfield*, 4 B. & A. 75 (6 E. C. L. R.).

he said township from time whereof the memory, &c., have repaired and amended, and been used and accustomed to repair and amend, and still ought to repair and amend all common and public highways situate within the *township used for all the liege subjects of the realm to go, return," &c.; after a [*502 verdict of guilty it was moved in arrest of judgment that it charged the township with a customary liability to repair all roads within it, whereas it ought to have charged a liability to repair all roads within it, "which but for the custom would be repairable by the parish." But the Court of Queen's Bench held that although those words had of late years been introduced, they were not necessary: where they were introduced they put the township *prima facie* in the same position as a parish; and if the defendants meant to assert that any individuals were liable to repair the road in question, *ratione tenuræ* or otherwise (if it could be), they must lead that matter specially; but where those words were omitted and the defendants pleaded not guilty, it became incumbent on the prosecutor to prove that the township was liable to repair *all* roads within it; which might be if there were one repairable by individuals; but if the defendants could show that there were any so repairable, they would negative the custom as being laid too largely. It was a question of evidence, and not of pleading; and in truth the words in question were introduced within living memory for the very purpose of avoiding a failure which frequently happened by reason of the custom laid being larger than the evidence warranted. Nevertheless the custom may be laid as in the present indictment, if no roads in the township are repairable by individuals other than the inhabitants at large.(w) But an *extra-parochial place* is not as such bound of common right to repair its own roads; and some ground for charging it must be stated; at least, unless it be shown negatively that it is not parcel of any district bound to repair the district roads. The indictment stated, that part of a highway in an extra-parochial hamlet was out of repair, and that the inhabitants of the hamlet ought to repair it. Upon error brought, on the ground that no immemorial obligation, nor any special ground to make them liable, was stated, it was urged that they were liable of common right, and that an extra-parochial place stood in this respect on the footing of a parish; but the Court held that they could not consider a common law obligation as attaching upon the inhabitants of the hamlet from necessity, unless it were shown negatively that the hamlet was not parcel of any other district liable to repair its own roads; and the judgment was reversed.(x)

The inhabitants of a district cannot be charged *ratione tenuræ*, because unincorporated inhabitants cannot, *quâ* inhabitants, hold lands: and a district cannot be charged by prescription alone (without a consideration) to repair what is not within such district. The indictment stated that an ancient bridge, in the parishes of M. and P., in the highway there, was out of repair, and that the inhabitants of the parish of P. and of the town of M. aforesaid, from time whereof, &c., and by reason of the tenure of certain lands in the said parish and town, had repaired and of right ought to repair it. Upon error it was urged that inhabitants as such could not be charged *ratione tenuræ*; and that as it did not appear that any part of the bridge was in the township of M., the indictment against the township, on the ground of *immemorial obligation, could not be supported; and the Court being of [*503 that opinion the judgment was reversed.(y) Where an indictment alleged that the inhabitants of three townships in a parish were liable to repair a public road, it was objected, but without success, that the indictment was bad for charging three townships conjointly; since, if all were liable, it was the separate neglect of each.(z)

Where lands bound to the repair of a bridge or highway *ratione tenuræ* are conveyed to several persons, every one of the grantees, being a tenant of any parcel, is liable to the whole charge, and must have contribution from the others. So where a manor so bound is conveyed to several persons, a tenant of any parcel, either of the demesnes or services, is liable to the whole repair, and may call upon the

(w) *Reg v. Heage*, 2 Q. B. 128 (42 E. C. L. R.).

(z) *Rex v. Kingsmoor*, 2 B. & C. 190 (9 E. C. L. R.).

(y) *Rex v. Machynlleth*, 2 B. & C. 166 (9 E. C. L. R.).

(x) *Rex v. Bishop Auckland*, 1 A. & E. 744 (28 E. C. L. R.).

tenants of the residue to contribute; and the grantees are chargeable with the repair, though the grantor shall convey the lands or manor discharged of the repair; and the grantees must have their remedy against the grantor. And the reason seems to be, because the whole manor or land, and every part thereof, in the possession of one tenant, being once chargeable with the repair, it shall remain so, notwithstanding any act of the owner. For the law will not suffer him to apportion the charge, and so make the remedy for the public benefit more difficult; or, by alienations to insolvent persons, to render the remedy against such persons quite frustrate. And though such lands or manor come into the hands of the crown, yet the obligation or duty continues; and any person afterwards claiming the whole, or any part of it, under the crown, will be liable to an indictment for not repairing.(a)

As an *inclosure* of a highway takes away the liberty and convenience which the public have of going upon the adjoining lands when the highway is out of repair,(c) it has been holden, that if the owner of lands not inclosed next adjoining to a highway incloses his lands on both sides, he is bound to make a *perfectly good way* as long as the inclosure lasts; and is not excused by showing that he has made the way as good as it was at the time of the inclosure; because, if it was then defective, the public might have gone upon the adjoining land.(d) So if a man incloses land on one side, which has been anciently inclosed on the other side, he ought to repair all the way; but if there is no such ancient inclosure on the other side, he ought to repair but half the way. Thus, if there be an old hedge time out of mind, belonging to A. on the one side of the way, and B. having land lying on the other side, make a new hedge, there B. shall be charged with the whole repair: but if A. make a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties.(e) A strong *opinion has been expressed that such liability does not accrue where either the highway is not immemorial, or where the adjoining land inclosed has not been used for passage before the inclosure.(f) And where such a liability exists it lies on the occupier of the lands inclosed and not on the owner as owner.(g) But a person, having made himself liable to repair a highway by reason of inclosure, may relieve himself from the burthen of any further reparations by throwing it open again.(h) Thus if a person remove an encroachment, and leave that part of the road which was injured by the encroachment in a perfect state, his liability to repair *ratione coarctationis* ceases.(i) But if a person charged *ratione tenuræ* pleads

(a) Note (9) to *Rex v. Stoughton*, 2 Saund. 159, citing *Reg. v. Duchess of Buccleugh*, 1 Salk. 358; 3 Viner, tit. *Apportionment*, 5 pl. 9.

(b) See the 25 & 26 Vict. c. 61, s. 46, where there are local boards.

(c) *Ante*, p. 461.

(d) 1 Roll. Abr. 390 (B.) pl. 1; *Duncombe's case*, Cro. Car. 366; *Henn's case*, Sir W. Jones, 296; Sty. 364; 2 Lord Raym. 1170; 1 Hawk. P. C. c. 76, s. 6; Bac. Abr. tit. *Highways* (F.); *Rex v. Stoughton*, 2 Saund. 160, note (12). And see *Steel v. Prickett*, 2 Stark. R. 469 (3 E. C. L. R.).

(e) Bac. Abr. tit. *Highways* (F.); *Rex v. Staughton*, 1 Sid. 464; 1 Hawk. P. C. c. 76, s. 7; *Rex v. Stoughton*, 2 Saund. 161, note (12).

(f) Per Erle, J., and *semble* per Crompton, J., in *Reg. v. Ramsden*, E. B. & E. 949 (96 E. C. L. R.). Where the origin of a road is recent, the circumstances of the dedication, or the user by which the right of road has been acquired, may well exclude any right to go on the adjoining land; *e. g.*, where the object of laying out a street is that houses may be built on both sides of it. See the judgment of Crompton, J., *Ibid*.

(g) *Reg. v. Ramsden*, *supra*. In this case the road indicted was set out under an inclosure Act, and the land on each side was allotted under the Act, which authorized the persons to whom the lands were allotted to inclose them; it is extremely difficult, therefore, to see how any liability could be incurred by making such an inclosure, and equally so to see how the public could have any right to go out of the line of road set out under the Act. In such a case the rights of the public and the liabilities of the owners would seem to depend entirely on the Act, and yet no notice whatever was taken of it in the case.

(h) Bac. Abr. *Ibid*.; *Rex v. Flecknow*, 1 Burr. 465; 1 Hawk. P. C. c. 76, s. 7. But where the party is charged with the repairing *ratione tenuræ*, he will be still bound to repair, though he lay the ground open to the highway: 3 Salk. 392.

(i) *Rex v. Skinner*, 5 Esp. 219.

at the liability to repair arose from an encroachment which has been removed, and it appears that the road has been repaired by the defendant for twenty-five years since the removal of the alleged encroachment; this is presumptive evidence that the defendant repaired *ratione tenuræ* generally, and renders it necessary for him to show the time when the encroachment was made. (k) Where a road has been so inclosed, and it is insufficient, any passenger may break down the inclosure, and go over the adjoining land. (l)

Where a new road is made in pursuance of a writ of *ad quod damnum*, (m) the owner of the land is not obliged to repair the new road, unless the jury impose such a condition upon him: but the parishioners ought to keep it in repair for the future; because, being discharged from repairing the old road, no new burden is laid upon them, but their labor is only transposed from one place to another. But if the new road lie in another parish, then the person who sued out the writ and his heirs ought not only to make it, but to keep it in repair; otherwise the parishioners of such other parish would have a new charge upon them, and no recompense, by the former road being taken away. (n) Where a highway is inclosed under the authority of an Act of Parliament for dividing and inclosing open common lands, the person who incloses is not bound to repair it. (o)

The General Turnpike Act, 3 Geo. 4, c. 126, s. 106, enacts, that it shall be lawful for the trustees or commissioners of any turnpike road, to contract and agree with any person or persons *liable to the repair of any part of the road, [505] under the care and management of such trustees or commissioners, or of any [505] ridges thereon, by tenure, or otherwise, for the repair thereof, for such term as they shall think proper not exceeding three years; and to contribute towards the repair of such road or bridges such sum or sums of money as they shall think proper out of the tolls arising on such turnpike road. The Turnpike Act, 4 Geo. 4, c. 95, s. 68, enacts, that where parts of old turnpike roads are widened, altered, diverted, or turned by legal authority, the body corporate and person who were liable to the repair of the old road shall be liable to the repair of the new, or so much thereof as shall be equal to the burthen and expense of repairing such old road from which they were exonerated by so altering the same. And if the several parties interested cannot agree, two justices are empowered in the manner therein mentioned to view and settle the same; and to fix a gross sum or annual sum, to be paid by the body corporate or person towards the repair of the new road, with their consent and in such manner as is therein mentioned.

The 4 Geo. 4, c. 95, s. 68, applies to parishes as well as to individuals. Where, therefore, disputes having arisen between two parishes as to the proportion of a turnpike road which each was bound to repair after it had been diverted by trustees, two justices made an order determining the proportions each parish was to repair; it was held that each parish was liable to repair the part so determined. (p)

The general statutes, making provision for repairing *highways*, were repealed and reduced into one Act: namely, the 5 & 6 Will. 4, c. 50, and the general statutes at present existing with respect to turnpike roads are the 3 Geo. 4, c. 126, and the 4 Geo. 4, c. 95. There are also inclosure Acts and other statutes, both of public and private nature, which relate to the repairs and management of the roads in particular places and districts. But these Acts, and especially the general statutes, are of great length, and branch out into a variety of clauses, a detail of which would not be consistent with the proposed limits of this work. It may, however, be useful to notice a few of the decided points which relate to their construction.

It is no excuse for parishioners, being indicted at common law for not repairing

(k) Id. Ibid.

(l) 3 Salk. 182.

(m) See note (k), *ante*, p. 475.

(n) Ex parte Vennor, 3 Atk. 771, 2; 1 Hawk. P. C. c. 76, ss. 7, 74, 75.

(o) Rex v. Flecknow, 1 Burr. 465.

(p) Reg. v. Barton, 11 A. & E. 343 (39 E. C. L. R.); 3 P. & D. 190. *Quære*, whether the Act applies where a parish is liable to repair one side of a road, and an individual the other.

the highways, that they have done their full work required by statute; for the statutes, being made in the affirmative, do not abrogate any provision of this kind by the common law (*q*)

If trustees under a road Act turn a road through an inclosure, and make the fences at their own expense, and repair them for several years, they cannot be compelled to continue such repairs, unless there be a special provision in the Act to that effect. (*r*) In this case it was considered, that what is meant by a road is the *506] surface over which the King's subjects have a right to pass, and *not the fences on each side; and that the owners of the land are bound to repair the fences on each side, unless otherwise provided by the Act. (*s*)

Where an indictment alleged in the usual way that the liege subjects could not pass and repass as they were wont and accustomed to do, and it appeared that there were precipices on the sides of the road, and no fences or guards to protect the passengers from such precipices, but there was no evidence of there having been any fences before, except that some had been put up after a former indictment; it was held that evidence of the want of fences was not admissible, for the public were in no worse a situation than they were wont and accustomed to be before, on account of the want of fences (*t*) So where an open ditch or sewer, which ran along the side of a highway, had existed from time immemorial, and was a tidal stream, and the commissioners of sewers had from time to time cleansed it, but had never put up any fence to it. There had formerly been a wooden fence, but it had been permitted to go to decay, and it did not appear by whom it was erected; it was held that the commissioners were under no obligation to protect the highway; for this was an ancient sewer, which had existed with the highway time out of mind, and therefore the public had only a right to the highway subject to the sewer. (*u*) It seems that a parish was not liable to cleanse the ditches by the side of a highway, but that the owners of the adjoining lands were liable to cleanse them under the provisions of the old highway Act. On an indictment which charged the inhabitants of a parish with neglecting to repair the drains, gutters, and ditches by which the water was accustomed to run off the road, it was objected that the parish were not liable to cleanse the drains; and Tindal, C. J., said, "Does the common law require the parish to cleanse the ditches? How do you get rid of the Highway Act?" (*v*)

It has been held that a turnpike Act, giving directions for repairing the road to and from a town, excludes the town. (*w*) The town had, lately before the Act was passed, been paved by the inhabitants, and it was kept in repair by them, and in several parts of the Act the roads were described as leading from, to, and through particular towns; but when it mentioned the town in question, it only said, to and from the town, omitting the word "through." (*x*)

*507] *So upon an indictment for illegally erecting a turnpike gate across a road leading "from the town of Cheltenham to a place called Hewlett's Hill," it was held that the town was excluded. (*y*) So where an indictment alleged a road

(*q*) 1 Hawk. P. C. c. 76, s. 43; Bac. Abr. tit. *Highways* (G.).

(*r*) *Rex v. The Com. of the Llandilo District*, 2 T. R. 232.

(*s*) *Ibid.*

(*t*) *Rex v. Whitney*, 7 C. & P. 208 (32 E. C. L. R.), Park, J. J. A.

(*u*) *Cornwell v. Metropolitan Commissioners of Sewers*, 10 Exch. R. 771.

(*v*) *Rex v. Upton on Severn*, MSS. C. S. G. Wor. Sum. Ass. 1833, Tindal, C. J. But see 5 & 6 Will. 4, c. 50, s. 67, which gives the surveyor power to cleanse all ditches, &c., he deems necessary, in and through any lands or grounds adjoining, or laying near to any highway. The 13 Geo. 3, c. 78, s. 8, made the occupiers of such lands liable to cleanse all ditches, &c., for keeping highways dry, under a penalty of ten shillings, but no such provision is contained in the 5 & 6 Will. 4, c. 50.

(*w*) *Hammond v. Brewer*, 1 Burr. R. 376. The word "town" in a local Act may be understood in a popular sense, as a congregation of houses so reasonably near that the inhabitants may be fairly said to dwell together: *Reg. v. Cottle*, 16 Q. B. 412 (71 E. C. L. R.), or a congregation of inhabited houses so near to each other that they may reasonably be said to be continuous, and the term will include a space of open ground surrounded by continuous houses, and it should seem also all open spaces occupied as mere accessories to such houses, although not so surrounded: *Elliott v. S. Devon R. Co.*, 2 Exch. R. 725.

(*x*) *Hammond v. Brewer*, 1 Burr. R. 376; and see *Rex v. Gamlingay*, post, p. 512; and *Rex v. Harrow*, 4 Burr. 2091.

(*y*) *Reg. v. Fisher*, 8 C. & P. 612 (34 E. C. L. R.), Patteson, J.

lead "from and through the town of Upton," towards the parish of Great Malvern, it was held that the town was thereby excluded.^(z) So where an indictment charged that the defendant erected a gate across a certain road "leading from the township of Detton" "unto the town of Cleobury Mortimer," and it appeared that the gate was erected across that part of the highway which was situate in the township of Detton; Coleridge, J., held that the indictment was not supported, as the words "from" and "to" excluded the termini.^(a)

The commissioners appointed by the 6 Geo. 3, c. 78 (an Act for dividing and closing certain lands in the parish of Cottingham) which enacted, that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by each person or persons as they should award, had no power to impose on the parish the large burden of repairing any of the private roads set out in pursuance of the Act.^(b)

And where under a similar Act the commissioners had made an order in 1802, that the private ways set out by them should be repaired by the inhabitants, and some of them had been used by the public in every way, and repaired by the parish up to 1825, when the inhabitants having, as was alleged, found out that they were not bound to obey the order, discontinued the repairs, and evidence was offered to show that the parish had been acting under a mistake; it was held that the inhabitants were not bound to obey the order, but that that was not conclusive of the case. In ordinary cases there was an owner of the land, but here there was none, except as directed by the Act; for the presumption that roads are the property of the adjacent owners (which is founded on the supposition that the roads originally passed over the lands of the owners, and therefore they still belong *ad medium viæ* to the adjacent owners) does not hold where roads are made under an Inclosure Act. The case turns on this question only, whether or no the parish required under a mistaken notion of liability. If they acted on a voluntary disposition on their part to repair a road, which was useful to a large class of persons, and for the convenience of the public, they ought to be convicted. If it was a mistake, they ought to be acquitted.^(c)

Upon an indictment against the parish of Haslingfield, for not repairing a highway, an award made by commissioners under an Inclosure Act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants, without showing that the commissioners had given notices which the Act required to be given previously to the boundaries having been ascertained by them; it appearing that the usage had not been pursuant to the award; the defendants having since the award, as well as before, repaired the highway. The learned judge who tried this case reported that he should have had no difficulty in admitting the award, if the usage had been pursuant to it, and presuming that the proper notices had been given.^(d)

We may now shortly consider the modes of proceeding by which persons guilty of these nuisances to highways may be prosecuted.

Nuisances or annoyances to highways, whether positive, in the nature of actual obstructions, or negative, by the defect of proper reparations, may be made the subject of indictment, which is the more usual course of proceeding. And formerly justices of assize and of the peace might have presented highways which were in need of repair, but now by the 5 & 6 Will. 4, c. 50, s. 99, it is not lawful "to take or

(z) *Rex v. Upton on Severn*, 6 C. & P. 132 (25 E. C. L. R.), Tindal, C. J., MSS. C. S. 11, s. C.

(a) *Reg. v. Botfield*, C. & Mars. 151.

(b) *Rex v. Cottingham*, 6 T. R. 20. See *Rex v. Wright*, 3 B. & Ad. 681 (23 E. C. L. R.); *ibid.*, p. 468. See *Rex v. Richards*, 8 T. R. 634, that a disobedience to repair a private road is not indictable, but an action lies by the party injured by the non-repair.

(c) *Rex v. Edmonton*, 1 M. & Rob. 24, Lord Tenterden, C. J. *Quære*, whether in such a case the soil be not in the lord of the manor: it was so before the Inclosure, and it would seem so to continue, unless there were an express provision vesting it elsewhere. C. S. 11. See accordingly, *Poole v. Huskinson*, 11 M. & W. 827, and *Johnson v. Hodgson*, 3 East B. 38.

(d) *Rex v. Haslingfield*, 2 M. & S. 558. See the cases, *ante*, p. 483.

commence any legal proceeding by presentment against the inhabitants of any parish, or other person, on account of any highway or turnpike road being out of repair."^(e)

A new mode of compelling the repairs of highways has been introduced by the 5 & 6 Will. 4, c. 50, s. 94, which enacts, that "if any highway(*g*) is out of repair, or is not well and sufficiently repaired and amended, and information thereof, on the oath of one credible witness, is given to any justice of the peace, it shall and may be lawful for such justice, and he is hereby authorized and required to issue a summons requiring the surveyor of the parish, or other person or body politic or corporate chargeable with such repairs, to appear before the justices at some special sessions for the highways in the said summons mentioned, to be held within the division in which the said highway may be situate; and the said justices shall either appoint some competent person to view the same, and report thereon to the justices in special sessions assembled, on a certain day and place to be then and there fixed, at which the said surveyor of the highways or other party as aforesaid, shall be directed to attend, or the said justices shall fix a day whereon they or any two of them shall attend to view the said highway; and if to the justices at special sessions, on the day and at the place so fixed as aforesaid, it shall appear, either on the report of the said person so appointed by them to view, or on the view of such justices, that the said highway is not in a state of thorough and effectual repair, they the said justices at such last-mentioned special sessions shall(*h*) convict *509] the said surveyor or *other party liable to the repair of the said highway in any penalty not exceeding five pounds, and shall make an order on the said surveyor, or other person or bodies politic or corporate liable to repair such highway, by which order they shall limit and appoint a time for the repairing of the same; and in default of such repairs being effectually made within the time so limited, the said surveyor, or such other person or body politic or corporate as aforesaid, shall forfeit and pay to some person to be named and appointed in a second order a sum of money to be therein stated, and which shall be equal in amount to the sum which the said justices shall, on the evidence produced before them, judge requisite for repairing such highway, which money shall be recoverable in the same manner as any forfeiture is recoverable under this Act, and such money when recovered shall be applied to the repair of such highway, and in case more parties than one are bound to repair any such highway, the said justices shall direct in their said order what proportion shall be paid by each of the said parties; provided, that if the said highway so out of repair is a part of the turnpike road, the said justices shall(*i*) summon the treasurer or surveyor or other officer of such turnpike road, and the order herein directed to be made shall be made on such treasurer or surveyor or other officer as aforesaid, and the money therein stated shall be recoverable as aforesaid; provided nevertheless that the said justices shall not have power to make such order as aforesaid in any case where the duty or obligation of repairing the said highway comes in question."

Sec. 95. "If on the hearing of any such summons respecting the repair of any highway the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required(*l*) to direct a bill of indictment

(e) See *Reg. v. Mawgan*, 8 A. & E. 496 (35 E. C. L. R.). A presentment and indictment differ: 2 Inst. 739; Comb. 225.

(g) This section only applies to cases where the way is admittedly a public highway, and the dispute confined to the liability to repair: *Reg. v. Heanor*, 6 Q. B. 748 (51 E. C. L. R.); and where a parish has been acquitted on an indictment ordered to be preferred under this section, the justices may well refuse to order another indictment: *Reg. v. Somersetshire*, 3 Law T. 316. The 25 & 26 Vict. c. 61, s. 18, provides for those cases where local boards are established under that Act.

(h) This is not compulsory, but the justices may exercise a discretion whether they will convict: *Reg. v. Lord Radnor*, 8 Dow. P. C. 717.

(i) See *Reg. v. Trafford*, 5 E. & B. 967 (85 E. C. L. R.).

(k) See the 25 & 26 Vict. c. 61, s. 19, where there is a local board.

(l) If the liability to repair is denied, the justices are bound to direct an indictment to be preferred: *Reg. v. Arnould*, 8 E. & B. 550 (92 E. C. L. R.).

ment to be preferred, and the necessary witnesses in support thereof to be subpoenaed, at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place wherein such highway shall be, against the inhabitants of the parish or the party to be named in such order for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall(m) be directed by the judge of assize before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rate made and levied in pursuance of this Act in the parish in which such highway shall be situate: provided nevertheless that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions(n) as aforesaid to remove such indictment by certiorari or otherwise into his Majesty's Court of King's Bench.

The 95th section of the 5 & 6 Will. 4, c. 50, is in force still in South Wales, notwithstanding the 23 & 24 Vict. c. 68.(nn)

On the hearing of a summons under secs. 94, 95, the surveyor denied that the road was a highway, and said that consequently he denied the liability of the parish to repair it. The justices proceeded to hear evidence as to the road being a highway, but another justice came in, and the discussion was renewed before him. The justices made the order without hearing further evidence. The Court of Queen's Bench made a rule absolute to bring up the order in order that it might be quashed. In any view of the statute the justices were not justified in making the order; either the road must be admitted to be a highway, or there must be evidence to satisfy them that the road is a highway.(oo) This case must not be taken as deciding that the justices have jurisdiction to try whether the road be a highway. See *Reg. v. Chedworth*, and other cases, p. 526 of Vol. I., which were not cited, and show that the true construction of sec. 95 is that it only applies where the road is confessedly a highway, but there is a dispute as to the party liable to repair it.

Another mode of proceeding is by *information*, which may be granted by the Court of King's Bench at their discretion. But they will not grant an information to compel a parish to repair a *highway which is not much used; and when it appears that another highway, equally convenient to the public, is in good repair. And indeed they never give leave to file an information for not repairing a highway, unless it appear that the grand jury have been guilty of gross misbehavior in not finding a bill; and they refuse it for this reason, that the fine set on conviction upon an information cannot be expended in the repair of the highway, whereas on an indictment it is always so expended.(o) But it has been granted against the inhabitants of a parish where it was shown that a bill of indictment had been thrown out by the grand jury, and that two of the grand jury were proprietors of land in the parish, and had taken an active part in opposing the finding of the indictment.(p)

A mandamus will not be granted to repair a road.(q)

Though it is often stated in indictments for nuisances to highways,(r) that, "from time whereof the memory of man is not to the contrary," or, "from time immemorial," there was and is a common and ancient King's highway, yet it is not necessary to do so; for it is sufficient to state in a compendious manner *that it is a highway*.(s) And if an indictment against a parish unnecessarily allege the road

(m) See *post*, p. 525

(n) An indictment found at the assizes may also be removed by the defendants: *Reg. v. Sandon*, 3 E. & B. 547 (77 E. C. L. R.).

(nn) *Reg. v. James*, 3 B. & S. 901 (113 E. C. L. R.).

(oo) *Reg. v. Askerton*, 11 Law T. 706.

(o) *Bac Abr. tit. Highways* (H.); *Rex v. Steyning*, Say. 92.

(p) *Reg. v. Upton St. Leonards*, 10 Q. B. 827 (59 E. C. L. R.).

(q) *Reg. v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 A. & E. 427 (40 E. C. L. R.).

(r) It is not within the scope of this work to treat particularly of the forms of the pleadings, though some of the prominent points concerning them are occasionally mentioned. For indictments, pleas, &c., relating to nuisances to highways the reader is referred to the *Cro. Circ. Comp.* (8th edit.) 301; 6 *Wentw.* 405; 2 *Stark.* 664; 3 *Chit. Cr. L.* 576, 607; and the notes to *Rex v. Stoughton*, 2 *Saund.* 157, *et seq.*

(s) *Aspindall v. Brown*, 3 T. R. 265.

to have existed "from time whereof the memory of man runneth not to the contrary," and it appear that part of the highway had been made within living memory, there is no variance, for in an indictment against a parish it is not material whether the way be immemorial or not, as the instant it becomes a public way the parish is liable.^(t) But it is otherwise where an immemorial custom is necessary to raise the liability. Where, therefore, an indictment for non-repair of a highway stated that the inhabitants of a tithing from time immemorial had been used and accustomed to repair the said highway, and the way in question had been set out as a private road and a drift-way under an inclosure Act in 1784, for the use of the adjoining owners, who were directed to repair it; and the award under a power in the Act extinguished all ways, both public and private, not set out in it. The way had been publicly used before the inclosure, and since had been repaired occasionally by the tithing, and been used to a great extent by the public. It was objected that whatever might be the facts as to the use and repair by the tithing before and since the inclosure, the award extinguished the road as a public way for some time at least, and therefore the allegation of immemorial user and liability to repair was not proved; and Maule, J., held that the indictment clearly failed on the facts.^(u) And though it is usual to state the *termini* of the highway, it is said not to be necessary; on the ground that a public highway is intended to go through all *511] the realm, and to lead from sea to sea.^(v) But if the *termini* are stated, they must be substantially proved, according to the statement:^(w) and the road must in general (if described at all) be described correctly. Thus, where a highway leading from A. to C., not passing through B., though communicating with it by means of a cross-road, was described as a road leading from A. to B., and from thence to C., the variance was held to be fatal.^(x) An indictment describing a footpath as leading from A. towards and unto the parish church, is satisfied by proof of a public way leading from A. to the parish church, though turning backwards between A. and the church at an acute angle, and though the part from A. to the angle be an immemorial way, and the part from the angle to the church be recently dedicated.^(y) So where an indictment alleged that the highway led from T. to E., and it appeared that a person travelling from T. to E. on the way described would pass into a turnpike road, travel a short distance along that road, and then turn off into a distinct road which led to E., it was objected that the portion of the highway between the turnpike road and E. was not part of a road from T. to E., inasmuch as a person leaving T. came into and travelled along a distinct line of turnpike road, before he entered upon the highway in question, which immediately led to E.; but the Court of Queen's Bench held that the way was properly described, as it was the nearest between T. and E., and a turnpike road is itself a parish road.^(z) So where an indictment described the highway as leading from the town of Abingdon to the village of East Hendred, and it appeared that to go from Abingdon to East Hendred with a carriage a person would go along the Chilton turnpike road for about four miles, and then into and along Featherbed Lane (which was the part indicted), and then cross the Wantage turnpike road, and then go for a short distance along a road which led from the Wantage turnpike road to the village of East Hendred; it was objected that the road was misdescribed, as parts of it were turnpike; but it was held that the description

(t) Reg. v. Turweston, 16 Q. B. 109 (71 E. C. L. R.).

(u) Reg. v. Westmark, 2 M. & Rob. 305.

(v) Rex v. Hammond, Str. 44; 10 Mod. 382; Halsell's case, Noy. 90; Latch. 183; Rex v. St. Weonards, 6 C. & P. 582 (25 E. C. L. R.); Rex v. Neale, 3 Keb. 89; Rouse v. Bardin, 1 H. Blac. 351; but see Lord Loughborough's judgment, who differed.

(w) Rouse v. Bardin, 1 H. Blac. 351; Rex v. St. Weonards, 6 C. & P. 582 (25 E. C. L. R.).

(x) Rex v. Great Canfield, cor. Ellenborough, C. J., 6 Esp. C. 136.

(y) Rex v. Marchioness of Downshire, 4 A. & E. 232 (31 E. C. L. R.); 5 N. & M. 662. If the indictment had described it as an immemorial way from A. to the church, it would have been bad. Per Lord Denman and Coleridge, J. But see *ante*, p. 510.

(z) Reg. v. Turweston, 16 Q. B. 109 (71 E. C. L. R.). So where part is an ancient highway, and part of recent date, it may well be described as a highway: Rex v. Marchioness of Downshire, *supra*.

ficient; for a road is not the less a highway because part of it happens to runpike road.(a)

the *termini* of the part out of repair are not material. Where, therefore, repaired part of a highway was described as leading out of a highway "at a place called Parkside," and the place was Parkgate; it was held that this material.(b)

highway must be alleged in the indictment to lie in the parish indicted, as such parish is not bound to repair it; and if it be not so alleged, the indictment is erroneous, and judgment will be reversed.(c) Where an indictment that "there was a highway in the town of Bishop Auckland, in the [512] of St. Andrew Auckland, and that certain parts of the same highway, were set out, and laid to be in the town of Bishop Auckland, were out of and that the inhabitants of the township of Bondgate in Auckland, Newgate kland, and the borough of Auckland, in the parish of St. Andrew Auckland, were bound to repair the same; it was held that the indictment was bad, because it did not show that the parts out of repair were within the townships indicted.(d) It is no cure the objection, that the part which is out of repair is expressly alleged to be in the parish indicted, if such part be represented as part of the road described. Thus, where an indictment against the parish of Gamlingay that there was a highway leading from the parish of Hartley St. George, and unto the parish of Gamlingay, and that a certain part of the said highway situate in the said parish of Gamlingay was out of repair, it was moved in arrest of judgment that no part of the road, as described, lay in Gamlingay; and the court held the objection fatal.(e) So where an indictment against the parish of Severn stated that there was a highway "from and through the town of Severn," and there was no express averment that the part out of repair was in the parish, it was held bad.(f) But where an indictment charged that the defendant removed the gravel over a culvert in the parish of Studley opposite to there in a certain King's common highway there leading from Studley to upon Arden, it was objected that it did not distinctly appear that the road charged was in the parish of Studley, and *Rex v. Gamlingay*(g) was relied upon; it was held that the indictment in that case differed essentially from this indictment because there was a distinct allegation that the nuisance was committed in the parish of Studley. The words leading from Studley to Henley would *prima facie* import that it was a highway leading from a vill in the parish, and, therefore, was considered as a highway leading from a vill or town situate in the parish of Henley place.(h) Where an indictment charged that the defendant at the village of W. upon a highway there leading from a highway leading from the village of W. towards the parish church of C. towards and unto a highway leading from the said village of W. towards and unto the township of L. W. by a certain highway extending into the said highway unlawfully encroached, it was held that the words "there" and "said" could only be referred to the first-mentioned highway, and that the indictment was sufficient.(i) Where the indictment is against a particular person, charging him with the repair of a highway in respect of certain land, it seems that the occupier, and not the owner, is the proper person against whom the indictment should be brought; on the ground that the "public" [513] means of knowing who is the owner of the lands charged with the

eg. v. Steventon, 1 C. & K. 55 (47 E. C. L. R.), Erskine, J., and the Court of Q. B. gave a rule for a new trial.

eg. v. Waverton, 17 Q. B. 562 (79 E. C. L. R.). (c) *Rex v. Hartford*, Cowp. 111.

ex v. Bishop Auckland, 1 A. & E. 744 (28 E. C. L. R.).

ex v. Gamlingay, 3 T. R. 513. And see *Hammond v. Brewer*, ante, p. 506, and

J. Bardin, 1 H. Blac. 356, Lord Loughborough's judgment.

Rex v. Upton on Severn, 6 C. & P. 132 (25 E. C. L. R.), Tindal, C. J. MSS. C.

supra.

ex v. Knight, 7 B. & C. 413 (14 E. C. L. R.); 1 M. & R. 217. Lord Tenterden, C. J., cited the propriety of the decision in *Rex v. Gamlingay*, saying that, in common law, the words "leading from a place," include as well as exclude that place. See *Whittle*, 6 Exch. R. 411.

ex v. Wright, 1 A. & E. 434 (28 E. C. L. R.).

repair: and it does not seem to be material what estate the occupier has in the lands liable.^(k) The averment of obligation to repair, in an indictment against a person for not repairing *by reason of tenure*, will, it seems, be sufficient, if it state that the defendant ought to repair *by reason of the tenure of his lands*, without adding that those who held the lands for the time being have *immemorially* repaired; a prescription being implied in the estate of inheritance in the land.^(l) But it is not sufficient to state that the party is chargeable by being owner and proprietor of the property subject to the charge.^(m) But an indictment against *a particular part of a parish*, such as a district, township, division, or the like, for not repairing a highway in the parish, stating that the inhabitants of the district from time immemorial *ought to repair and amend it*, is erroneous; it should state that the inhabitants of such district from the time whereof, &c., *have used and been accustomed*, and of right ought to repair and amend it: for the inhabitants of a particular division of a parish not being bound to repair by common law, and their obligation arising necessarily only from custom or prescription, the indictment ought to show such custom, prescription or reason of their obligation.⁽ⁿ⁾ So it was decided that a presentment under the 13 Geo. 3, c. 78, s. 24 (now repealed) against a smaller district than a parish, must have stated expressly *how* the inhabitants thereof were liable to the repair of the roads, or that they have been liable immemorially.^(o) We have seen that a material variance from the description of the road in the indictment will be fatal; so that a highway leading from A. to B., and communicating with C. by a cross-road, cannot be described as a highway leading from A. to C., and from thence to B.^(p) In every indictment against a parish for not repairing a highway, there are three essential averments: the first, that the road is a highway; the second, that it is out of repair; and the third, that it is situated in the parish.^(q)

Where the first count of an indictment alleged that there was a highway in the county of C., and that "a certain part of the said highway situate, &c., in the township of W. in the parish of W. in the county aforesaid (describing it, and stating its length and breadth) was very ruinous," &c.: and the second count alleged an immemorial usage for the inhabitants of the said township to amend so many of the highways, situate in the said township, as would otherwise be repairable by the parish at large, and that "*the said part of the same common highway hereinbefore mentioned to be ruinous, &c., as aforesaid*" was a highway, which but for the said usage would be repairable by the parish at large; and that by reason of the premises the inhabitants of the said township ought to have repaired "*the same part of the said common highway so being ruinous, &c., as aforesaid*;" the jury having found the *de-
 *514] fendants not guilty on the first count, but guilty on the second, it was objected, in arrest of judgment, that the second count was bad on the ground that it did not contain any sufficient averment that the highway was in the township, or out of repair; but the Court of Queen's Bench held that the words "so being ruinous, &c., as aforesaid," were a clear and specific reference to the first count, which contained a formal allegation that this part of the highway was out of repair, and there were many authorities to show that one count of an indictment might refer to another, and that under such circumstances the maxim applies *verba relata inesse videntur*. And as to the objection, that the second count did not show that the part indicted was situate in the township of W.; it had been determined that any qualities or adjuncts averred in one count to belong to any subject, if they are separate from it, shall not be supposed to be alleged as belonging to it in a subsequent count, which merely introduces it by reference as the same subject "before mentioned."^(r) But the local situation

(k) *Reg. v. Watts*, 1 Salk. 357; *Reg. v. Bucknell*, 7 Mod. 55; *Rex v. Sutton*, 3 A. & E. 597 (30 E. C. L. R.).

(l) *Rex v. Stoughton*, 2 Saund. 158 d. note (9); 1 Chit. C. L. 475, *et seq.*

(m) *Rex v. Kerrison*, 1 M. & S. 435. See *Russell v. Shenton*, 3 Q. B. 449 (43 E. C. L. R.).

(n) *Ante*, note (l); *Rex v. Broughton*, 5 Burr. 2700; *Freem. 522*; *Rex v. Stoughton*; *Rex v. Sheffield*, 2 T. R. 111.

(o) *Rex v. Penderryn*, 2 T. R. 513; *Rex v. Marton*, Andr. 276.

(p) *Rex v. Great Canfield*, 6 Esp. 136, *ante*, note (x), p. 511.

(q) 2 Stark. Crim. Plead. 667, note (f).

(r) See *Reg. v. Martin*, 9 C. & P. 215 (38 E. C. L. R.); *Reg. v. Waters*, 1 Dou. C. C. 356—

of the part of the highway described must necessarily and invariably belong to it, and if once described as being in a particular township, when there is afterwards enough to identify it as being what is so described, a repetition of the allegation that it is within the township is not strictly necessary.^(s)

A highway may be described as a common highway for carts, carriages, &c., although it has always been arched over, provided it be capable of being used by all ordinary carriages and notwithstanding the archway be not sufficiently high to permit road wagons and other carriages of unusual dimensions to pass under it.^(t)

Where an indictment charged the non-repair of a highway for horses, coaches, carts, and carriages, and there was no evidence that any carriages had ever gone the whole length of it, but the road had been repaired by the parish, and persons on horseback had frequently passed along it, it was held that the defendants could not be convicted, as there was no count charging that it was a road for horses.^(u) And where an indictment stated that there was a pack and prime way between certain specified places, and it appeared that part of that road was a turnpike road, it was held that this was fatal, for the statement in the indictment was matter of description, and must be proved as laid.^(v) On an indictment for obstructing a footway leading from a turnpike road to Gravesend, it appeared that from the turnpike road to the top of a hill the road was a carriage way, but from thence to Gravesend it was a footway, and the obstruction was in the latter part, and it was held that, assuming this to be a misdescription, it was amendable under the 14 & 15 Vict. c. 100, s. 1.^(w)

In order to support a claim to a right of way there must be evidence of some defined way in some particular direction: *where therefore a place had been an open place in Epping Forest, and people had always been used to go over it, as over the rest of the forest, wherever they liked and wherever they could, but there was no distinct evidence of any definite way in any particular direction, and though there were tracks from time to time, which might last for a few weeks or months, there was no beaten or enduring track which had lasted for years; Wightman, J., directed the jury that if they thought that there was no regular way, but that people merely went where they liked, they should find against the right of way.^(x)

A map made by order of a former lord of a manor in which a way lies, which has been used for more than thirty years by the stewards of the manor, for the purpose of defining the copyholds, and which set out the way in question, but did not describe it as a highway, and set out other ways in a similar manner which were only occupation roads, is not admissible as a declaration by a deceased person as to a public highway; for the map, if a declaration at all, was only a declaration as to the matter for which it had been used, viz., the defining the copyholds, and the map itself did not describe the way as a highway.^(y) Where on an indictment for non-repair of a highway a map of the parish was produced from the parish chest, and the person who made the map thirty-four years before the trial proved that he laid down the boundaries from the information of an old man then about sixty, who went round and showed them, it was held that this map would have been receivable as evidence of reputation, if the old man was dead, but that it was not receivable without proof of his death.^(z)

Where a person who is bound *ratione tenuræ* to repair a highway lives out of the

^(s) *Reg. v. Waverton*, 2 Den. C. C. 340; 17 Q. B. 562 (79 E. C. L. R.). Both the judgment and the marginal note treat this case as if the question being raised after verdict made a difference; but it is clearly erroneous so to treat it.

^(t) *Rex v. Lynn*, 1 C. & P. 527 (12 E. C. L. R.), *totâ curiâ*, B. R.

^(u) *Rex v. St. Weonards*, 5 C. & P. 579 (24 E. C. L. R.), Parke, B.

^(v) *Rex v. St. Weonards*, 6 C. & P. 582 (25 E. C. L. R.), Alderson, B. and Williams, J.

^(w) *Reg. v. Sturge*, 3 E. & B. 734 (77 E. C. L. R.).

^(x) *Schwinge v. Dowell*, 2 F. & F. 845. There was a similar case at Gloucester, where a way was claimed over a common; and Littledale, J., very strongly directed the jury that they could not find that there was a right of way unless some one particular line had been regularly used by the public. See also *Chapman v. Cripps*, 2 F. & F. 864; s. p. per Erie, C. J.

^(y) *Pipe v. Fulcher*, 1 E. & E. 111 (102 E. C. L. R.).

^(z) *Reg. v. Milton*, 1 C. & K. 58 (47 E. C. L. R.), Erskine, J., who also held that the map was not admissible without proof of the inclosure Act under which it was made.

county in which such a highway is situate, he may nevertheless be indicted in such county for not repairing it. (a)

If the description of a highway in an indictment for the non-repair of it be too indefinite, being equally applicable to several highways, advantage should be taken by plea in abatement; and the description given, if true in fact, cannot be objected to at the trial under the plea of the general issue. (b)

When an indictment is against the inhabitants of a parish at large, who, as it has been seen, are bound of common right to repair all the highways lying within it, they may upon the general issue, *not guilty*, show that the highway is in repair, or that it is not a highway, or that it does not lie within the parish; for all these are facts which the prosecutor must allege in his indictment, and prove on the plea of not guilty. (c)

On an indictment for non-repair of a highway it appeared that *it had always been a green road, and was in very bad repair. Patteson, J., told the jury that it was not enough to say that it was as good as ever it was, or as it usually had been; and that if it were a public road, and the necessities of the public required it, the inhabitants might be bound to convert it from a green road into a hard road; it was contended that this was a misdirection, that the road was proved to be in as good a state as it had ever been, and that that was an answer to the indictment; but it was held that the direction was right; and that the degree of repair necessary had reference to the existing use of the road; if the road was little used, then little repair was necessary; but if much used, then proportionably more. (d) On an indictment for non-repair of a highway it appeared that the road was an old soft road formed of weald of Kent clay, and had never been repaired with hard substances; the defence was that the parish was not bound to make the road a hard road, and that they had sufficiently repaired it by hacking in the ruts, as had before been the custom. Blackburn, J., told the jury that the parish was not bound to make the road hard, or bring stone or other hard substances to repair the road; but they were bound in some way, by stone or other hard substances, if necessary, to put the road in such repair as to be reasonably passable for the ordinary traffic of the neighborhood at all seasons of the year. (e) But it is settled that the parish cannot, upon the general issue, throw the burthen of repairing on particular persons, by prescription or otherwise: but must set forth their discharge in a special plea. (f) This rule, however, was recently held not to apply to a case where the burthen of repairing was transferred from the inhabitants of a parish to other persons by a public Act of Parliament, to which all are supposed to be privy, and of which all are supposed to have cognizance. (g) Where a person is charged with the repairs of a highway or bridge, *against common right*, he may discharge himself upon *not guilty* to the indictment: and therefore where a particular division of a parish is charged with the repair by prescription, or a particular person by reason of tenure or the like, which are obligations against the common law, they may throw the burthen either on the parish, or even on an individual on the general issue. And the reason seems to be, because upon this issue the prosecutor is bound to prove that the defendants are chargeable by tenure or prescription, and therefore the defendants may disprove it by opposite evidence; but if they will, though unnecessarily, plead the special matter, it is held not to be enough to say that they ought not to repair, but they must go further and show *who ought*. (h)

If a parish consisting of several townships be indicted for not repairing a road within it, a plea that each township has immemorially maintained its own roads must show how much of the road indicted lies in one township, and how much in another.

(a) *Rex v. Clifton*, 5 T. R. 502, 503.

(b) *Rex v. Hammersmith*, 1 Stark. Rep. 357 (2 E. C. L. R.). Particulars of the roads indicted may be obtained. See *ante*, p. 456.

(c) *Rex v. Norwich*, 1 Str. 181, *et seq.*; *Rex v. Stoughton*, 2 Saund. 158, note (3).

(d) *Reg. v. Henley*, 2 Cox C. C. 334.

(e) *Reg. v. High Halden*, 1 F. & F. 678.

(f) *Rex v. St. Andrews*, 1 Mod. 112; *Anon.*, 1 Vent. 256.

(g) *Rex v. St. George*, 3 Campb. 222.

(h) *Rex v. Yarnton*, 1 Sid. 140; *Rex v. Hornsey*, Carth. 213; *Rex v. City of Norwich*, 1 Str. 180, *et seq.*; *Rex v. St. Andrews*, 3 Salk. 183, pl. 3; *Rex v. Stoughton*, 2 Saund. 159 a, note (10).

other; for *it is considered that the parish must know the limits of each township, and is bound to show with certainty the parties liable to repair [*517 every part of the highway indicted, and in what right they are so liable.(i) Where to an indictment for non-repair of a road the parish plead specially that particular individuals are liable *ratione tenuræ* to repair parts of the road indicted, they must accurately describe the parts such persons are respectively liable to repair, for they can only discharge themselves by showing precisely who are liable, and for what particular parts of the road. To an indictment against a parish for not repairing a road beginning at the confines of the parish of L. and ending at B., containing in length 2390 yards, the parish pleaded as to part commencing at the confines of the parish of L., and continuing thence onward in length 363 yards *or thereabouts*, that the same adjoined on the north-east side thereof to certain lands in the occupation of V. as tenant to P., and on the south-west side to certain other lands in the occupation of J. as tenant to the said P., and that the said P., by reason of the tenure of such lands ought to repair such part of the said highway adjoining to the said lands being in length as aforesaid *or thereabouts*, when and as often as there should be occasion, &c.; and as to another part commencing at the termination of the said part of the said highway last described, and continuing thence onwards in length 499 yards *or thereabouts*, that the same on each side thereof adjoined to certain other lands in the occupation of B. as tenant to C., and that C. by reason of his tenure of such lands ought to repair such part of the said highway adjoining to the last-mentioned lands.(k) The replication was that P. C., &c., by reason of their several and respective tenures of the said several lands ought not respectively to repair such part of the said highway respectively as adjoins to the lands in the several and respective tenures of the said P. C., &c., *modo et formâ*. It appeared that on entering the road from the parish of L. the land of P. extended on both sides of the road, but about eighteen yards further on the left than on the right-hand side. Where P.'s land ended C.'s land began on each side of the road, so that for the eighteen yards P.'s land and C.'s were opposite to each other. It was objected that there was a misdescription, for it was stated that P. was bound to repair the whole road and C. the whole road, but the evidence was that there were about eighteen yards in which P. and C. would be bound to repair *ad medium filum viæ*. It was answered, that the form of the issue, as well as the substance, was, whether persons holding lands were bound to repair the road adjoining to their lands—that the statement of so many yards "*or thereabouts*," left it quite at large, as much as if it had been alleged under a *videlicet*; but it was held that the plea was not proved; for it was an entire plea which the defendants were bound wholly to prove, and as no part of the plea stated that P. and C. were bound to repair up to the middle of the road there was a variance.(l)

*Where a plea to an indictment in the ordinary form against a parish for non-repair of a road, alleged that the road lay within a township, and that the inhabitants of the township had been accustomed from time immemorial to repair all highways within the township, which otherwise would be repairable by the parish at large, and that the inhabitants of the parish at large had not been accustomed to repair the highways within the township, and that by reason of the premises the township ought to repair the said road, and the replication traversed the custom for the township to repair all highways within it as stated in the plea, and a verdict was found for the defendants; judgment was arrested, because the plea did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and so did not show what party other than the defendants was liable to repair it (m)

If a person indicted for non-repairing *ratione tenuræ*, or a township, or particular persons, indicted for non-repairing by prescription, plead (though unnecessarily) to

(i) *Rex v. Bridekirk*, 11 East 304.

(k) The plea proceeded to aver the liability of the owners of the adjoining lands to repair the residue of the road in a similar manner.

(l) *Rex v. Rockfield*, Monm. Summer Ass. 1830, Bosanquet, J. There were similar variances in the proof as to the other parts of the road: MSS. C. S. G.

(m) *Rex v. Eastrington*, 5 A. & E. 765 (31 E. C. L. R.); *Reg. v. Colling*, 2 Cox C. C. 184.

the indictment, and show who ought to repair, as they must do, it is necessary to traverse their obligation to repair: but if a parish be indicted for not repairing a highway, or a county for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to repair, for it is a traverse of matter of law; and such traverse, though very often inserted, is demurrable, and therefore ought always to be omitted.⁽ⁿ⁾ Where an indictment charged that the defendant ought to repair *ratione tenuræ* of certain lands inclosed and encroached by him out of the highway, a plea, traversing the obligation *ratione tenuræ*, was held good; on the ground that it professed to charge the defendant *ratione tenuræ*, and not by reason of the encroachment; and that the obligation *ratione tenuræ* would continue, though the land should be again thrown open to the highway, whereas the obligation by reason of the encroachment would not.^(o)

Where an indictment for the non-repair of a highway in Wingfield alleged that the defendant was liable by reason of the tenure of certain lands in Wingfield, and it appeared that the defendant occupied a farm, and that the occupiers of that farm had for a long series of years repaired the road; but the farm was made up of lands lying in Wingfield and three other parishes, in two of which there was a part of the same road, also repaired by the occupier of the farm; Rolfe, B., left it to the jury to say whether the liability, if proved, was in respect of the part of the farm in Wingfield to repair the road in Wingfield; and told them they must be satisfied that the liability was in respect of that part only in order to convict on this indictment. If the liability was a liability to repair the road passing through the three parishes *519] reason of the joint occupation of the whole farm the defendant must be acquitted.^(p)

In one case it was held that evidence of reputation could not be admitted to establish a liability to repair *ratione tenuræ*, that liability being a matter of a private nature.^(q) But it has since been held that evidence of reputation is admissible in such a case.^(r)

Where the inhabitants of a parish pleaded that the inhabitants of a particular district were bound by prescription to repair all common highways situate within that district, save and except one common highway within the said district, it was holden that the plea might be supported, although it appeared that the excepted highway was of recent date; and it was also holden that in such a plea it was not necessary to state by whom the excepted highway was repairable.^(s) And such a plea will be good although it does not state any consideration for the liability of the inhabitants of the district.^(t)

Where any subdivision of a parish is liable to the repair of a highway, and the indictment is, notwithstanding, preferred against the whole parish, care should be taken to plead the liability of such subdivision; for if judgment be given against the parish, whether after verdict upon not guilty, or by default, the judgment will be conclusive evidence of the liability of the *whole parish* to repair, unless *fraud* can be shown.^(u) Fraud, however, is only put for example; for if the other districts can show that they had no notice of the indictment, and that the defence was made and conducted entirely by the district in which the highway indicted lay, without their knowledge

(n) *Rex v. Stoughton*, 2 Saund. 159, c. note (10); *Bennett v. Filkins*, 1 Saund. 23, note (5). In *Rex v. Ecclesfield*, 1 B. & A. 350, 351, J. Williams *arguendo* denied that such traverse is demurrable: and said that *Rex v. Inhabitants of Glamorgan* contained such a traverse (2 East 356, *in notis*), and that the better precedents have always inserted it. Supposing such traverse to be necessary, it is sufficiently expressed by a plea concluding thus, "And that the inhabitants of the said parish at large ought not to be charged with the repairing and amending the same."

(o) *Rex v. Stoughton*, 2 Saund. 160.

(p) *Reg. v. Mizen*, 2 M. & Rob. 382.

(q) *Reg. v. Wavertree*, 2 M. & Rob. 353, Maule, J.

(r) *Reg. v. Bedfordshire*, 4 E. & B. 535 (82 E. C. L. R.).

(s) *Rex v. Ecclesfield*, 1 Stark. Rep. 393 (2 E. C. L. R.).

(t) *Rex v. Ecclesfield*, 1 B. & A. 348.

(u) *Rex v. St. Pancras*, Peake Rep. 219; *Rex v. Whitney*, 7 C. & P. 208 (32 E. C. L. R.). *Park, J. J. A.*, see the same case, 3 A. & E. 69 (30 E. C. L. R.). And in a case of a prescription for a public right of way, a verdict against one defendant negating such a right, is evidence against another defendant who justifies under the same right: *Reynolds v. Jackson*, 1 East Rep. 355.

ky, the Court will consider it as being substantially an indictment against that, and give the other districts leave to plead the prescription to a subsequent sent for not repairing the highways in that parish.(v)

re to an indictment for not repairing a highway against the parish of Eardis-nsisting of three townships, Eardisland, Burton, and Hardwicke, there was a the part of Burton that each of the three townships had immemorially re-its own highways separately; it was held that the records of indictments the parish generally for not repairing highways situate in the township of and, and the township of Hardwicke, with general pleas of *not guilty*, and ions thereupon, were *primâ facie* evidence to disprove the custom for each ip to repair separately; but that evidence was admissible to show that these f *not guilty* were pleaded only by the inhabitants of the townships of Eardis-d Hardwicke, without the privity of Burton.(w)

a defendant was indicted for the non-repair of a highway, which it was he was liable to repair *ratione tenuræ* of certain lands called Saw-pit [*520 and pleaded not guilty. To prove this liability evidence was given of the con-of W. Smith, a former owner and occupier of the same lands, for the non-re-the same highway, showing that in the year 1801 a presentment had been ad against him, alleging his liability to repair it *ratione tenuræ* of the lands Saw-pit Field, to which he pleaded guilty. Evidence was also given of the of the said highway subsequently to the said conviction of W. Smith by the rs of the lands, of which Saw-pit Field formed part; that public notice was rhen Saw-pit Field was offered for sale of the liability to repair the highway tion, and that the defendant, who purchased the lands after such notice, was ie owner and occupier of Saw-pit Field; and, upon a case reserved after a of guilty, the judges were unanimously of opinion that there was evidence to he jury of immemorial usage, and of the defendant's liability to repair the y *ratione tenuræ*; and Parke, B., Alderson, B., Patteson, J., and Coleridge, e of opinion that the conviction of W. Smith estopped the defendant, who ivy to him in estate, from denying his liability *ratione tenuræ*. If the de-t had pleaded that he was not liable *ratione tenuræ*, then the prosecutor might eplied the previous conviction as an estoppel, but as he had pleaded the issue, there was no opportunity of pleading the conviction as an estoppel, and re the prosecutor might take advantage of it upon the evidence as conclu-) And on an indictment for non-repair of a highway against a township z it to be liable by prescription to repair such highways in the township as the but for the prescription would have been liable to repair, with a plea of not a record of a presentment by a justice, under the 13 Geo. 3, c. 78, on his own hat the road in question was out of repair, and alleging that it was in the ip, and that the township ought to repair it, with a plea of guilty by two of abitants, and a sentence of a fine, was held conclusive evidence against the ip that the highway was situate within it and that the township was liable to t; and that, though the presentment might be bad on demurrer, in arrest of nt or on error, the conviction being before a competent tribunal, and unre- was not the less an estoppel. It was also held that it was unnecessary to hat the fine had been paid, as no fraud or collusion was shown.(y) So where ran over a waste in the township of Ecclesall, but had always been repaired by , both before and after an inclosure Act for Ecclesall, and three years before losure Act Hallam had submitted to an indictment for non-repair of the road; held that that conviction was conclusive evidence that the road lay in Hallam, at an award under the Act was void as to that road, as the commissioners had rsidiction over roads in Ecclesall (z)

ex v. Stoughton, 2 Saund. 159, c. note (10); Rex v. Townsend, Dougl. 421, *post*,

lex v. Eardisland, 2 Camp. 494. (z) Reg. v. Blakemore, 2 Den. C. C. 410.
eg. v. Haughton, 1 E. & B. 501 (72 E. C. L. R.). It was also held that a recital in that the highway was in another township was only evidence, and did not prevail e estoppel.
eg. v. Nether Hallam, 6 Cox C. C. 435. A verdict of guilty and judgment thereon
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On an indictment for continuing a nuisance upon a highway, the judgment on an indictment for the same nuisance, which was the erection of a wall, is conclusive evidence, and no evidence to the contrary is admissible.(zz)

*521] Upon an indictment against the inhabitants of the township of B., it appeared that the road indicted passed through three adjoining townships, B., Attercliffe, and T.; and the Court of Queen's Bench held that the record of an indictment against the township of Attercliffe for non-repair of part of the highway in that township, to which that township appeared to have submitted, was admissible for the purpose of proving that the way in question was a highway. It was clear that user by the public and repair by the township would be admissible as facts raising presumption of highway; and an indictment was another fact of the same class: and proceedings at law to compel the repair of a highway (when submitted to) show it right as much or more than acts of repair without compulsion would have done.(a)

It has been held that the record of an acquittal upon an indictment for not repairing a highway is not evidence to show that the parish is *not liable*: on the ground that some other parties might have indicted them, and that those parties could not be bound by this record.(b) And a satisfactory reason for rejecting such evidence altogether seems to be that the acquittal might have proceeded upon the want of proof that the road was out of repair.(c) In the case of an indictment for not repairing a highway, which it was alleged the defendant was bound to repair *ratione tenuræ*, it was held that an award made under a submission by a former tenant for years of the premises, could neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *post litem motam*.(d)

The 5 & 6 Will. 4, c. 50, s. 100, enacts, that "no person shall be deemed incompetent to give evidence or be disqualified from giving testimony or evidence in any action, suit, prosecution, or other legal proceedings to be brought or had in any Court of law or equity, or before any justice or justices of the peace, under or by virtue of this Act, by reason of being an inhabitant of the parish in which any offence shall be committed, or of being a treasurer, clerk, surveyor, district surveyor, assistant surveyor, collector, or other officer appointed by virtue of this Act, nor shall such testimony or evidence for any of the reasons aforesaid be rejected or liable to be questioned or set aside." The inhabitants of a parish indicted for not repairing a highway were not competent to give evidence for the defendants.(e) under the 13 Geo. 3, c. 78, and it has been held that they were not rendered competent by the 54 Geo. 3, c. 124, s. 9.(f)

*522] On an indictment for not repairing a highway, the prosecutor was examined as a witness for the prosecution, and no objection was taken to his competency;(h) and it seems that the prosecutor was a competent witness, under the 13 Geo. 3, c. 78, for, though the Court was authorized to award costs against him in

in an indictment for obstructing a highway cannot be pleaded as an *estoppel* in an action brought by the party convicted against a person for using the way: *Petrie v. Nuttall*, 11 Exc. R. 569. *Sed quære*; for it is just like the case of an order of removal confirmed on appeal, which is conclusive against the parish as to all other parishes. See 2 Nol. P. L. 578.

(zz) *Reg. v. Maybury*, 4 F. & F. 90. *Martin, B.*, on the authority of *Reg. v. Haughton*, 1 E. & B. 501 (72 E. C. L. R.).

(a) *Reg. v. Brightside Bierlow*, 13 Q. B. 933 (66 E. C. L. R.).

(b) *Rex v. St. Pancras*, Peake Rep. 219.

(c) *Mann. Ind. N. P. R.* 128.

(d) *Rex v. Cotton*, 3 Camp. 444, *cor. Dampier, J.*

(e) *Rex v. Wadsworth*, 1 B. & A. 63. See 15 East 474.

(f) *Rex v. Bishops Auckland*, 1 A. & E. 744 (28 E. C. L. R.); 1 M. & Rob. 286. This case was decided on the authority of *Oxenden v. Palmer*, 2 B. & Ad. 236 (22 E. C. L. R.). In *Doe v. Adderley*, 8 A. & E. 502 (35 E. C. L. R.), the court, after taking time to consider, held that rated inhabitants were competent witnesses, under the 54 Geo. 3, c. 124, s. 9, for the parish officers in an ejectment brought by them, and said, "we cannot agree with *Oxenden v. Palmer*, and the decisions to which it has given birth." So that *Rex v. Bishops Auckland* seems to be overruled. See also *Morrell v. Martin*, 6 Bing. N. C. 373 (37 E. C. L. R.), and the 3 & 4 Vict. c. 26, s. 1, 6 & 7 Vict. c. 75, and 14 & 15 Vict. c. 99, *post, Evidence*.

(h) *Rex v. Hammersmith*, 1 Starkie R. 337 (2 E. C. L. R.).

the proceeding was vexatious,⁽ⁱ⁾ yet the Court would scarcely presume that the prosecutor's conduct had been vexatious, so as to raise an objection to his competency, specially after the finding of a bill by the grand jury.^(k) The 5 & 6 Will. 4, c. 50, does not give any costs against the prosecutor, so that he seems now clearly to be a competent witness.

Though the 13 Geo. 3, c. 78, s. 24, declared that no presentments or indictments could be removed by *certiorari* before traverse and judgment, except where the obligation of repairing came in question, yet this clause did not take away the writ at the instance of the prosecutor, for the crown does not traverse; and it was calculated merely to prevent delay on the part of defendants.^(l) And it was held to be no objection to a *certiorari* to remove such a presentment, that it was prosecuted by other than the justice presenting, if it were by his consent.^(m) The 5 Will. & M.

11, s. 6, also provided, that if any indictment or presentment be against any persons for not repairing highways or bridges, and the right or title to repair the same may come in question, upon a suggestion and affidavit made of the truth thereof, a *certiorari* may be granted, provided that the party prosecuting such *certiorari* enter into a recognizance mentioned in the Act. Upon an indictment against a parish for not repairing a highway, the right to repair may come in question so as to entitle the parish to remove it by *certiorari*, though the parish plead not guilty only, it being stated in an affidavit filed by the defendants, that, on the trial of the indictment, the question, whether the parish were liable to repair, and the right to repair, would come in issue.⁽ⁿ⁾ And the prosecutor may remove an indictment by *certiorari*, though there be no recognizance given according to the statute.^(o)

The general rule of a new trial never being allowed where the defendant is acquitted in a criminal case, formerly prevailed in a prosecution for not repairing a highway, though such prosecution is usually carried on for the purpose of trying or enforcing civil liability.^(p) But if the justice of the case seemed to require it, the Court used to stay the judgment upon payment of costs, until another indictment was preferred for the purpose of trying the question of liability to repair.^(q) [*523] but it is now held that where the proceeding is in substance merely to try a civil right a new trial may be granted after an acquittal,^(r) and therefore a new trial would be granted in a case where the question was as to the liability to repair or the non-repair of a highway; but not where the charge was a wrongful obstruction of a highway.^(s)

The object of prosecutions for nuisances to highways is to effect either a removal of the nuisance in cases of obstruction, or the repair of the highway in cases where the nuisance charged is the want of reparation. The judgment of the Court is usually a fine, and an order on the defendant, at his own costs, to abate the nuisance in the one case,^(t) and in the other a fine, for the purpose of obliging the defendants to repair the nuisance; for they will not be discharged by submitting to a fine, as a distringas will go *ad infinitum* until they repair.^(u) But writs of distringas are the

(i) By the 13 Geo. 3, c. 78, s. 64.

(k) *Rex v. Hammersmith*, 1 Starkie R. 358 (2 E. C. L. R.), note (a).

(l) *Rex v. Bodenham*, Cowp. 78.

(m) *Rex v. Penderryn*, 2 T. R. 260.

(n) *Rex v. Taunton*, St. Mary, 3 M. & S. 465.

(o) *Rex v. Farewell*, 2 Str. 1209. Leave, however, must be obtained by motion in the same way by the prosecutor as by the defendants, by the 5 & 6 Will. 4, c. 33.

(p) *Rex v. Silverton*, 1 Wils. 298, cited 2 Salk. 646, in the note; *Rex v. Mann*, 4 M. & S. 127; *Rex v. Cohen*, 1 Starkie R. 516 (2 E. C. L. R.); *Rex v. Reynell*, 6 East 315; *Rex v. Handsworth*, 1 B. & A. 63 (44 E. C. L. R.); *Rex v. Sutton*, 5 B. & Ad. 52 (27 E. C. L. R.).

(q) *Rex v. Oxfordshire*, 16 East 223. It was said by Lord Kenyon, C. J., in *Rex v. Hawby*, 6 T. R. 819, "In misdemeanors there is no authority to show that we cannot grant a new trial in order that the guilt or innocence of those who have been convicted may be again examined into." It may be observed also that, in cases of indictments for misdemeanors, the Court will, in its discretion, save the point for consideration, giving the defendant an opportunity, in case he shall be convicted, to move to have an acquittal entered: *Rex v. Gash and another*, 1 Starkie R. 445 (2 E. C. L. R.).

(r) *Reg. v. Chorley*, 12 Q. B. 515 (64 E. C. L. R.); *Reg. v. Russell*, 3 E. & B. 942 (77 E. C. L. R.); *Reg. v. Leigh*, 10 A. & E. 398 (37 E. C. L. R.).

(s) *Reg. v. Russell*, *supra*; *Reg. v. Johnson*, 29 Law J., M. C. 133; s. c., 2 E. & E. 613.

(t) *Rex v. Pappineau*, 1 Str. 586; 1 Hawk. P. C. c. 75, s. 15.

(u) *Rex v. Cluworth*, 1 Salk. 358; 6 Mod. 163; 1 Hawk. P. C. c. 76, s. 249.

only further remedy on an indictment, upon which the Court has already pronounced judgment by imposing a fine. For the fine is the punishment for the neglect and offence of which the defendants are indicted; and, though the Court may compel an actual repair, yet the punishment has been inflicted, and they cannot inflict a further punishment or fine. The parish may, however, be again indicted; and a fine may be imposed on such new indictment.^(v) And upon this principle an order of a Court of quarter sessions by which it was ordered that the fine theretofore imposed for the not repairing a bridge should be increased by a certain sum, was quashed.^(w) In order to warrant a judgment for abating the nuisance, it must be stated in the indictment to be *continuing*; as otherwise such a judgment would be absurd.^(x) And if the Court be satisfied that the nuisance is effectually abated before judgment is prayed upon the indictment, they will not in their discretion give judgment to abate it. And though it was contended, on the authority of several cases,^(y) that if the nuisance be of a permanent nature the regular judgment must be to abate it, the Court refused to give such judgment upon an indictment for an obstruction in a public highway, where the highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate was obtained of the new way being fit for the passage of the public and the affidavits stated that so much of the old way indicted as was still retained was freed from all obstruction.^(z) But where the existence of a building, &c., is a nuisance, and the indictment imports that it was existing at the time of the bill being found, it seems that if a judgment be pronounced, it can only be a judgment to abate the nuisance.^(a) But where the nuisance arises not from the existence of the thing, but from the use to which it is applied, a judgment to abate, &c., is not necessary;^(b) and, therefore, if a stinking trade is indicted, it does not follow that the house in which it is carried on is to be pulled down.^(c) And if a house is a nuisance from being too high, so much only as is too high shall be pulled down.^(d)

The 5 & 6 Will. 4, c. 50, s. 96, enacts, that "no fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the Court of Exchequer or other Court, but shall be levied by and paid into the hands of such person residing in or near the parish where the road shall lie, as the justices or Court imposing such fines, issues, penalties, or forfeitures, shall order and direct, to be applied toward the repair and amendment of such highway; and the person so ordered to receive such fine shall and is hereby required to receive, apply, and account for the same according to the direction of such justices or Court, or in default thereof shall forfeit double the sum received; and if any fine, issue, penalty, or forfeiture to be imposed for not repairing the highway, or not appearing as aforesaid, shall hereafter be levied on any inhabitant of such parish, township, or place, then such inhabitant shall and may make his complaint to the justices at a special sessions for the highways; and the said justices are hereby empowered and authorized, by warrant, under their hands, to make an order on the surveyor of the parish for payment of the same out of the money receivable by him for the highway rate, and shall, within two months next after service of the said order on him, pay unto such inhabitant the money therein mentioned."

(v) *Rex v. Old Malton*, 4 B. & A. 470 (6 E. C. L. R.), note.

(w) *Rex v. Machynnleth*, 4 B. & A. 469 (6 E. C. L. R.).

(x) *Rex v. Stead*, 8 T. R. 142.

(y) *Rex v. Pappineau*, *ante*, note (t); *Rex v. The Justices of Yorkshire*, 7 T. R. 467; *Rex Stead*, *ante*, note (x), and other cases cited in those.

(z) *Rex v. Incedon*, 13 East 164. Judgment was given that the defendant should pay a fine to the King of 6s. 8d. In *Rex v. Mawbey*, 6 T. R. 619, it was held that a certificate by justices of the peace, that a highway indicted is in repair is a legal instrument recognized by the Courts of law, and admissible in evidence after conviction when the Court are about to impose a fine. In *Rex v. Wingfield*, 1 Blac. Rep. 602, where a person was convicted upon an indictment for not repairing a road *ratione tenuræ*, it was held that the Court would not inflict a small fine, on a certificate of the road being repaired, until the prosecutor's costs were paid.

(a) 1 Str. 686.

(b) *Id.* *Ibid.*

(c) By *Ld. Raymod and Reynolds, J.*, 1 Str. 688, 9.

(d) By *Ld. Raymond*, 1 Str. 688.

Upon the latter part of sec. 47 of the 13 Geo. 3, c. 78, which was similar to the existing provision of the new Act, it was held that the application for the rate to reimburse the inhabitants, on whom a fine has been levied, after a conviction upon an indictment against the parish for non-repair, ought to be made within a reasonable time after such levy, and before any material change of inhabitants; and the Court of King's Bench refused a mandamus to the justices to make such rate after an interval of eight years; though applications had been made in the interval, from time to time, to the magistrates below, who had declined to make the rate *on the ground that the parish at large had been improperly indicted and convicted, though, so lately as the year before the application to the Court of King's Bench, the magistrates had ordered an account to be taken of the *quantum* expended upon repairs out of the money levied (e). In a case where, although separate parts of the parish were bound to maintain their own roads, there had been an indictment and judgment against the parish generally, but such indictment was only known to and acted by that part of the parish in which the defective road lay, it was held that the justices might make a warrant to reimburse upon that part only; and the Court of King's Bench granted a mandamus to collect to the surveyor of that part only. (f) The 3 Geo. 4, c. 126, s. 10, provides for a portion of the fine being paid by the turnpike trustees when the highway shall be a turnpike road; and enacts, that when inhabitants of any parish, township, or place, shall be indicted or presented for not repairing any highway, being turnpike road, and the Court, before whom such indictment or presentment shall be preferred, shall impose a fine for the repair of such highway, such fine shall be apportioned, together with the costs and charges, between such inhabitants and the turnpike trustees as to the Court shall seem just: and the Court shall order the treasurer of such turnpike road to pay the same out of the money then in his hands, or next to be received by him, in case it shall appear to such Court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the security of the creditors who have advanced their money on the credit of the tolls. The true construction of a similar provision in the repealed Act of 13 Geo. 3, was held to be, that the Court which imposed the fine had power to apportion it between the parish and the trust; so that where an indictment was originally preferred at the assizes and afterwards removed into the Court of King's Bench by *certiorari*, it was held that the Court of King's Bench might apportion the fine. (g)

If a turnpike road be out of repair the inhabitants of the parish are liable to be indicted, although the tolls are appropriated by the Act to the repair of the road, and the inhabitants in such case must seek relief under the 3 Geo. 4, c. 126, s. 10. (h) Where an indictment was preferred at the assizes under an order of two justices, pursuant to sec. 95 of the 5 & 6 Will. 4, c. 50, and the defendants were found guilty on the trial of the traverse at a subsequent assizes, it was held that the judge had discretion, but was bound to award costs to the prosecutor. (i) But where an indictment was preferred under a similar order, and tried at *nisi prius*, after having been removed by *certiorari*, and the defendants acquitted on the ground that the road was a highway, it was objected that the prosecutor was not entitled to costs under sec. 95 of 5 & 6 Will. 4, c. 50; 1st, because that section *only applied to cases where the publicity of the road was admitted, but the liability to repair disputed; 2dly, that the section did not apply to cases where the indictment was removed by *certiorari*; 3dly, that sec. 95 was to be construed together with sec. 98, which merely meant that where the defence was frivolous the costs were to be paid out of the fund there mentioned; and it was held that the prosecutor was not entitled to costs. (k) And it is now settled that there is no jurisdiction to make an order for

a) *Rex v. The Justices of Lancashire*, 12 East 366.

f) *Rex v. Townsend*, Dougl. 421.

g) *Rex v. Upper Papworth*, 2 East R. 413.

h) *Reg. v. Preston*, 2 Lew. 193, Alderson, B.

i) *Reg. v. Yarkhill*, 9 C. & P. 218 (38 E. C. L. R.), Williams, J., after consulting the other Judges of B. R. See the section, *ante*, p. 509.

k) *Reg. v. Chedworth*, 9 C. & P. 285 (38 E. C. L. R.), Patteson, J., after consideration of the ground on which the costs were refused, was that the road was not a highway. See *Reg. v. Heanor*, *infra*. His lordship intimated that he thought the last point untenable;

costs unless the jury find or it appear affirmatively that the road is a highway.^(l) Where a jury is discharged without giving a verdict there is no power to order the costs to be paid out of the highway rate.^(m) So the judge has no jurisdiction to certify for costs under sec. 95, where the road described in the indictment is not the road ordered to be indicted; *e. g.*, where it is in another parish.⁽ⁿ⁾ It was held in several cases that the Court had no jurisdiction to award costs where the defendants pleaded guilty.^(o) But it has since been deliberately held that the Court may order the costs where the defendants plead guilty.^(p)

An order directing an indictment for the non-repair of a road is void unless it shows on the face of it that it was made at a special sessions for the highways within the division in which the road lies, and therefore such an order will not support an order for payment of the costs.^(q) An order for costs must state out of what funds the costs are to be paid or it is bad.^(r) The costs may be ordered to be paid to the prosecutor where he has removed the indictment into the Court of Queen's Bench, as well as where it is removed by the defendants.^(s) An order to indict a road is not invalid simply because one of the justices who made it is interested, as where he is the owner of the land liable to the repair of the road.^(t) Where an indictment is found at one quarter sessions and the trial adjourned to the next sessions, the latter may make an order for costs.^(u) Where an indictment was preferred against a parish under an order, and they pleaded that an individual was liable to repair the road *ratione tenuræ*, and the jury found a verdict for the defendants, Wigham, J., held that the prosecutor was entitled to his costs, and granted a mandamus to compel the sessions to order payment of them.^(v)

Where an order for costs is made in a Criminal Court the Court or its officer ought to ascertain the amount. Where therefore a judge ordered the costs to be paid generally, but they were not ascertained or taxed during the continuance of the commission; it was held that a mandamus to enforce their payment could not be granted.^(w) But where an indictment was removed by *certiorari*, and the judge at *nisi prius* ordered the costs to be paid out of "the rate made and levied" in the parish according to the statute, it was held that this order was good, though it did not name the amount of the costs, and that a side bar rule might be obtained for the Coroner and Attorney of the Court of Queen's Bench to tax the costs.^(x) And if the costs were

it was also objected that as the order to indict the road did not follow the information on which it was founded, in the description of the road, it was altogether a nullity, but the learned judge said he was inclined to think that when the justices had the case before them they might make any order respecting it which they thought fit. *Sed quære*, for the information on oath is the foundation of the magistrate's jurisdiction, and if they make an order, as they did in *Reg. v. Chedworth*, including a greater length of road than the information comprehends, *pro tanto* they are acting without any information at all. See *Rex v. Soper*, 3 B. & C. 857 (10 E. C. L. R.). C. S. G. The practice in these cases on the Oxford Circuit has been to put in and prove the information and order of the justices in the beginning of the case. The indictments have all been in the same form as before the passing of the Act, without containing any mention of the order of justices. C. G. S. (l) *Reg. v. Heanor*, 6 Q. B. 745 (51 E. C. L. R.), [setting aside the order of Tindal, C. J., 2 M. & Rob. 445 (a)]; *Reg. v. Downholland*, 2 Sess. C. 177; *Reg. v. Challicombe*, 2 M. & Rob. 311 (a); *Reg. v. Paul*, 2 M. & Rob. 307. See also *Reg. v. Buckland*, 12 Law T. 308, that the same law prevails under the 25 & 26 Vict. c. 61, s. 19.

(m) *Reg. v. Heytesbury*, 8 Law T. 315.

(n) *Reg. v. Fifehead*, 3 Cox C. C. 59.

(o) *Reg. v. Aston Ingham*, Hereford Sum. Ass. 1840; *Reg. v. Linton*, *Ibid.*, Williams, J.; *Reg. v. Vowchurch*, 2 C. & K. 393 (61 E. C. L. R.); *Reg. v. Stainhall*, 1 F. & F. 363; *Reg. v. Langley*, 2 F. & F. 170.

(p) *Reg. v. Haslemere*, 7 Law T. 382; s. c., 3 B. & S. 313.

(q) *Reg. v. Hickling*, 7 Q. B. 880 (53 E. C. L. R.); *Reg. v. Martin*, 2 Q. B. 1037; *Reg. v. Heytesbury*, 8 Law T. 315.

(r) *Reg. v. Attford*, 4 D. & L. 593.

(s) *Reg. v. Wand*, 3 E. & B. 960 (77 E. C. L. R.).

(t) *Reg. v. Justices of Surrey*, 1 Bail. C. C. 70.

(u) *Ibid.*

(v) *Reg. v. Justices of Surrey*, 1 Bail. C. C. 70.

(w) *Reg. v. Clark*, 5 Q. B. 887 (48 E. C. L. R.).

(x) *Reg. v. Eardisland*, 3 E. & B. 960 (77 E. C. L. R.), Crompton, J., *dissentiens*. Lord Campbell said the costs incurred subsequently to the Assizes might be included.

not paid by the defendants in pursuance of such rule an attachment for contempt will be awarded against them.^(y) The words "rate made and levied" in sec. 95 do not point merely to any particular rate already made and levied at the time when an order of costs is made, but to the highway rate in general, and it is the duty of the surveyors in office at the time an order is made to pay the costs out of any funds then in their hands, or, if they have none, to make and levy a rate for the purpose; and the order binds not only the surveyors in office at the time it was made but their successors also until the costs are paid, and if they are not paid a mandamus will be granted to take proper steps towards their payment.^(z)

Where an order was made to indict a "highway called Quaker Lane," and the indictment contained counts alleging it to be a way for carriages, and others a pack and prime way, and the jury found it was not a way for carriages, and the defendants admitted it was a pack and prime way; the Court of Queen's Bench held that the prosecutor was not entitled to costs; for the defendants really only denied that it was a highway for carriages.^(zz)

The 5 & 6 Will. 4, c. 50, s. 98, enacts, "that it shall and may be lawful for the Court before whom any indictment shall be preferred for not repairing highways, to award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said Court that the defence made to such indictment was frivolous or vexatious."^(a) It was held under the 13 Geo. 3, c. 78, s. 64, which was similar to the 5 & 6 Will. 4, c. 50, s. 98, that it was matter to be determined by inquiry, whether the person was or was not the prosecutor within that section; and that a court of quarter sessions, before whom a parish was acquitted upon the trial of an indictment for not repairing a highway, might, by their order, award C. and E. to pay costs to the parish, although the names of C. and E. were not on the back of the indictment, and although the indictment originated in a presentment of A. and B. constables, whose names were on the indictment; and it was also held to be enough, if the order was entitled as in the prosecution of C. and E. without showing further that C. and E. were prosecutors; and that it need not appear on the face of the order that the indictment was tried, if that appear by the record of the proceedings; and also that the order was good in form, if it was for the payment of the costs to the solicitor of the parish.^(b) The repealed statute did not direct a certificate to be given in a precise form of words, in order to entitle the party to costs; therefore where the judge, on the trial of an indictment, certified that the defence was frivolous, without also awarding costs in express terms, it was held that the prosecutor was entitled to costs.^(c)

Where the defendants plead guilty to an indictment for the non-repair of a highway, there is no power to grant costs under the 5 & 6 Will. 4, c. 50, s. 98, on the ground that the defence was frivolous or vexatious.^(cc)

Where at the trial the judge certified under the 13 Geo. 3, c. 78, s. 64, that the defence was frivolous, the prosecutor was entitled to costs, although the defendant obtained a rule to arrest the judgment.^(d) The 13 Geo. 3, c. 78, s. 64, only applied to cases tried in the ordinary course; where, therefore, an indictment was removed by *certiorari*, and a new trial ordered, and the prosecutor's costs of both trials were at stake the event of the new trial, it was held that this special rule took away the judge's power to certify in favor of the defendant.^(e)

Upon an indictment which had been removed into the Court of King's Bench by *certiorari* and been sent down for trial to the assizes, where the defendants were acquitted for want of prosecution, it was held that the Court of King's Bench had

^(y) Reg. v. Pembridge, 3 Q. B. 901 (43 E. C. L. R.).

^(z) Reg. v. Eyton, 3 E. & B. 390 (77 E. C. L. R.). The Court also held that the costs could not be recovered under sec. 103.

^(zz) Reg. v. Cleckheaton, 11 Law T. 305.

^(a) This section gives no costs in any case to the defendant. The 13 Geo. 3, c. 78, s. 64, gave them to the person indicted, where the prosecution was vexatious. C. S. G.

^(b) Rex v. Commerell, 4 M. & S. 203.

^(c) Rex v. Clifton, 6 T. R. 244.

^(cc) Reg. v. Denton, 10 Cox C. C. 61.

^(d) Rex v. Margate, 6 M. & S. 130.

^(e) Rex v. Selwick, 2 B. & Ad. 136 (22 E. C. L. R.).

no power under the repealed statute to award costs to the defendants on the ground of the prosecution having been vexatious, but that the application ought to have been made to the judge at *nisi prius*.^(f)

It was once held that the judge on the trial of an indictment, preferred by order of two justices under the 5 & 6 Will. 4, c. 50, s. 95, and removed by *certiorari* and tried at the assizes, had no authority to award costs, because the defence was frivolous, under sec. 98, as that power was limited to the Court at which the indictment was preferred;^(g) but in that case the Court of Queen's Bench awarded the costs to the prosecutor, for "the Court before whom any indictment shall be preferred included the Queen's Bench."^(h)

It has since, however, been expressly held, that where an indictment for non-repair of a highway is removed by *certiorari*, the judge at the trial may certify that the defence is frivolous, and award the costs.⁽ⁱ⁾ And where an indictment has been preferred under the order of justices, and removed by *certiorari* and the defendant is convicted, the judge who tries the case must order the costs.^(k)

The 5 Will. & M. c. 11, s. 3, enacts, that if the defendant, prosecuting such writ of *certiorari* as is mentioned in that Act, "be convicted of the offence for which he was indicted, that then the Court of King's Bench shall give reasonable costs to the prosecutor if he be the party grieved or injured, or be a justice of the peace, mayor, bailiff, constable, &c., or any other civil officer who shall prosecute upon the account of any fact committed or done that concerned him or them as officer or officers to prosecute or present" to be taxed, &c. Upon this statute it has been held, that a justice of the peace who *indicts* a road for being out of repair is entitled to his costs, after a removal of the indictment by *certiorari*, if the defendant be convicted.^(l) But the prosecutor must show himself to be the party grieved in order to obtain costs under this statute: therefore, in a case where he did not apply for the costs until two years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and it was stated, that while the highway was stopped, he had declared that he did not care about it, the Court held that he was not entitled to costs as the party grieved, although the prosecution was at his instance and expense.^(m) In a case where this statute was considered as a remedial law,⁽ⁿ⁾ it was held that several persons were entitled to costs under it as prosecutors of an indictment, removed by *certiorari*, for not repairing a highway: one, as constable of the manor within which the highway lay; the others, as parties grieved; they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route.^(o)

The township of Wareham was included in a highway district under the 25 & 26 Vict. c. 61, and Heath having caused an obstruction in a street in the township, the Highway Board, at the instance of the waywarden of Wareham, indicted Heath for the same, who removed the indictment by *certiorari*, and was convicted, and paid the costs, but there were extra costs, which the Highway Board charged on Wareham, and it was held that the Highway Board were justified in incurring these costs to remove an obstruction in the highway, and that they were properly chargeable against the township; and per Cockburn, C. J., Crompton, J., and Blackburn J., the same would have been the case under the 5 & 6 Will. 4, c. 50.^(oo)

The 5 & 6 Will. 4, c. 50, s. 111, enacts, "that if the inhabitants of any parish

(f) *Rex v. Chadderton*, 5 T. R. 272.

(g) *Reg. v. Preston*, 2 M. & Rob. 137.

(h) *Reg. v. Preston*, 7 Dow. P. C. 593. See *Rex v. Upper Papworth*, *ante*, p. 525.

(i) *Reg. v. Pembridge*, 3 Q. B. 901 (43 E. C. L. R.).

(k) *Ibid.*, per Lord Denman, C. J., *Reg. v. Great Broughton*, 2 M. & Rob. 444, Rolfe, B.

(l) *Rex v. Kettleworth*, 5 T. R. 33.

(m) *Rex v. Incedon*, 1 M. & S. 268.

(n) By Lord Ellenborough, C. J., in conformity with the opinion of Lord Kenyon, *S. J.*, in *Rex v. Kettleworth*, 5 T. R. 33, and contrary to the view taken of it by Buller, *S. J.*, in *Rex v. Sharpness*, 2 T. R. 48, where that learned judge said, that the statute had always been construed as strictly as possible.

(o) *Rex v. Taunton St. Mary*, 3 M. & S. 465.

(oo) *Reg. v. Heath*, 12 Law T. 492.

shall agree at a vestry to defend any indictment found against any such parish, or to appeal against any order made by or proceeding of any justice of the peace in the execution of any powers given by this Act, or to defend any appeal, it shall and may be lawful for the surveyor of such parish to charge in his account the reasonable expenses incurred in defending such prosecution, or prosecuting or defending such appeal, after the same shall have been agreed to by such inhabitants at a vestry or public meeting as aforesaid, and allowed by two justices of the peace within the division where such highway shall be; which expenses, when so agreed to or allowed, shall be paid by such parish out of the fines, forfeitures, payments, and rates authorized to be collected and raised by virtue of this Act; provided, nevertheless, that if the money so collected and raised is not sufficient to defray the expenses of repairing the highways in the said parish, as well as of defending such prosecution, or prosecuting or defending such appeal as aforesaid, the said surveyor is hereby authorized to make, collect, and levy an additional rate in the same manner as the rate by this Act is authorized to be made for the repair of the highway."

Where two surveyors included in their accounts the expenses of supporting the appointment of one of them for a previous year *against an appeal, which was dismissed, and also the expenses of opposing a rule for a *certiorari* to [530 remove their accounts into the Queen's Bench, which rule was discharged, it was held that the justices had jurisdiction to allow these expenses under the 13 Geo. 3, c. 78, s. 48, although these expenses had not been agreed to by the inhabitants under sec. 65.(p)

By sec. 113, "nothing in this Act contained shall apply to any turnpike-roads, except where expressly mentioned, or to any roads, bridges, carriageways, cartways, horseways, bridleways, footways, causeways, churchways, or pavements, which now are or may hereafter be paved, repaired, or cleansed, broken up, or diverted, under or by virtue of the provisions of any local or personal Act or Acts of Parliament."

By sec. 5, "in the construction of this Act the word 'surveyor' shall be understood to mean surveyor of the highways, or waywarden; the word 'parish' shall be construed to include parish, township, tithing, rape, vill, wapentake, division, city, borough, liberty, market-town, franchise, hamlet, precinct, chapelry, or any other place or district maintaining its own highways; and wherever anything in this Act is prescribed to be done by the inhabitants of any parish in vestry assembled, the same shall be construed to extend to any meeting of inhabitants contributing to the highway rates in places where there shall be no vestry meeting, provided the same notice shall have been given of the said meeting as would be required by law for the assembling of a meeting in vestry; and that the words 'highways' shall be understood to mean all roads, bridges (not being county bridges), carriageways, cartways, horseways, bridleways, footways, causeways, churchways, and pavements; and that the word 'justices' shall be understood to mean justices of the peace for the county, riding, division, shire, city, town, borough, liberty, or place in which the highway may be situate, or in which the offence may be committed; and that the word 'church' shall be understood to include chapel; and that the word 'division' shall be understood to include limit; and that the word 'owner' shall be understood to include occupier; and 'inhabitant' to include any person rated to the highway rate; and the words 'petty session' or 'petty sessions' to mean the petty session or petty sessions held for the division or place; and wherever in this Act, in describing or referring to any person or party, animal, matter, or thing, the word importing the singular number or the masculine gender only is used, the same shall be understood to include and shall be applied to several persons or parties as well as one person or party, and females as well as males, and several animals, matters, or things, as well as one animal, matter, or thing, respectively, unless there be something in the subject or context repugnant to such construction; and all the powers hereby given to, and notices, matters, and things required for, and duties, liabilities, and forfeitures imposed on, surveyors, shall be applicable to all persons, bodies corporate or politic, liable to the repair of any highway."

*531]

**Sec. III.—Of Nuisances to Public Rivers.*

IN books of the best authority, a *river* common to all men is called a highway: (a) and if it be considered as a highway, any obstruction, by which its course and the use of it as a highway by the King's subjects are impeded, will fall within the same principles as those which relate to public roads, and which have been considered in the preceding section of this chapter. But it should be observed that a learned judge appears to have considered a river as differing, in some respects, at least, from a highway, where he is reported to have said, "*Callis* compares a navigable river to a highway: but no two cases can be more distinct. In the latter case, if the way be foundrous and out of repair, the public have a right to go on the adjoining land: but if a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands." (b) In the same case the Court decided, that the public are not entitled at common law to tow on the banks of ancient navigable rivers. (c) ¹

The term, navigable, as applied to a river, is a relative and comprehensive term, containing within it all such rights upon the waterway as, with relation to the circumstances of each river, are necessary for the full and convenient passage of vessels and boats along it. Therefore, where a river was a tidal river, and so shallow at certain states of the tide that a vessel could not float, but necessarily grounded, it was held that the jury were rightly directed that a navigable river was so at all times, and that a person might go upwards or downwards, though he might not be able to reach the port or the deep water in one tide or without grounding, and that even if such grounding subjected him to compensate for injury done, that did not affect the nature of the right in respect to the time of enjoyment. (d)

It has been before observed, that a highway may be changed by the act of God; and upon the same principle it has been holden, that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old. (e) It has been held that the soil of a navigable river *primâ facie*, though not necessarily, belongs to the King; and it is not by presumption of law in the owners of the adjoining lands. (f)

*532] ²The public right of navigation in a river or creek may be extinguished either by Act of Parliament or writ of *ad quod damnum* and inquisition thereon, or under certain circumstances by commissioners of sewers, or by natural causes, such as the recess of the sea, or the accumulation of mud or sand. Where, therefore, a public road, obstructing a channel once navigable, has existed for so long a time that the state of the channel, at the time when the road was made, cannot be proved, in favor of the existing state of things it must be presumed that the right of

(a) 1 Hawk. P. C. c. 76, s. 1, citing 27 Ass. 23; Fitz. 279; 2 Com. Dig. 397; Williams v. Wilcox, 8 A. & E. 314 (35 E. C. L. R.). And see Anon., Loft 556.

(b) By Buller, J., in Ball v. Herbert, 3 T. R. 263. See Williams v. Wilcox, 8 A. & E. 314 (35 E. C. L. R.), *post*, p. 537.

(c) Ball v. Herbert, 3 T. R. 253.

(d) Mayor of Colchester v. Brooke, 7 Q. B. 339 (53 E. C. L. R.).

(e) 1 Hawk. P. C. c. 76, s. 4; 22 Ass. 93; 1 Roll. Abr. 390; 4 Vin. Ab. *Chimin* (A.). See Reg. v. Betts, *post*, p. 536.

(f) Rex v. Smith, Dougl. 441; but this seems not free from doubt. See Williams v. Wilcox, *post*, p. 537; Reg. v. Wharton, 12 Mod. 610, as to private rivers. As to right of soil in a moiety of a creek: Lord v. Commissioners for the City of Sydney, 12 Moore P. C. 473, cited 10 C. B. (N. S.) 414 (100 E. C. L. R.). As to land left by a river: Forster v. Lacy, 7 H. & N. 151.

¹ As to the erection of dams or other obstructions in rivers or harbors see Douglas v. State, 4 Wis. 387; People v. Vanderbilt, 28 N. Y. 396; Beach v. People, 11 Mich. 106; Zug v. Comm., 20 P. F. Smith 138; State v. Freeport, 43 Maine 198; People v. Platt, 17 Johns. Rep. 195. See also Comm. v. Chapin, 5 Pick. 199; Hooker v. Cummings, 20 Johns. Rep. 90; Adams v. Pease, 2 Conn. 481; Comm. v. Charlestown, 1 Pick. 180; Comm. v. Breed, 4 Ib. 460; Carson v. Blazer, 2 Bin. 495; Shrunken v. Schuylkill Nav. Co., 14 Ser. & Rawle 71; Comm. v. Shaw, Ib. 9; Executors of Coates v. Waddington, 1 McCord, 80; Scott v. Wilson, 3 N. H. 321; Arnold v. Mundy, 1 Halstead's Rep. 1.

avigation was extinguished in one of the modes before mentioned, and the road cannot be removed as a nuisance to the navigation.(g) Every creek or river, into which the tide flows, is not on that account necessarily a public navigable channel, though sufficiently large for that purpose, but the flowing of the tide into such a creek or river is strong *prima facie* evidence that it is a public navigation.(h)

It is a common nuisance to divert part of a public navigable river, whereby the current of it is weakened and made unable to carry vessels of the same burthen as it could before.(i) And the laying timber in a public river is as much a nuisance, where the soil belongs to the party, as if it were not his, if thereby the passage of vessels is obstructed.(k) The placing a floating dock in a public river has been also held to be a nuisance, though beneficial in repairing ships.(l) So where a wooden stytty was erected on piles driven into the bed of the river Thames and extended considerably beyond high-water mark, but not quite to low-water mark, it was held that this was a nuisance to the navigation.(m) So a dummy or flush-decked barge fastened by means of chains to a wharf and to a mooring stone sunk into the bed of a navigable river, so as to rise and fall with the tide, for the convenience of embarking and disembarking passengers from vessels, and without which it would have been impossible for boats to land or embark passengers at the wharf at low water, is a nuisance.(n) And the bringing a great ship into Billingsgate dock, which, though a common dock, was common only for small ships coming with provisions to the markets in London, appears to have been considered as a nuisance, in the same manner as if a man were so to use a common pack and horseway with his cart, as to plough it up, and thereby render it less convenient to riders.(o) Where an Act authorizes a company to erect a bridge over a public navigable river, and they erect it in such a manner as to impede the navigation, and not in compliance with the provisions of the Act, they are guilty of a nuisance.(p) And the erection of *weirs* across rivers [533] has been reprobated in the earliest periods of our law. "They were considered as public nuisances. The words of Magna Charta are, that all weirs from henceforth shall be utterly pulled down by Thames and Medway, and through all England, &c. And this was followed up by subsequent Acts treating them as public nuisances, prohibiting the erection of new ones, and the enhancing, straitening, or enlarging, of those which had aforetime existed."(q) Upon the principle, therefore, which has been before stated(r) that the public have an interest in the suppression of public nuisances, though of long standing, it was held that a right to convert a brushwood into a stone weir (whereby fish would be prevented from passing except in flood times), was not evidenced by showing that forty years ago two-thirds of it had been so converted without interruption.(s) So in a more recent case it was holden, that twenty years' possession of the water at a given level was not conclusive as to the right. Abbott, C. J., said "If it be admitted that this is a public navigable river, and that all his Majesty's subjects had a right to navigate it, an obstruction to such navigation for a period of twenty years would not have the effect of preventing his Majesty's subjects from using it as such."(t) But where there was a grant of wreck from Henry 2, to the Abbey of Cerne by all their lands upon the sea confirmed by *assizes* by Henry 8, and also a grant from Henry 8, of the island of Brownsea

(g) *Rex v. Montague*, 4 B. & C. 599 (10 E. C. L. R.).

(h) *Ibid.*, per Bayley, J., citing the *Mayor of Lynn v. Taylor*, Cowp. 86, and *Miles v. Lose*, 5 Taun. 706 (1 E. C. L. R.).

(i) 1 Hawk. P. C. c. 75, s. 11.

(k) *Bac. Abr. tit. Nuisance (A.)*, where it is also said, "And hence it seems to follow that private stairs, from those houses that stand by the Thames, into it, are common nuisances. But it seems that where there are cuts made in the banks that are not annoyances to the river, the timber lying there is no nuisance."

(l) *Anon.*, Surrey Ass. at Kingston, 1785, cited in the notes to 1 Hawk. P. C. c. 75, s. 11.

(m) *Dimes v. Petley*, 15 Q. B. 276 (67 E. C. L. R.).

(n) *Eastern Counties R. Co. v. Dorling*, 5 C. B. (N. S.) 821 (94 E. C. L. R.).

(o) *Reg. v. Leech*, 6 Mod. 145; *Bac. Abr. tit. Nuisance (A.)*.

(p) *Hole v. Sittingbourne and Sheerness R. Co.* 6 H. & N. 488.

(q) By Lord Ellenborough, C. J., in *Weld v. Hornby*, 7 East 195.

(r) *Ante*, p. 456.

(s) *Weld v. Hornby*, *supra*.

(t) *Vooght v. Winch*, 2 B. & A. 662.

and the shores thereof, belonging to the late monastery of Cerne, together with wreck, &c. ; and there was also evidence that between forty and fifty years ago the proprietor of the island of Brownsea raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil without opposition ; it was held, that although the usage of forty years' duration could not of itself establish such exclusive right, or destroy the rights of the public, yet it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words contained in the grants, served to establish such right. If, however, it had appeared, that the public had a right to fish over the place in question, prior to the forty years, and that the raising the bank was an act of usurpation, the exclusive right would not have been established. (u)

At common law every holder of lands adjoining to a river or brook has a right to the banks of the river or brook, upon his own lands so as to confine the flood-water within the banks, provided he does not thereby occasion injury to the lands or property of other persons ; and if such right has been exercised before the passing of an Act authorizing the making of a public navigable canal, the exercise of such right after the making of the canal will not be a nuisance, although it may be injurious to the canal, as the construction of the canal may be considered as having taken place subject to the enjoyment of such rights as the landholders possessed when the Act passed, except so far as the Act may have restrained such rights.

*[534] Upon an indictment for a nuisance to a public canal navigation established by Act of Parliament, it was found by a special verdict that the canal was carried across a river and the adjoining valley by means of an aqueduct and an embankment, in which were several arches and culverts : that a brook fell into the river above its point of intersection with the canal, and that in times of flood the water, which was then penned back into the brook, overflowed its banks, and was carried by the natural level of the country, to the above-mentioned arches, and through them to the river, doing, however, much mischief to the lands over which it passed ; that except for the nuisance aftermentioned, the aqueduct would be sufficiently wide for the passage of the river at all times but those of high flood, notwithstanding the improved drainage of the country, which had increased the body of the water ; that the defendants, occupiers of lands adjoining the river and brook, had for the protection of their lands, subsequently to the making of the canal, aqueduct and embankment, created or heightened certain artificial banks called fenders, on their respective properties, so as to prevent the flood-water from escaping as aforesaid, and that the water had consequently, in time of flood, come down in so large a body against the aqueduct and canal banks as to endanger them and obstruct the navigation : that the fenders were not unnecessarily high, and that, if they were reduced, many hundred acres of land would again be exposed to inundation. It was held, by the King's Bench, that the defendants were not justified under these circumstances, in altering for their own benefit the course, in which the flood-water had been accustomed to run ; that there was no difference in this respect between flood-water and an ordinary stream ; that an action on the case would have lain at the suit of an individual for such diversion, and consequently that an indictment well lay where the act affected the public. (r) But the Court of Exchequer Chamber, although they agreed in the principle that the ancient course and outlet of the flood-water had been obstructed by the wrongful raising from time to time of the fenders by the defendants, upon which the judgment of the King's Bench proceeded, held that the special verdict ought to have found—1st, whether the raising fenders was an ancient and rightful usage, or whether it had been commenced since the construction of the canal. For there was no doubt that at common law the landholders would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood-water within the banks, and to prevent it from overflowing their own lands ; with this single restriction, that they did not thereby occasion any injury to the lands

(u) *Chad v. Tilsed*, 5 Moore, 185.

(v) *Rex v. Trafford*, 1 B. & Ad. 874 (20 E. C. L. R.). The jury also found that the acts creating the nuisance were done by the defendants severally, and it was held that as the nuisance was the result of all those acts jointly, the defendants were rightly joined in one indictment, which stated the acts to have been several.

or property of other persons. And if this right had actually been exercised and enjoyed by them before the passing of the Act, then the construction of the aqueduct and embankment might be considered as having taken place subject to the enjoyment of such rights as the landholders possessed at the time of passing the *Act, [*535 unless so far as the Act might have restrained the exercise of such rights. 2dly, whether the course described by the special verdict to have been taken by the flood-water, was or was not, the ancient and rightful course. And, 3dly, whether or not the raising of the fenders to their present height had become necessary in consequence of the construction of the aqueduct.(w)

It is no defence to an indictment for a nuisance in a navigable river and port to prove that, although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the river. Where, therefore, a causeway had been made in the river Medina, which was an inconvenience to the navigation, as small vessels were much obstructed in making their way up with the tide, but it was a great benefit to the public: first, in launching and landing boats more readily: secondly, steam boats and other vessels could approach where they could not before: thirdly, vessels obtained shelter from the quay; and the jury found it to be a nuisance, but added the inconvenience was counterbalanced by the public benefit arising from the alteration; it was held that this finding amounted to a verdict of guilty.(x)

On an indictment for a nuisance, in the navigable river Itchen, it appeared that a wharf was built between high and low-water mark, and projected over a portion of the river on which boats formerly passed; before its erection there was no means of unloading trading vessels in the river, except by lightening them in the middle of the stream and then getting them at high water on to the mud between high and low-water mark; but since its erection such vessels had been unloaded at it, and thus the centre of the river was kept clear and the general navigation improved; but Wightman, J., left it to the jury to say whether the wharf itself occasioned any impediment whatever to the navigation of the river by any description of vessels or boats, and told them that they were not to take into consideration the circumstance that a benefit had resulted to the general navigation of the river by the said channel being kept clear.(y) But there may be cases where the injury to the public is too small to support an indictment. Upon the trial of an indictment for a nuisance to a harbor by erecting and continuing piles and planking in the harbor, and thereby obstructing it and rendering it insecure, it was found by a special verdict, that "by the defendant's works, the harbor is in some extreme cases rendered less secure;" and it was held that the defendant could not be made criminally responsible for consequences so slight, uncertain, and rare, as were stated by this verdict to result from his works.(z)

*An Act recited that the river Witham was formerly navigable from Lincoln to the sea, but that by sand and silt brought in by the tide the outfall had been greatly obstructed, and powers were given to commissioners to restore the navigation, and they were authorized to make a new cut through lands adjoining the river, and the

(w) *Trafford v. Regem*, 8 Bingh. R. 204 (21 E. C. L. R.).

(z) *Rex v. Ward*, 4 Ad. & E. 384 (31 E. C. L. R.); 6 N. & M. 38, overruling *Rex v. Russell*, 6 B. & C. 566 (13 E. C. L. R.); 9 D. & R. 566. See *Rex v. Morris*, 1 B. & Ad. 441 (20 E. C. L. R.).

(y) *Reg. v. Randall*, C. & M. 496 (41 E. C. L. R.).

(z) *Rex v. Tindall*, 6 A. & E. 143 (33 E. C. L. R.); 1 N. & P. 719. In *Reg. v. Russell*, 3 E. & B. 942 (77 E. C. L. R.), on the trial of an indictment for obstructing a navigable piece of water, the jury were asked whether they thought the erection would prove a "material nuisance," in which case they were to find a verdict of guilty; but were told that if they thought the "nuisance" was so slight, rare, and uncertain, that the defendant ought not to be made criminally liable for it, they should acquit him, and the jury said that they considered the erection, "although a nuisance, was not sufficiently so to render the defendant criminally liable," and thereon an acquittal was entered; it was held by Coleridge and Crompton, JJ., and *semble* by Lord Campbell, C. J., that the charge was to be understood as meaning, not that a party may legally commit a small nuisance, but that an obstruction might be so insignificant as not to constitute a nuisance; and that the jury must be understood as finding that the obstruction was so insignificant; and that, therefore, there was not a misdirection warranting a new trial.

navigation so made was to be open to all persons paying certain tolls: the commissioners were also authorized by this and another Act to build bridges under certain regulations. The cut was made, and a more direct channel thereby created, through which the waters of the river passed to the sea. The powers of the commissioners were afterwards vested by another Act in a company, who built a bridge over the cut, not according to the regulations of the Act, upon piles fixed in the bed of the cut, and its piers occupied part of the breadth of the river; the jury were told that this was a public highway, and were desired to say whether or not the construction of the bridge was a nuisance to the navigation of the river, and they answered that they did not consider it to be an obstruction to the navigation; and it was held that there was no doubt that this was a public river; that the cut, which merely straightened the course, was in the same situation as the original channel, and the public had the same rights over it as they had over the original channel; and that if the bridge had been so built as to obstruct the navigation, it would have been an indictable offence; but that the verdict amounted to a finding of not guilty. It was for the jury to say whether an erection of this kind was a damage to the navigation or not, and the true question for them was, whether a damage accrued to the navigation in the particular locality. (a)

Both the person who erects, and the person who keeps erected, on the shore of a navigable river between high and low-water mark, a work for the more convenient use of his wharf adjoining, which work, either from its original defective construction, or from want of repair, presents a dangerous obstruction to the navigation, is guilty of a nuisance. (aa)

By the 1 Eliz. c. 17, the taking of fish, except with the particular trammels or nets therein specified, was prohibited, upon pain of the forfeiture of a certain penalty, of the fish taken, and also of the unlawful engines: and upon this Act it was contended, that a party laying certain illegal engines called *bucks* in his own fishery was guilty of a nuisance; but the Court held that it could not be considered as a nuisance public or private. (b)

Where a vessel has been sunk in a navigable river by accident and misfortune, ~~no~~ indictment can be maintained against the owner *for not removing it. ~~Lord~~ *537] Kenyon, C. J., said that the grievance has been occasioned, not by any default or wilful misconduct of the defendant, but by accident and misfortune; and that ~~it~~ it would be adding to the calamity to subject the party to an indictment for what ~~had~~ had proceeded from causes against which he could not guard, or which he could not ~~pre-~~ prevent: and though it was urged that if the defendant was not punishable for hav- ~~ing~~ ing caused the nuisance, yet it was his duty to have removed it, and that he was liable ~~to~~ to be indicted for not having done so, the learned judge said, that perhaps the expe- ~~nse~~ nse of removing the vessel might have amounted to more than the whole value of ~~the~~ the property; and that he was therefore of opinion, that the offence charged was not ~~the~~ the subject of indictment. (c) And this decision has been fully confirmed in two ~~cases,~~ cases, in which it has been held that it is the duty of a person using a navigable river ~~with~~ with a vessel of which he is possessed and has the control, to use reasonable skill and ~~care~~ care

(a) Reg. v. Betts, 16 Q. B. 1022 (71 E. C. L. R.). Lord Campbell asked, during the argument, "may not there be a common law right to erect bridges not obstructing the navigation?" "How have bridges ever been legally made over navigable rivers?" His Lordship also expressed his dissent from the opinions of the majority of the judges in Rex v. Russell, 6 B. & C. 566 (13 E. C. L. R.). And in the Mayor of Norwich v. Norfolk R. Co., 4 E. & B. 440 (82 E. C. L. R.), speaking of a nuisance to a navigable river, Lord Campbell said, "the doctrine of compensation has not hitherto been applied in such a case to justify a public nuisance; and I have not before heard it suggested that, without the authority of Parliament, the passage of ships up and down a navigable river could be obstructed for a given period by works which might afterwards enable ships to navigate the river with increased facility. The consent of the Lords of the Admiralty, and of the riparian proprietors, could not supersede the necessity for the authority of the Legislature." See Abraham v. G. N. R. Co., 16 Q. B. 586 (71 E. C. L. R.) as to the construction of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, in cases of bridges built over rivers.

(aa) White v. Phillips, 15 C. B. (N. S.) 245 (109 E. C. L. R.).

(b) Bulbrooke v. Goodere, 3 Burr. 1768.

(c) Rex v. Watts, 2 Esp. R. 675.

to prevent mischief to others, and his liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it. For in all these circumstances the vessel may continue to be in his possession and under his control. This duty arises out of the possession and control of the vessel being in him: and this liability may be transferred, with the transfer of the possession and control, to another person. And on the abandonment of such possession and control the liability ceases. And further, that from an unavoidable accident producing the wreck of a vessel, no duty arises to the owner to take any precautions or to remove the impediment to navigation which it creates. (*d*)

A weir appurtenant to a fishery, obstructing the whole or a part of a navigable river, is legal, if granted by the crown before the commencement of the reign of Edward 1, and such a grant may be inferred from evidence of its having existed before that time. If the weir, when so first granted, obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Where the crown had no right to obstruct the whole passage of a navigable river, it had no right to obstruct a part by erecting a weir, except subject to the rights of the public; and, therefore, in such a case, the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. In an action of trespass for throwing down a weir, the plaintiff established the existence of the weir by a royal grant made at some time prior to the time of Edward 1; but it stood across part of the Severn, a public navigable river—a part, indeed, not required for the purposes of navigation at the date of the grant, but, at the time of the commission of the trespass, necessary for those purposes, by reason of the residue of the channel having become choked up. The plaintiff contended that, at the date of the grant, the crown had the power of making it, *even to the disturbance or total prevention, of the right of navigation by the subject: or that, at all events, it had the power of making such a grant, if, in the then existing state of circumstances, it did not interfere with the rights of the subject: and that such a grant, valid in its inception, would not become invalid by reason of any change of circumstances, which might afterwards affect the residue of the channel. Lord Denman, C. J., in delivering the judgment of the Court, said, “If the subject (which this view of the case concedes) had by common law a right of passage in the channel of the river, paramount to the power of the crown, we cannot conceive such a right to have been originally other than a right wholly unlimited to pass in all and every part of the channel. The nature of the highway which a navigable river affords, liable to be affected by natural and uncontrollable causes, presenting conveniences in different parts and on different sides according to the changes of wind or direction of the vessel, and attended by the important circumstance that on no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway to remove obstructions, namely, clear away sand-banks and preserve any accustomed channel—all these considerations make it an almost irresistible conclusion that the amount right, if it existed at all, must have been a right in every part of the channel between the banks. It cannot be disputed that the channel of a public navigable river is a King’s highway, and is properly so described; and, if the analogy between it and a highway by land were complete, there could be no doubt that the right would be such as we now lay down; for the right of passage in a highway by land extends over every part of it. Now, although it may be conceded that the right is not complete, yet the very circumstances in which it fails, are strong to show that in this respect at least it holds. The absence of any right to go *extra viam* in a case of the channel being choked, and the want of a definite obligation on the owner to repair, only render it more important, in order to make the highway an effective one, that the right of passage should extend to all parts of the channel. If

White v. Crisp, 10 Exch. R. 312; *Brown v. Mallett*, 5 C. B. 599 (57 E. C. L. R.). Remarks on this case on *Harmond v. Pearson*, 2 Esp. 675, which is cited in *Harmond v. Newcastle and Berwick R. Co.*, 10 C. B. 348 (70 E. C. L. R.), to show that it was no defence to leave an anchor in a navigable river without a buoy; and where it was held that the owner of an anchor was not guilty of a nuisance created by it in a place to which it had been removed without his knowledge.

then, *subject to this right*, the crown had at any period the prerogative of raising weirs in such parts as were not at the time actually required by the subject for the purposes of navigation, it follows, from the very nature of a paramount right on the one hand and a subordinate right on the other, that the latter must cease whensoever it cannot be exercised but to the prejudice of the former. If, in the present case, the subject has not at this moment the right to use that part of the channel on which the weir stands, it is only because of the royal grant; and that grant must then be alleged at its date to have done away for ever, in so much of the channel, the right of the public: but that is to suppose the subordinate right controlling that which is admitted to be paramount, which is absurd. On the other hand, there is nothing unreasonable or unjust in supposing the right to erect the weir subject to the necessities of the public when they should arise; for the right of the public being supposed to be paramount by law, the grantee must be taken to be cognizant of such right: and the same natural peculiarities, and the same absence of any obligation by law on *539] any one to *counteract those peculiarities above-mentioned, would give him full notice of the probability that at some period his grant would be determined. We do not therefore think that the plaintiff can sustain his second point."

With regard to the power of the crown at common law to interfere with the channels of public rivers, Lord Denman, C. J., said, "On the one side the contention is, that prior to Magna Charta, the power of the crown was absolute over them; and that this weir, by the antiquity assigned to it by the finding of the jury, is saved from the operation of that or any succeeding statute; while, on the other, it is alleged that they are and were highways to all intents and purposes, which the crown had no power to limit or interfere with, and that as well the restraints enacted by, as the confirmations implied from, the statutes alluded to have nothing to do with the present question.

"After an attentive examination of the authorities and the statutes referred to in the argument, we cannot see any satisfactory evidence that the power of the crown in this respect was greater at the common law before the passing of Magna Charta than it has been since. It is clear that the channels of public navigable rivers were always highways: up to the point reached by the flow of the tide the soil was presumably in the crown; and above that point, whether the soil at common law was in the crown or the owners of the adjacent lands (a point perhaps not free from doubt), there was at least a jurisdiction in the crown, according to Sir Matthew Hale, 'to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats:' *De Jure Maris*, Part I., c. 2, p. 8. In either case the right of the subject to pass up and down was complete. In the case of the *Bann Fishery*(e), where the reporter is speaking of rivers within the flux and reflux of the tide, it is stated that this right was by the *King's permission*, for the ease and commodity of the people; but if this be the true foundation, and if the same may be also properly said of the same right in the higher parts of rivers, still the permission supposed must be coeval with the monarchy, and anterior to any grant by any particular monarch of the right to erect a weir in any particular river. It is difficult, therefore, to see how any such grant made in derogation of the public right previously existing, and in direct opposition to that duty, which the law casts on the crown, of reforming and punishing nuisances which obstruct the navigation of public rivers, could have been in its inception valid at common law. Nor can we find, in the language of the statute referred to, anything inconsistent with this conclusion. They speak indeed of as done in violation of this public right; but they do not refer them to any power legally existing in the crown, which for the future they propose to abridge. We are, therefore, of opinion that the legality of this weir cannot be sustained on the supposition of any power existing by law in the crown in the time of Edward I. which is no taken away. But this does not exhaust the question; because that which was not legal at first may have been subsequently legalized."

*540] "The learned counsel for the defendants is probably correct in saying that the twenty-third chapter of Magna Charta may be laid out of the case. The *kidelli* there spoken of appear, from the 2 Inst. p. 38, and the *Chester Mill Case*,(f)

(e) Davies's R. 57, a.

(f) 10 Rep. 137, b.

to have been open weirs erected for the taking of fish; and the evil intended to be remedied by the statute was the unlawful destruction of that important article of consumption. That statute, therefore, being pointed at another mischief, might leave any question of nuisance by obstruction to the passage of boats exactly as it stood at common law. But the same remark does not apply to 4 stat. 25 Edw. 3, c. 4. That begins by reciting that the common passage of boats and ships in the great rivers of England is oftentimes annoyed by the inhansing [a mistranslation of the word *lever* for levying or setting up(*g*)] of gorges, mills, weirs, stanks, stakes, and kiddles, and then provides for the utter destruction of all such as have been levied and set up in the time of Edward 1, and after. It further directs that writs shall be sent to the sheriffs of the places where need shall be, to survey and inquire, and to do thereof execution: and also the justices shall be thereupon assigned at all times that shall be needful. It is clear, we think, that, in any criminal proceeding for the demolition of this weir which had been instituted immediately after the passing of this statute, it would have been a sufficient defence to have shown its erection before the time of Edward 1; and, considering the concise language of statutes of that early period, we think the statute would equally have been an answer in any civil proceeding at the suit of a party injured. Assuming the weir to have been illegally erected before the date of Magna Charta, it is not unreasonable to suppose that a sort of compromise was come to: similar nuisances were probably very numerous; but they were probably, many of them, of long standing: it may have been impossible to procure, or it may well have been thought unreasonable to insist on, an Act which should direct those to be abated which had acquired the sanction of time: and a line was therefore drawn, which, preventing an increase of the nuisance for the future, and abating it in all the instances which commenced within a given period, impliedly legalized those which could be traced to an earlier period. This appears to us the proper effect to be attributed to the statute; and, if it be, it disposes of any difference between a criminal and civil proceeding. The earlier weirs were not merely protected against the specific measures mentioned in the Act, but rendered absolutely legal. If this would have been a good answer immediately after the Act passed, it is at least equally good now; and therefore, of stat. 45 Edw. 3, c. 2, and stat. 1 Hen. 4, c. 12, it is unnecessary to say more than that they do not at all weaken the defence which the defendants have under the former statute."^(h)

It is said to have been adjudged that if a river be stopped, to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighboring towns, who have a common passage and easement therein, may be *compelled to do it.⁽ⁱ⁾ For nuisances in the nature of obstructions an indictment will of course lie, if the river be such as may be considered a public highway.^(k) [*541

Sec. IV.—Of Nuisances to Public Bridges.

The more ancient cases do not supply any immediate definition or description in terms of what shall be considered "public bridges." But a distinction between a public and a private bridge is taken in one of the books,^(l) and made to consist principally in its being built for the common good of all the subjects, as opposed to a bridge made for private purposes; and though the words, "public bridges," do not occur in the 22 Hen. 8, c. 5 (called the statute of bridges), yet as the statute empowers the justices of the peace to inquire of "all manner of annoyances of bridges broken in the highways," and applies to bridges of that description, in all its subsequent provisions, it may be inferred that a bridge in a highway is a public bridge for all purposes of repair connected with that statute. And "if the meaning of the words *public bridge* could properly be derived from any other less authentic source

(g) Corrected in the translation of the 45 Edw. 3, c. 2 (recital).

(h) *Williams v. Wilcox*, 8 Ad. & E. 314 (35 E. C. L. R.).

(i) 1 Hawk. P. C. c. 75, s. 13; Bac. Abr. tit. *Nuisance* (C.); 37 Ass. 10; 2 Roll. Abr. 137.

(j) See *Reg. v. Dobson*, 1 Cox C. C. 251, as to costs where an indictment for a nuisance on the Thames had been removed into the Court of Queen's Bench by *certiorari*.

(k) 2 Inst. 701.

than this statutable one, they might safely be defined to be such bridges as all his Majesty's subjects had used freely and without interruption, as of right, for a period of time competent to protect themselves and all who should thereafter use them, from being considered as wrong-doers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use might be questioned."(*m*)

But a bridge built for the mere purpose of connecting a private mill with the public highway, or for any other such merely private purpose, would not necessarily become a part of the highway, although the public might occasionally participate with the private proprietor in the use of it; and it is not every sort of bridge, erected possibly for a temporary purpose, during a time of flood, that may have rendered the ordinary fords impassable, or the ordinary means of passage impracticable, which can be considered as a *bridge in a highway*, to be repaired, when broken down, according to the provisions of the statute of bridges.(*n*)

It is a question of fact, whether a particular structure be a bridge or not; and, upon a question whether an arch be a bridge or culvert, the fact that it is built over a stream of water flowing between banks, is not decisive to show that it is a bridge; although there must be such a stream for the structure to be a bridge. Neither is it decisive that it is not a bridge, that there are no parapets to it.(*o*) On an indictment for not repairing the *highway next adjoining each end of Warnley

*542] Bridge, it appeared that the bridge was built before the 43 Geo. 3, c. 59, and conveyed a turnpike road between parapet walls over a stream of water, which at that place was confined between banks, which prevented its overflowing the adjacent land in winter when the water averaged two feet and a half in depth; but the stream was never dry at any time of the year; Cresswell, J., told the jury that if they were satisfied that this structure was a bridge their verdict must be for the Crown. If it had been erected for the convenience of the public in passing over the stream, it was a county bridge, and rendered the county liable to repair it, though the bridge might not have been necessary for the convenience of the public when it was built.(*p*) Where an ancient foot bridge consisted of three planks nine or ten feet long, and was over a stream about a foot and a half deep in summer, but frequently deeper in winter, and had originally been repaired by a parish, it was held that this was not a county bridge.(*q*)

The inhabitants of a county are bound by common law to repair bridges erected over such water as answers the description of *flumen vel cursus aquæ*, that is, water flowing in a channel between banks, more or less defined, although such channel may be occasionally dry; they are, therefore, not bound to repair arches in a raised causeway, more than three hundred feet from the end of a bridge, through which the water passes in flood times only. Where a road, in continuation of a bridge over a river, ran through low meadow ground, liable to be flooded by the river, for five hundred and seventy-six feet from the foot of the bridge, and formed a causeway, in which were placed at different intervals, five arched openings, two of which were within three hundred feet of the bridge, which the county had always repaired, and the other three more than three hundred feet from the foot of the bridge, and the arches were built not over the ordinary stream or course of the river, but over solid meadow ground, which was subject to be much flooded, and there was generally a strong current in winter through the arches, which, by giving vent to the flood water, helped to protect the bridge, which would be in danger from the penning

(*m*) By Lord Ellenborough, C. J., in *Rex v. Bucks*, 12 East 204.

(*n*) *Rex v. Bucks*, 12 East 203, 204.

(*o*) *Rex v. Whitney*, 3 A. & E. 69 (30 E. C. L. R.); 7 C. & P. 208 (32 E. C. L. R.). The structure in question in this case was an arch of nine feet span, over a stream, which fed a mill, and which was usually about three feet deep, but occasionally shallower, and in flood times much deeper, and it had no battlements at either end; the jury having found a verdict of guilty upon an indictment treating this structure as part of the road, the Court refused a rule for a new trial.

(*p*) *Reg. v. Gloucestershire*, C. & M. 506 (41 E. C. L. R.).

(*q*) *Reg. v. Southampton, Tinker's Bridge case*, 18 Q. B. 841 (83 E. C. L. R.). The liability to repair county bridges had been transferred from parishes to the county, and the bridge had not been repaired by the county, but by commissioners who had the charge of the repairs of the highways. See the case, *post*, p. 546.

up of the water if the causeway had no arches; it was held that the county was not liable to repair the arches which were more than three hundred feet from the foot of the bridge. The ancient form of indictment, as mentioned in 2 Inst. 701 is, *quod pons publicus et communis situs in altâ regiâ viâ super flumen seu cursum aquæ, &c.*, and although in many indictments in modern times the words, *super flumen, &c.*, are omitted, yet in such indictments they must be considered as virtually included in the true import of the term bridge; for, *otherwise, all such indictments would be bad, there being many structures, bearing the name of bridge, erected across a steep ravine, and in modern times over an ancient road, crossed in a traverse direction by a new road, having no reference to water, and which, unquestionably the county is not bound to repair; and no more certain rule can be laid down than the words *flumen vel cursus aquæ* are to be considered to denote water, flowing in a channel between banks, more or less defined, although such channel may be occasionally dry.(r)

But this case has since been reconsidered. Upon an indictment against the county of Derby for the non-repair of Swarkestone Bridge, it appeared that the bridge was a structure 1275 yards in length, and consisted of forty-two arches, divided, at some points, by a stone causeway, at others by the piers only. The river Trent flowed constantly under five of the arches at one end of the structure, and a brook flowed constantly under an arch at the opposite end. The other arches lay across meadow land, and in times of flood the water flowed under all of them, and under most of them there was stagnant water at all times. The county had immemorially repaired the whole structure, and had rebuilt and widened twenty-two of the arches under which there was no constant stream. Parts of the whole structure, other than the five arches, had been presented at different times under the name of Swarkestone Bridge by the grand jury, as out of repair and thereupon repaired by the county. The Court of Queen's Bench held that the county were liable to repair the whole structure; as the whole must be deemed a bridge, and there was no general rule of law that arches, under which there was no constant stream, could not form part of a county bridge, and that, where such arches are contiguous to and as it were in continuation of an acknowledged county bridge, and have been immemorially treated by the county as part of the bridge, there was no rule of law to prevent their being part of the bridge.(s)

As there may be a dedication of a road to the public:(t) so in the case of a bridge, though it be built by a private individual, in the first instance, for his own convenience, yet it may be dedicated by him to the public, by his suffering them to have the use of it, and by their using it accordingly.(u) And though, where there is such a dedication, it must be absolute,(v) yet it may be definite in point of time; that a bridge may be a public bridge, if it be used by the public at all such times as are dangerous to pass through the river.(w) A bar across a public bridge, locked, *except in times of flood, is conclusive evidence that the public have only a limited right to use the bridge at such times: and if an indictment [*544

Rex v. Oxfordshire, 1 B. & Ad. 289 (20 E. C. L. R.). The county had previously been indicted for not repairing two of the same arches, which were described in the indictment as bridges, and on a special case it was held that there was not sufficient to show they were bridges, which the county was liable to repair, as the jury had not found that they were erected at the same time as the bridges over the river, or for the use of enabling the public to pass, and not for the benefit of the owners of the adjoining lands: *Rex v. Oxfordshire*, 1 B. & Ad. 297 (20 E. C. L. R.). The indictment in *Rex v. Oxfordshire*, 1 B. & Ad. 289 (20 E. C. L. R.), contained six counts, all of which charged the non-repair of a bridge, varying the description in each count.

See *Derbyshire*, 2 Q. B. 745 (42 E. C. L. R.).

Id., p. 462, *et seq.*

Rex v. Glamorgan, 2 East 356; *Glusburne Bridge case*, 5 Burr. 2594; 2 Blac. R. 118; *Rex v. West Riding of Yorkshire*, 2 East 342. And see *post*, 552, *et seq.*

According to the doctrine in *Roberts v. Karr*, 1 Campb. 262, in the note. And see 63.

Rex v. Northampton, 2 M. & S. 262. In *Rex v. Devonshire*, R. & M., N. P. C. 144, 1 J., held that the county were liable to repair a bridge by the side of a ford, as only used by the public in times of floods, which made the ford impassable, as it was at all times open to the public.

for not keeping it in repair states that it is used by the King's subjects, "at their free will and pleasure," the variance is fatal.(x)

But a bridge built in a public way, without public utility, is indictable as a nuisance; and so it is if built colorably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county.(y)

Where a bridge is, in the sense which has been described, a bridge *in a highway*, it will of course be as public as the highway itself in which it is situate, and of which, for the purpose of passage, it must be understood to form a part.(z) All actual obstructions, therefore, to such bridges will come within the rules already stated with respect to nuisances to highways by obstruction,(a) and do not require a repetition in this place. There is, however, one case where the defendant was indicted for not repairing a house adjoining to a public bridge, which he was bound to repair *ratione tenuræ*, but permitted it to be so much out of repair that it was ready to fall upon people passing over the bridge; it was found by a special verdict that the defendant was only tenant at will of the house: but the Court adjudged that he ought to repair, so that the public should not be prejudiced; and though not properly chargeable to repair the house *ratione tenuræ*, yet that the averment should be intended of the possession, and not of the service.(b)

The nuisances which more frequently arise to the public in respect of bridges are in the nature of *nonfeasance*, from the neglect to keep them in a proper state of repair.

As parishes are bound to repair the public ways within their district; so the inhabitants of a county at large are *primâ facie* and of common right, liable to the repair of all public bridges within its limits, unless they can show a legal obligation on some other persons or public bodies to bear the burthen:(c) and this without any distinction as to foot, horse, or carriage bridges.(d) The statute of bridges shows that the burthen is *primâ facie* on the county; and it is exactly analogous to the liability of the parish to repair a road.(e) But a hundred, or parish, or other known portion of a county, may by usage and custom be chargeable to the repair of a bridge erected *545] within it.(f) And a corporation, *aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription, and also any other persons by reason of such special tenure, may be compelled to repair them.(g) And if a part of a bridge lie within a franchise, those of the franchise may be charged with the repairs for so much: also by a special tenure a person may be charged with the repairs of one part of a bridge, and the inhabitants of the county be liable to repair the rest.(h) A prescription, that the lords of the manor ought to repair a bridge is good, being laid *ratione tenuræ*, by reason of the demesnes of the manor.(i) And, as the obligation is by reason of the demesnes of the manor, if part of the

(x) *Rex v. The Marquis of Buckingham*, 4 Campb. 189.

(y) *Rex v. West Riding of Yorkshire*, 2 East R. 342. But see *post*, p. 554; 43 Geo. 3. c. 59, s. 5, as to the liability of counties to repair bridges thereafter to be erected.

(z) *Rex v. Bucks*, 12 East 202, 203.

(a) *Ante*, p. 845, *et seq.*

(b) *Reg. v. Watson*, 2 Lord Raym. 856.

(c) 2 Inst. 700, 701, in the comment upon the statute of bridges, 22 Hen. 8, c. 5. The reparation of public bridges was part of the *trinoda necessitas*, to which, by the ancient law, every man's estate was liable, namely, *expeditio contra hostem, arcium constructio, et pontium reparatio*.

(d) By Lord Ellenborough, C. J., in *Rex v. Salop*, 13 East 97.

(e) By Bayley, J., in *Rex v. Oxfordshire*, 4 B. & C. 196 (10 E. C. L. R.).

(f) *Rex v. Hendon*, 4 B. & Ad. 628 (24 E. C. L. R.); *Reg. v. New Sarum*, 7 Q. B. 941 (53 E. C. L. R.); *Rex v. Ecclesfield*, 1 B. & A. 359. Per Curiam, and this without stating any other ground than immemorial usage.

(g) 1 Hawk. P. C. c. 77, s. 2; Bac. Abr. tit. *Bridges*. A body politic may be bound either *ratione tenuræ* *sive prescriptionis*: but a private person does not appear to be liable upon a general prescription: 2 Inst. 700; 13 Co. 33; 1 Salk. 358; 3 Salk. 77, 381, and see *ante*, p. 500.

(h) Bac. Abr. tit. *Bridges*; 1 Hawk. P. C. c. 77, s. 1.

(i) *Reg. v. Bucknall*, 2 Lord Raym. 804. At *nisi prius* (2 Lord Raym. 792), Holt, C. J., ruled that the prescription was good without saying *ratione tenuræ*, on the ground that the manor might have been granted to be held by the service of repairing the bridge before the statute *quia emptores terrarum*, or that the king might make such a grant, he not being bound by the statute: but he afterwards changed his opinion.

demesnes be granted to an individual, he will be obliged to contribute to the repairs : but the indictment may be against any of the tenants of the demesnes, and it will be no defence on an indictment against one of them that another is also liable.(k) And where an individual is liable to repair a bridge, his tenant for years, being in possession, will be under the same obligation, and liable to an indictment for the neglect.(l) We have seen that the inhabitants of a district cannot be charged *ratione tenuræ*, because unincorporated inhabitants cannot *quod* inhabitants hold lands ; and that a district cannot be charged by prescription alone, without a consideration, to repair what is not within such district.(m) As the burthen resting upon a county to repair the public bridges is exactly analogous to the liability of a parish to repair a road, it is not removed by an Act of Parliament directing trustees to lay out the tolls thereby granted in repairing roads, and empowering them to make and repair bridges. To an indictment against a county for not repairing a bridge in a highway, there was a plea that, by an Act of Parliament certain trustees were directed to lay out the tolls thereby granted in repairing the roads, and were empowered to make and repair bridges ; that the bridge in question was erected by the trustees under that Act ; that the trustees had been liable to repairs, and had repaired the bridge from the time it was so erected ; and that they were still liable to keep it in repair : the replication traversed that they were so liable ; and the Court held that the bridge having been erected for public purposes, in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built ; and that the plea was clearly insufficient to exonerate them, as it did not aver that the trustees had funds adequate to the repair of the bridge.(n)

*The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace ; before 1842 all public bridges in it, not [*546 repairable by tenure, had been repaired either by the tithings, parishes, or townships in which they were situate, or by rates in the nature of county rates levied on all the parishes and places in the island, under the following arrangement. In 1772 the island having been assessed to the general county rate with the other parts of the county, appeals were entered against that assessment, and in 1774 an arrangement was made, by consent, fixing certain proportions to be paid by the parishes in the island towards the general county rate, but leaving the expense of bridges and the house of correction to be raised by a local rate ; the order of sessions being that "the said island be thereby adjudged and declared not to be liable or subject to pay the county bridge rate or to the house of correction ; the Isle of Wight agreeing to erect and maintain, from time to time, houses of correction and bridges within the said island." After this arrangement the practice was for the county quarter sessions, on the application of the justices for the island division, to levy a rate, in the nature of a county rate, on every parish in the island for the repair of the island bridges and bridewell. There was no instance before 1842 of the application of the general county rate to the repair of an island bridge ; but the justices of the island used to expend the island rate made in the manner above-mentioned on the island bridges and bridewell. A local Act, 53 Geo. 3, c. 92, appointed commissioners for the repair of the highways in the island, with the power of making assessments, and enacted that all bridges previously repaired by any parishes, &c., within the island should for ever be repaired in the same manner and by the same means as other bridges, usually called county bridges, within the said island, had been accustomed

(k) Ibid. 792 ; Reg. v. The Duchess of Buccleugh, 1 Salk. 358. And see *ante*, p. 503.

(l) Reg. v. Bucknall, 2 Lord Raym. 804. And see Reg. v. Watson, 2 Lord Raym. 856, *ante*. See also *ante*, p. 503.

(m) Rex v. Machynlleth, *ante*, p. 503.

(n) Rex v. Oxfordshire, 4 B. & C. 194 (10 E. C. L. R.). And it seems that even if the fact of adequate funds in the hands of the trustees had been averred and proved, the county would still have been primarily liable, and must have taken their remedy against the trustees. Bayley, J., said, "It was necessary to allege in the plea, and prove at the trial, that the trustees had funds adequate to the repair of this bridge. Even then, I think, a valid defence would not have been made out ; for the public have a right to call upon the inhabitants of the county to repair, and they may look to the trustees under the Act." *Ibid.* 197. And see the opinion of Holroyd, J., and Littledale, J. And see Rex v. Netherthorpe, and other cases, *ante*, p. 495.

to be repaired, and that such particular parishes, &c., should be discharged from the exclusive burden of maintaining such bridges, &c. It was held that all bridges, which, when the Act passed, were repairable by the parishes, &c., in which they were situate, were for the future repairable by the county generally, and that the arrangement of 1774 did not affect the legal liability of the county; for the sessions had no authority to make such a rate upon the parishes in the island, nor could this conventional mode of dividing the performance of the legal obligation alter the right of the public, when the liability to the performance became a legal question. No indictment could be maintained against the island, which was not a district chargeable, as such, with any liability known to the law, and as the statutes had expressly removed the obligation from the parishes, &c., the county was bound to repair the bridges.^(o)

Where an Act recited that it was convenient that a bridge *should be *547] built across the Thames, and empowered S. D. to build a bridge, at his own expense, and in consideration of the great expense he would be at not only in building the bridge, but in erecting, repairing, and maintaining other matters necessary to be erected, it should be lawful for S. D., his heirs and assigns at all times thereafter to take, for pontage or toll for any passage over the bridge, certain sums; and a clause reciting that it might happen that the passage might for some time become dangerous or impracticable, enabled S. D., his heirs and assigns to provide and maintain a ferry across the river, and to take the same sums for passage over the river by it as were granted for the toll or pontage; but such ferry was not to continue longer than should be necessary for repairing or rebuilding the bridge; and the bridge was not to be a county bridge. A later Act recited that it had been found that the pontage or toll was greatly inadequate to the expense of building and keeping in repair the said bridge, and enacted that S. D., his heirs and assigns might take the tolls therein specified. In 1859 the principal arch of the bridge fell in, and the defendant, who had become proprietor of the bridge in 1829, thereupon provided and maintained a ferry across the river near to the bridge, and for passage over the ferry took the tolls authorized by the Acts; and it was held that these Acts imposed upon the defendant, as proprietor of the bridge, the duty to repair and maintain it as long as he received the tolls.^(p)

In one case a question was made as to the evidence on which a jury might find that the defendants were an immemorial corporation, and liable, in their corporate character, to the repair of a bridge. The evidence was of a charter of Edw. 6, granted upon the recited prayer of the *inhabitants* of the borough of *Stratford-upon-Avon*, "that the King would esteem them, the inhabitants, worthy to be *made, reduced, and erected*, into a body corporate and politic;" and thereupon proceeding to "*grant* (without any word of *confirmation*) unto the *inhabitants* of the borough, that the same borough should be a free borough for ever thereafter;" and then proceeding to incorporate them by the name of the bailiffs and burgesses, &c.: and this, it was considered, would, without more, imply a new incorporation. But the same charter recited that it was an *ancient borough*, in which a guild was theretofore founded, and endowed with lands, out of the *rents, revenues, and profits* of which a school and an almshouse were maintained, and a *bridge was from time to time kept up and repaired*; which guild was then dissolved, and its lands lately come into the King's hands; and further recited that the *inhabitants of the borough, from time immemorial*, had enjoyed *franchises, liberties, free customs, jurisdictions, privileges, exemptions, and immunities*, by reason and pretence of the guild, and of charters, grants, and confirmations to the guild, and *otherwise*, which the inhabitants could not then hold and enjoy by the dissolution of the guild, and for other causes, by means whereof it was likely that the *borough and its government* would fall into a worse state without speedy remedy; and that thereupon the *548] *inhabitants of the borough* had prayed the King's favor (for *bettering the borough and government thereof*, and for *supporting the great charges* which from time to time they were bound to sustain,) to be deemed worthy to be made, &c., a body corporate, &c.: and thereupon the King, after granting to the inhab-

(o) *Rex v. Southampton*, 18 Q. B. 841 (83 E. C. L. R.).

(p) *Nicholl v. Allen*, 1 B. & S. 916 (101 E. C. L. R.).

itants of the borough to be a corporation (as before stated), granted them the same *bounds and limits as the borough and the jurisdiction thereof from time immemorial* had extended to: and then "willing that the *almshouse* and *school* should be kept up and maintained as theretofore (without naming the *bridge*) and that the *great charges to the borough and its inhabitants* from time to time *incident* might be thereafter *the better sustained and supported*," granted to the corporation the lands of the late guild. There was also parol evidence, as far back as living memory went, that *the corporation* had always *repaired the bridge*. And the Court held that, taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, first, that this was a *corporation by prescription*, though words of creation only were used in the incorporating part of the charter of Edw. 6; and, secondly, that the burthen of repairing the bridge was upon such prescriptive corporation, during the existence of the guild, before that charter; though the guild out of their revenues had, in fact, repaired the bridge, but only in ease of the corporation, and not *ratione tenuræ*; and that the corporation were still bound *by prescription*, and not merely *by tenure*. A verdict, therefore, against them upon an indictment for the non-repair of the bridge, charging them as *immemorially* bound to the repair of it, was held to be sustainable. (q)

Upon an indictment for the non-repair of Kelham Bridge, charging the defendants *ratione tenuræ*, they produced at the trial a record from the treasury of the Court of the receipt of the Exchequer, setting forth a presentment in the time of Edw. 3, against the Bishop of Lincoln, who was thereby charged with the liability to repair the same bridge. The record stated a trial of this presentment at the spring assizes, 20 Edw. 3; and that the jury found that the bishop was not liable to repair the bridge, and being asked who of right was bound to repair it, said that they were entirely ignorant; but, that the bridge was built about sixty years before, and then of alms of the men of the country passing that way; and that a former Bishop of Lincoln passing through the country, charitably bestowed 40s. on the workmen of the said bridge, and not in any other manner. The defendants also put in a writ of privy seal, dated 28th of June, 20 Edw. 3, granting to the men of Kelham for three years, customs for things for sale passing the said bridge, in order to repair the said bridge. It was held, that these documents were material to the issue, and good evidence towards proving it. It was argued that the ignorance of the jury of any other liability, and their statement of the origin of the bridge, and the manner in which the bishop had contributed, by way of charity and not upon compulsion, were beyond their province: but the Court thought it could not be assumed that at the remote period of this inquiry, the functions of a jury were bounded within the same limits as at *present; every lawyer, indeed, knew [*549 that the contrary was the fact; with the reasonable presumption therefore, which must always be made in favor of the regularity of proceedings conducted by proper authority, it might not be too much to hold that this inquest was a public proceeding, in which the jury might properly inquire, not only whether the person charged, but also in general who, and whether any one was liable to the repairs. At the same time there was no necessity for going this length; because, even if there should be some irregularity in setting forth some particulars not inquired of, that could not vitiate what was correctly done. The facts then, that the bishop was presented as chargeable by the men of Kelham, acting for the public, that such presentment ended with his acquittal on that ground, and that it was shortly followed by the grant of pontage to the men of Kelham for the same repairs, were strong to negative any immemorial liability *ratione tenuræ*, because the Court must suppose that the presentment would rather have been made against the person so liable than against the bishop; and that the grant of pontage would not have been made at all. (r)

The 22 Hen. 8, c. 5, s. 1, called the Statute of Bridges, and made in affirmance of the common law, enacts that the justices of the peace in every shire, franchise, city, or borough, or four of them, whereof one to be of the quorum, may inquire and determine, in their general sessions, of all manner of annoyances of bridges broken in the highways; and make such process and pains on every presentment

(q) *Rex v. Stratford-upon-Avon*, 14 East 348.

(r) *Reg. v. Sutton*, 8 Ad. & E. 516 (35 E. C. L. R.); 3 N. & P. 563.

against the persons as ought to be charged for the making or amending of such bridges as the King's Bench is used to do, or as it shall seem by their discretions to be necessary and convenient. Secs. 2, 3. enact, that where it cannot be known what hundred, city, town, &c., ought to make such bridges decayed, they shall, if without city, or town corporate, be made by the inhabitants of the shire or riding; and if within any city or town corporate, then by the inhabitants of such city or town corporate; and that if part shall be in one shire, &c., and part in another, the inhabitants of each shall repair and make such part as lies within their respective limits. Sec. 9 enacts, that such parts of highways as lie next adjoining to the ends of bridges by the space of three hundred feet, shall be amended as often as need shall require; and that the justices, or four of them, whereof one to be of the quorum, within their several limits, may inquire and determine, in their general sessions, all annoyances therein, and do in everything concerning the same in as ample a manner as they may do for making and repairing bridges, by virtue of the Act.^(s) No private bridges are within purview of this statute, but only such as are common in the highways where all the king's liege people have or may have passage.^(t) Unless the justices of a town, &c., be four in number, and one of the quorum, they have no jurisdiction under this statute. But the justices of the county in which such town (not being a county of itself, and not having the number *550] of justices), shall lie, may *determine as to the annoyances of bridges within the town, &c., if it be known for a certainty what persons are bound to repair them: but if it be not known, it seems that such annoyances are left to the remedy at common law.^(u)

The term, "riding," in the 22 Hen. 8, c. 5, is not to be restrained to districts called by that name, but any division of a county, which corresponds in its definition to that of a riding, is to be included within it. The Isle of Ely, therefore, is included within that term; and it is sufficient in an indictment for the non-repair of a bridge within the Isle of Ely to allege that the bridge is in the Isle of Ely, out of repair, and that the inhabitants of the Isle of Ely ought to repair it.^(v)

It appears also to have been holden, that where the King enlarges the boundaries of a city, by annexing part of the county to the county of the city, the enlarged part is to be considered as parcel of the old county of the city, so as to charge its inhabitants with the repairs of bridges which were situate, at the time when the 22 Hen. 8, c. 5, was made, within the county at large. The point was put upon the ground that the statute lays no absolute charge till a bridge is in decay; so that though, when the statute was made, the bridges in question were within the county of Norfolk, yet, as they were not then in decay, the statute had no operation upon them before they were annexed to the city of Norwich.^(w) But where a borough incorporated by charter with a non-intromittant clause, was enlarged under the 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, s. 7, by the addition of a parish in the same county containing a bridge, which until that time the county had repaired, and there was no evidence that the borough had ever been used to maintain any bridge, it was held that the transfer of the new district did not render the borough liable to repair the bridge.^(x)

The 13 & 14 Vict. c. 64, s. 5, recites that by the 5 & 6 Will. 4, c. 76, certain bridges and parts of bridges have been included within cities and boroughs, which bridges before that Act were maintained as to the whole or such parts thereof as were within such cities or boroughs by the inhabitants thereof, and the remaining bridges and parts of bridges which were not situate within such limits were maintained by the counties or ridings respectively adjoining thereto, and enacts that "every bridge which is wholly or in part included within the boundary of any suc-

(s) See the 5 & 6 Will. 4, c. 50, s. 21, *post*, p. 559.

(t) 1 Hawk. P. C. c. 77, s. 19, and see *ante*, p. 541.

(u) 1 Hawk. P. C. c. 77, s. 20; 2 Inst. 702.

(v) *Reg. v. Isle of Ely*, 15 Q. B. 827 (69 E. C. L. R.). The Court held that the 6 & 7 Will. 4, c. 87; 7 Will. 4, and 1 Vict. c. 53, s. 7, and 1 Ann. st. 1, c. 18, s. 1, showed that the Isle of Ely was a division of a county corresponding to a riding.

(w) *Rex v. Norwich*, 1 Str. 177. And see also *Rex v. St. Peter in York*, 2 Lord Raym. 1249; *Rex v. Oswestry*, 6 M. & S. 361, *post*, p. 563.

(z) *Reg. v. New Sarum*, 7 Q. B. 941 (53 E. C. L. R.).

city or borough, the inhabitants whereof, before the passing of the said recited Act, were by perscription or otherwise liable to and did maintain the bridges and parts of bridges within their respective cities and boroughs, shall as to the whole of such bridges, if the same is (*sic*) wholly within the limits of such city or borough, or as to such part as is within the limits of such city or borough, if part only is within such limits, be maintained, altered, *widened, and repaired, improved or rebuilt, under the sole management and control of the council of such city or borough."(*y*)

But though the inhabitants of a county, by common right, and other persons, by the obligations which have been mentioned, are bound to repair existing bridges, no person can be compelled to build, or contribute to the building, any *new bridge*, without an Act of Parliament; nor can the inhabitants of a county, by their own authority, change a bridge or highway from one place to another.(*z*) Before the 14 Geo. 2, c. 33, the justices at the sessions had no authority to change the situation of bridges: but by that statute they were empowered, at their quarter sessions, to purchase any piece of land adjoining or near to any county bridge, within the limits of their respective commissions, for the more commodious enlarging or convenient rebuilding the same; but the land was not to exceed an acre for any such bridge.(*a*) It was considered by a very learned judge, that this statute impliedly enabled the magistrates to alter the position of bridges to suit the convenience of the public:(*b*) but a more recent statute expressly gives them that power where bridges are so much in decay as to require to be taken down. The 43 Geo. 3, c. 59, s. 2, enacts, "that where any bridge or bridges, or roads at the ends thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the justices at any of their general quarter sessions, to order and direct such bridge or bridges and roads to be widened, improved, and made commodious for the public; and that where any bridge or bridges, repaired at the expense of any county, shall be so much in decay as to render the taking the same wholly down necessary or expedient, it shall and may be lawful to and for the said justices, at any of their said general quarter sessions, to order and direct the same to be rebuilt, either on the old site or situation, or in any new one more convenient to the public, contiguous to or within two hundred yards of the former one, as to such justices shall seem meet." And the statute also provides for the purchasing of land necessary for such purposes, not exceeding an acre at any one bridge; and for assessing a compensation for such land, by means of a jury, where the surveyor cannot agree for the price with the owner, in the same manner as was done by the 13 Geo. 3, c. 78,(*c*) in relation to highways. The justices in Quarter Sessions have a discretionary power under the 43 Geo. 3, c. 59, s. 2, to order a bridge to be widened, and are not bound to make such an order even if the bridge be narrow and incommodious; and it seems that a presentment of the fact should first be made under the proviso in that section.(*cc*) By 54 Geo. 3, c. 90, s. 1, these provisions, relating to the purchase of land, are extended to such buildings and other erections as may be necessary to be purchased for the purposes of the 43 Geo. 3; and the provisions of 43 Geo. 3 (except such as relate to bridges thereafter to be re-erected),(*d*) are extended as well to bridges, and the roads at the ends thereof, repaired by the inhabitants of hundreds, and other general divisions in the *nature of hundreds, [**552* as to bridges and the roads at the ends thereof, repaired by the inhabitants

(*y*) The previous sections provide for the repair, &c., of bridges within corporate cities and boroughs, and for the raising money for those purposes.

(*z*) 2 Inst. 700, 701. By Magna Charta it is enacted that *nulla villa nec liber homo distringatur facere pontes, aut riparias, nisi qui ab antiquo et de jure facere consueverunt tempore Henrici regis avi nostri*. And see 2 Inst. 29; Rex v. Devon, 4 B. & C. 670 (10 E. C. L. R.); Post, p. 560.

(*a*) 14 Geo. 2, c. 33, s. 1. It also provides for the payment for the land out of the county rates: and its conveyance to such persons as the justices shall appoint, in trust for the purposes of the bridge.

(*b*) By Buller, J., in Rex v. Glamorganshire, 5 T. R. 283.

(*c*) Repealed by the 5 & 6 Will. 4, c. 50. This Act of the 43 Geo. 3, is not to extend to bridges repaired by reason of tenure, &c. Sec. 7.

(*cc*) In re Newport Bridge, 2 E. & E. 377 (105 E. C. L. R.).

(*d*) Post, p. 554.

of counties. The 3 Geo. 4, c. 126, s. 107, reciting that "many bridges on turnpike roads are, by prescription, liable to be repaired by certain parishes, and not by the county or counties in which they are situated, and which bridges, from change of times and circumstances, are become no longer sufficiently convenient for the use of the public, without being enlarged or otherwise improved," enacts, that "it shall be lawful for any such county or counties, parish or parishes, respectively, to enter into a composition or agreement with each other, and by the authority of those persons who shall be legally competent to make rates for such county and parish respectively, whereby the improvement and future repair of any such bridge shall be undertaken, and lie upon the county or counties in which such bridge is locally situated; and that all rates made for carrying into effect any such composition, agreement, repairs, or improvement, shall be made and assessed in the same manner as other the rates of such county or parish respectively, and shall be good and valid to all intents and purposes in the law whatsoever."

Where the justices of the county of Dorset had contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; and had directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials, which were to be used by the contractor in finishing the new bridge; the Court refused a writ of prohibition to them, to restrain them from pulling down the old bridge before the new one was passable; and this, though there were strong affidavits of the inconvenience and loss which would be sustained by the people in the neighborhood, by being obliged to use a circuitous way in the interval. And they referred the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance.^(e)

The question, whether the inhabitants of a county, from their common law liability to the repair of public bridges, are liable to repair a bridge not originally built by them, appears to have been formerly a subject of much discussion. But, after able argument and great consideration, the principle was established "that if a man build a bridge, and it *become useful* to the county in general, the county shall repair it."^(f) Upon this principle, where the inhabitants of a township took down an ancient foot-bridge, which they were bound to repair, and built another, for horses and carriages, in a different and more commodious part of the river, which became afterwards of general public utility, it was held that this bridge should be repaired by the county, and not by the township.^(g) And the same principle of the public being obliged to support a bridge of public utility has been acted upon in many subsequent cases. Thus the county was held liable to repair a bridge erected in the King's highway, which about forty years before had been erected by an individual, for his private benefit and utility, and for making a commodious way to his tin-works, *upon proof that the public had constantly used the bridge from the time of its being built.^(h) And where an old foot-bridge had been enlarged, in the first instance to a horse-bridge, and afterwards to a carriage-bridge, by a township, at their expense, it was recognized as the general law that where a township, or any private individuals, build a new bridge, and dedicate it to the public benefit, and it is used by the public, the onus of repairing it falls upon the county at large.⁽ⁱ⁾ In a case also where the doctrine was fully investigated and considered, it was held that the county or riding was liable to the repair of a bridge built by trustees under a turnpike Act, there being no special provision for exonerating them from the common law liability, or transferring it to others.^(k)

Where it appeared that Queen Anne, in the year 1708, for her greater convenience

(e) *Rex v. Dorset*, 15 East 594.

(f) *Glusburne Bridge case*, 5 Burr. 2594; 2 Blac. R. 685.

(g) *Id. Ibid.*

(h) *Rex v. Glamorgan*, 2 East 356, note (a); Bac. Abr. *Bridges*.

(i) *Rex v. The West Riding of Yorkshire*, 2 East 353, note (a).

(k) *Id. Ibid.*; 2 East 342, and the circumstance of the trustees being enabled to raise tolls for the support of the roads was not considered as taking the case out of the general principle.

ce in passing to and from Windsor Castle, built a bridge over the Thames, at ~~shet~~, in the common highway leading from London to Windsor, in lieu of an ~~ant~~ ferry with a toll, which belonged to the crown; and she and her successors ~~stained~~ and repaired the bridge till 1796, when, being in part broken down, the ~~le~~ was removed, and the materials converted to the use of the King, by whom ferry was re-established as before; it was held that the bridge was a public one, ~~irable~~ by the inhabitants of the county.^(l) And where the facts were, that a ~~on~~ about forty-five years before had erected a mill, and dam thereto, for his own ~~t~~, by which means he deepened the water of a ford through which there was a ~~ic~~ highway, but the passage through which was, before the deepening, very in- ~~enient~~ at times to the public, and the miller had afterwards built a bridge over ~~hich~~ the public had ever since used; it was decided that the county, and not ~~miller~~, were chargeable with the reparation.^(m) In this case the Court was ~~h~~ pressed by an ancient authority to this effect: "If a man erect a mill for his profit, and make a new cut for the water to come to it, and make a new bridge ~~it~~, and the subjects use to go over this as over a common bridge; this bridge ~~t~~ to be repaired by him who has the mill, and not by the county, because he ~~ed~~ it for his own benefit."⁽ⁿ⁾ And as that authority seemed to constitute an ~~aly~~ in the law, and to be at variance with all the cases, the record of the case ~~examined~~. From this it appeared that the real question was on an obligation ~~pair~~ by reason of the tenure of certain lands; and that no such question as was ~~osed~~, namely, of a legal obligation resulting from the building of the bridge by ~~nill~~-owner for his benefit, was ever directly or indirectly decided, or could properly ~~been~~ argued.^(o) Relieved, therefore, from this case, the Court considered the ~~orities~~ from first to last as uniform; and as establishing the *doctrine [^{*554} if a private person built a private bridge, which afterwards becomes of ^{ic} convenience, the county is bound to repair it.^(p)

~~i~~ these cases there is always that which is to be considered as an acquiescence ~~ie~~ county. The county is not liable, except for bridges made in *highways*; ~~as~~ the making of the bridge, and thereby obstructing the road while the bridge ~~aking~~, may be treated as a nuisance, and the county may, if it think fit, stop its ~~ress~~ by indictment, the forbearing to prosecute in that way is an acquiescence ~~he~~ county in the building of the bridge.^(q)

~~ut~~ though a bridge built by an individual may thus become public, yet it will ~~become~~ so from the mere circumstance of its being built in a public way; and it ~~ars~~ to have been considered that a bridge built in a public way, without public ~~ty~~, or built colorably in an imperfect or inconvenient manner, with a view to ~~w~~ the burthen of rebuilding or repairing it immediately on the county, may be ~~cted~~ as a nuisance.^(r) A protection is also given to counties by the 43 Geo. 3, ~~9~~, from the burthen of repairing certain bridges, erected after the 24th June, ~~3~~. For the more clearly ascertaining the description of bridges, which inhab- ~~ts~~ of counties shall be liable to repair and maintain, sec. 5 enacts, "that no bridge ~~after~~ to be erected or built in any county, by or at the expense of any individual ~~ivate~~ person or persons, body politic or corporate, shall be deemed or taken to

) *Rex v. Bucks*, 12 East 192.

s) *Rex v. Kent*, 2 M. & S. 513.

i) 1 Roll Abr. 368, citing the 8 Edw. 2, as adjudged in B. R. for Bow Bridge and Chan- ~~Bridge~~ against the Prior of Stratford.

o) See a copy of the record: 2 M. & S. 520, *et seq.* But see the observations on this ~~ord~~ and case in *Reg. v. Ely*, 15 Q. B. 827 (69 E. C. L. R.), and *semble*, that the case ~~'~~ be rightly stated by Rolle.

p) *Rex v. Kent*, 2 M. & S. 520. The same doctrine appears to have been laid down ~~ago~~ in a case cited by Northey, attorney-general, in *Rex v. Wilts*, 1 Salk. 359. ~~h~~ respect to the property in the materials of a bridge, when dedicated to the public, ~~till~~ continues in the individual, subject to the right of passage by the public, so that, ~~en~~ severed and taken away by a wrong-doer, he may maintain trespass for the aspor- ~~on~~: *Harrison v. Parker*, 6 East 154.

q) By Bayley, J., in *Rex v. St. Benedict*, 4 B. & A. 450 (6 E. C. L. C.). *Ante*, p. 496. ~~there~~ seems no necessity for anything like an adoption in this case any more than in ~~case~~ of a road: *Reg. v. Leake*, *ante*, p. 496.

r) *Rex v. The West Riding of Yorkshire*, 2 East 342.

be a county bridge, or a bridge which the inhabitants of any county shall be compellable or liable to maintain or repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or person appointed by the justices of the peace at their general quarter sessions assembled, or by the justices of the peace of the county of Lancaster, at their annual general sessions; and which surveyor, or person so appointed, is hereby required to superintend and inspect the erection of such bridge, when thereunto requested by the party or parties desirous of erecting the same; and in case the said party or parties shall be dissatisfied, the matter shall be determined by the said justices respectively at their next general quarter sessions, or at their annual general sessions in the county of Lancaster."(*s*) It has been observed, upon this statute, that it was passed to limit the liability of the county to those cases only where the new bridge is substantially built, it shows sufficiently, that by the common law they would otherwise be liable to the repair of *all the new bridges *555] which might be erected within their district.(*t*)

Where an ancient bridge in the Isle of Wight had always been repaired by the titling, in which it was situate, down to the passing of the 53 Geo. 3, c. 92, under the circumstances mentioned in a former page.(*u*) and in 1814 after the passing of that Act, the bridge being out of repair, the justices for the island caused a bridge of greater width than the old one to be built in a different position, higher up the river, and the expense was paid out of the local rate ordered by the quarter sessions of the county in the manner mentioned at a former page.(*v*) and levied on the inhabitants of the island, but the directions of the 43 Geo. 3, c. 59, were not complied with; it was held that the county was liable to repair the new bridge.(*w*)

Upon an indictment for the non-repair of a bridge, it appeared that the bridge had been widened subsequently to the 43 Geo. 3, c. 59, by the trustees of a turnpike road; the bridge had originally been built by them, but had not before been chargeable to the county. The statutes under which they had acted gave them a discretionary power to erect bridges; and the funds of the trusts were made applicable to the repairs. The public had used the bridge in its present state for a number of years; the jury found that it was necessary to have a bridge or culvert for the passage of a stream at the place in question; that a bridge was better for the public; but that a culvert would suffice, and would be beneficial. It was objected that this was substantially a bridge erected since the 43 Geo. 3, and not having been built under the direction of the county surveyor, the county was not liable to repair it. But the Court held that the county were liable; the bridge existed and was used by the public before the Act, and the county were bound to repair it; the trustees widened it after the Act came into force, but it continued the same bridge. The case of a bridge widened, as in the present instance, appears not to have occurred to the legislature; at all events, it is not within the words of the section. As to the finding of the jury, as they were of opinion that a bridge was better than a culvert, the verdict of guilty was right.(*x*)

Where before the 43 Geo. 3, c. 59, there had been a bridge used as a carriage-bridge, and which the county repaired; the abutments on each side of the river were of stone, but all the rest of the bridge was wood; in 1807 the wooden part of the bridge was, during a flood, carried some distance down the river, but the abutments remained, and such part of the old wooden work as was fit for the purpose, together with some new materials, were replaced on the abutments at the expense of the parish, and the bridge was made about two feet wider than it was before, and the bridge had ever since been used by the public; it was held that this was substantially

(*s*) Sec. 7 provides, that nothing in the Act contained shall extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure or by prescription, or to alter or affect the right to repair such bridges or roads.

(*t*) By Abbott, C. J., in *Rex v. Netherthong*, 2 B. & A. 183.

(*u*) *Ante*, p. 546.

(*v*) *Ante*, p. 546.

(*w*) *Reg. v. Southampton, Sandown Bridge case*, 18 Q. B. 841 (83 E. C. L. R.). It rather seems that the ground of this decision was, that this bridge was built by the justices of the county, and not by "any individual or private person."

(*x*) *Rex v. Lancashire*, 2 B. & Ad. 813 (22 E. C. L. R.).

the same bridge as that which existed before 1807, and that the county were liable to repair it.(y)

*The words of the 43 Geo. 3, c. 59, s. 5, comprehend every kind of persons, by whom or at whose expense a bridge is built. Where, therefore, [*556 a bridge was erected after the passing of the Act, by trustees appointed by a local turnpike Act, but not under the direction or to the satisfaction of the county surveyor, &c., it was held that it was not a bridge which the county was bound to repair.(z)

It may be useful shortly to notice a few cases in which counties have been holden not to be liable to repair certain bridges built by companies or trustees under particular Acts of Parliament.

Where the Medway Navigation Company, being empowered under a local Act to make the river navigable, and to take tolls, and "to amend or alter such bridges or highways as might hinder the passage or navigation, *leaving them or others as convenient in their room*," had, forty years before, destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place; it was held that they were bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit.(a)

A case not distinguishable in principle from the foregoing was decided shortly afterwards. A canal company, authorized by an Act of Parliament to make the river Bain navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, made a navigable cut, and deepened a ford which crossed the highway, for their own benefit, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expense of the company in the first instance; and it was held that the company (who were found to have profitable funds for the purpose) were bound to maintain it.(b)

The 49 Geo. 3, c. 84, appoints trustees for taking down the old and building a new bridge over the river Tone, and empowers them to take tolls; and enacts, that it shall be lawful for them, out of the moneys received, to build a new bridge, &c., and vests the property in the old and new bridge, during the continuance of the Act, in the trustees; and further enacts, that as soon as the purposes of the Act shall be executed, *then and from thenceforth* the tolls shall cease, and the bridge, &c., shall be repaired by such persons as are by law liable to repair the old bridge. Upon this statute it was decided that, during the time the trustees were engaged in executing the powers of the Act, and before they had completed them, the county was not liable to repair the bridge.(c)

The commissioners appointed by the 22 Car. 2, to make the river Waveney navigable, were authorized to cut through any land they thought fit, and make channels. They cut through a highway; and that cut made a bridge over it necessary for the public, though such bridge was of no use to navigation. A *bridge was [*557 accordingly made, but by whom did not appear; and the bridge being out of repair, an indictment was preferred against the proprietor of the navigation (who received tolls upon the navigation) for not repairing it. Upon a case reserved, he contended, that he was not liable: but the Court held clearly that he was; for by the act of his predecessors the bridge was made: they cut, not for public purposes, but for private benefit; and the county could not be called upon, for it could be no advantage to them to have a bridge in lieu of solid ground.(d)

To an indictment against the Isle of Ely, for not repairing a bridge situated therein, the defendants pleaded that the river, over which the bridge was erected,

) *Rex v. Devonshire*, 5 B. & Ad. 383 (27 E. C. L. R.); 2 N. & M. 212.

) *Rex v. Derbyshire*, 3 B. & Ad. 147 (23 E. C. L. R.).

Rex v. Kent, 13 East 220.

Rex v. Lindsey, 14 East 317.

Rex v. Somerset, 16 East 305. Lord Ellenborough, C. J., intimated an opinion, that trustees were dilatory in executing the powers of the Act, the Court of King's Bench, upon application, would lend its aid to expedite their functions.

Reg. v. Kerrison, 3 M. & S. 526.

was an artificial cut made across an existing highway by the Adventurers for the purpose of draining the Bedford Level, by virtue of certain powers under a commission of sewers; that the said river intersected and rendered wholly impassable the said highway, and that the Adventurers, under the powers aforesaid, erected the said bridge over the said river to enable the public to pass as they otherwise would have done; that the river was made for the benefit of the Adventurers, and was maintained by them until the 15 Car. 2, c. 17, when the property in the river and its banks, and in the bridge, and in the lands benefited by the river, became vested in the corporation of the Conservators of the Fens; and that the river was from that time maintained by the corporation for their own benefit, and that they have continually repaired the said bridge, and still are liable to repair the same; and upon demurrer the Court of Queen's Bench held that this plea disclosed a valid defence. And Patteson, J., in delivering the considered judgment of the Court, said, "the principle appears to be this, undoubtedly a just one, that where the act making the bridge necessary, though authorized to be done, interferes with the public rights, and is done primarily for private purposes, and the public use, from which the public benefit is inferred, it is to be referred only to the act, because made necessary by it, the public, indeed, remaining only with the same convenience which it had before, the authority to do the act is conditional only, equally whether the condition be expressed or implied; and the condition also is in both cases continuing so long as the act continues whereby the public right is interfered with. And as the obligation here insisted on arises from the party's own act, which would be unlawful unless such obligation could be complied with, the case steers clear of any consideration as to the existence of funds: for the party bringing the duty upon himself for his own purpose cannot object the want of funds for the performance of it. It appears to us, that when the Adventurers first cut the drain, and interrupted the public highway, that act, however authorized by commissioners of sewers or other power vested in them, was done for their own use, benefit, and convenience, and could be legal only on the condition of substituting another highway, which could be only by a bridge as convenient for the public as the old highway; (e) that the public were in truth no gainers by the change; *they were by this

*558] hypothesis merely placed in the same situation as before; and that the condition which was necessary to legalize the first cutting of the drain was and is a continuing one: the instant it is broken, the indefeasible rights of the public revive, and the cut becomes a nuisance. We think, therefore, that the plea is in substance good." (f)

It has been seen, (g) that by the 22 Hen. 8, c. 5, it is enacted, that such parts of highways as lie next adjoining to the ends of bridges, by the space of three hundred feet, shall be amended as often as need shall require; but it does not say by whom they shall be amended. It proceeds, however, to provide that the justices may inquire and determine and do in everything concerning the same in as ample a manner as they may do for making and repairing bridges by virtue of that Act. (g) As early as the reign of Edw. 3, the judges understood the approaches to a bridge to be, as it were, excrescences of the bridge itself, and that the charge of repairing them was considered as belonging, *primâ facie*, to the party charged with the repair of the bridge itself. To an indictment against an abbot, for the non-repair of a bridge, he pleaded that he was only bound to repair two arches of it, and the jury found that he was bound only to the repair of two arches, and the bridge over the stream of the water, *et non fines eiusdem pontis*. This was pleaded by him to a second indictment, and the record read: yet Knivet, J., said, "We intend that you are bound to repair the bridge, and the highway applying to the one end and to the other; although the soil be in another, because the easement shall be preserved for the people." (h) It has been decided, upon the authority of the preceding case, that by the common law, declared and defined by this statute, and other subsequent

(e) The words in the report are, "as the old one," obviously an error.

(f) Reg. v. Ely, 15 Q. B. 827 (69 E. C. L. R.).

(g) *Ante*, p. 549.

(h) The Abbot of Combe's case, 43 Ass. 275, B. pl. 37, as stated in the judgment of the Court in Reg. v. Sutton, 8 A. & E. 71 (35 E. C. L. R.).

es,(i) the inhabitants of a county liable to the repair of a public bridge able also to repair to the extent of *three hundred feet* of the highway at end of it; and that, if indicted for not repairing such highway, they can exonerate themselves by pleading specially that some other is bound to repair prescription or tenure.(k) And it seems that private persons are equally

(l) may be considered settled that where the liability to repair a bridge attaches to general law, the liability to repair the approaches to the bridge for the extent of three hundred feet follows the same rule. A corporation, therefore, liable by prescription, to repair a bridge, is also, *prima facie*, liable to repair the highway to the extent of three hundred feet at each end; and such presumption is not rebutted by proof that the corporation have been known only to repair the bridge, but that the only repairs known to have been done to the highway have been performed by commissioners under a turnpike road Act. The corporation of Lincoln, which is a county of itself, had, from time immemorial, exclusively repaired the approaches of a bridge, and were liable by prescription to repair it, but there was evidence that any part of the highway at each end of the bridge had ever [*559] repaired by the corporation, or by the parish in which it was situated, but the extent of the highway, including the part of it which passed over the bridge, had, as far back as living memory went, been repaired by commissioners under a turnpike Act of the 29 Geo. 2, c. 84; it was contended, that a prescriptive liability to repair the approaches of the common law, and must, in each case, be measured by its exact limits, which, in the present instance, were confined to the bridge itself. No evidence appeared, by which the liability to repair the approaches, as *part of* the prescriptive liability to repair the bridge, was excluded; and as the non-repair by the parish, or the county, and the non-repair, *de facto*, by the defendants, explained by the repairs having been done for a great number of years, by a statute created by a modern act, were both consistent with a prescriptive charge, *de facto* having been all the time existing and binding on the defendants; it was held, in the absence of any evidence to the contrary, *the prescription* to repair the approaches must be intended to include within it the repair of the approaches to it, the same principle, which has united the approaches of the bridge to the bridge itself, in the case of a *common law* liability, that, namely, of rendering the benefit to the public, from the repair of the bridge itself.(m)

It was where a new and substantial bridge, of public utility, was built within one county, and adopted by the public, it was held that the inhabitants of that county were bound to repair it, although it was built within three hundred feet of an old bridge, repairable by the inhabitants of another county, who were bound as a matter of course under the 22 Hen. 8, c. 5, to maintain three hundred feet of road leading to their bridge, though it lay in the other county. The Court said, that the space where the bridge was built continued a road, it was repairable as of the old bridge; but that when there was a substantial bridge built upon it, the bridge was repairable, as a bridge by the inhabitants of the county in which it was situated, according to the statute.(n)

It is now by the 5 & 6 Will. 4, c. 50, s. 21, "if any bridge shall hereafter(o) be built, which bridge shall be liable by law to be repaired by and at the expense of any county or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law before the erection of the said bridge bound to repair the said highways: provided nevertheless, that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county or any part of any county

1 Anne, st. 1, c. 18, ss. 3, 5, 13, and 12 Geo. 2, c. 29.

Rex v. West Riding of Yorkshire, 7 East 588, and the judgment was afterwards affirmed in the House of Lords, 5 Taunt. 284 (1 E. C. L. R.).

3 Chit. C. L. 589.

(o) *Rex v. The Mayor of Lincoln*, 8 Ad. & Ell. 65 (35 E. C. L. R.); 3 N. & P. 273.

Rex v. Devon, 14 East 477.

The Act came into operation on the 20th of March, 1836.

from repairing or keeping in repair the walls, banks, or fences of the raised causeways and raised approaches to any such bridge, or the land arches thereof."

*560] It seems clear that those who are bound to repair public bridges *must make them of such height and strength as shall be answerable for the course of the water, whether it continues in the old channel, or makes a new one; and that they are not punishable as trespassers for entering on any adjoining land for such purpose, or for laying on the materials requisite for such repairs.^(p) The Court of King's Bench once intimated, that if a bridge used for carriages, though formerly adequate to the purpose intended, were not of a sufficient width to meet the present public exigencies, owing to the increased width of carriages, the burthen of widening it must be borne by those who are bound to repair the bridge:^(q) but in the House of Lords, on error, this point was considered as doubtful.^(r) And, it has since been held, that the obligation upon a county is only to repair a bridge to the extent to which that bridge has been originally given to the public, and that they are not bound to widen it.^(s)

The taxing and collecting moneys for the repairing of bridges, and the highways, at the ends thereof, were first regulated by 22 Hen. 8, c. 5, and afterwards by the 1 Anne, stat. 1, c. 18, by which the justices at their quarter sessions were empowered, upon presentment of any bridge being out of repair, to make assessments upon every town or place within their commissions for the charges of the repairs. The 12 Geo. 2, c. 29, s. 1, for the better collection of such moneys, appointed that they should be paid out of the general county rate; but sec. 13 enacted, that no money should be applied to the repair of any bridge, until a *presentment* should be made by the grand jury of its want of reparation. The 43 Geo. 3, c. 59, s. 2, also enacted, that no money should be applied to such purposes until *presentment* made of the insufficiency or want of reparation of such bridges. The 52 Geo. 3, c. 110, and 55 Geo. 3, c. 143, make alterations in this respect, and sec. 5 of the latter Act enacts, that "it shall and may be lawful to and for the justices of the peace of any county, city, riding, division, town corporate, or liberty, at their general quarter sessions respectively, to contract and agree, or to authorize any other person or persons to contract and agree, with any person or persons, for the maintaining and keeping in repair any county or hundred bridge, and the road over such county or hundred bridge, and so much of the roads at the ends thereof as are by law liable to be repaired at the expense of any such county, hundred, city, riding, division, town corporate, or liberty, or any part of the same; and the said justices are hereby empowered to order such sum or sums of money as may be contracted for and agreed to be paid for the repairing, amending, and supporting such bridges, and the roads over the same, or the ends thereof, to be paid (in cases where the county is liable to the repair thereof) by the treasurer of the county out of the county rate: or (in cases where the hundred is liable to the *repair of the same) by the bridge-master (or other public officer charged with the repair of bridges) of the hundred, by which such bridge is liable to be repaired, for any term not exceeding seven years, nor less than one, although no presentment of the insufficiency, decay, or want of repair of the same, shall have been made, and although no public notice shall have been given by the said justices, at their respective general or quarter sessions, of their intention to contract for the repair of such bridges, or the roads at the ends thereof, as respectively directed by the said Act (12 Geo. 2, c. 29), provided nevertheless that, before any such contract shall be made, the said justices shall cause notices to be given in some public paper circulated in such county, city, riding, hundred, division, town corporate, or liberty, of their intention to contract." By the 4 & 5 Vict. c. 49, the justices in session

(p) 1 Hawk. P. C. c. 77, s. 1; Bac. Abr. *Bridges*; 43 Ass. pl. 37; Br. tit. *Presentment in Courts*, pl. 22, 29; Dalt. c. 14.

(q) *Rex v. Cumberland*, 6 T. R. 194.

(r) *Cumberland v. Rex*, 3 B. & Pul. 354. But the judgment was affirmed upon the ground that, after verdict, it must be presumed that the over-narrowness of the bridge arose from its having been contracted from its ancient width.

(s) *Rex v. Devon*, 4 B. & C. 670 (10 E. C. L. R.); 7 D. & R. 147; *Rex v. Middlesex*, 3 B. & Ad. 201, per Lord Tenterden, C. J. But though their obligation is only to this extent, see as to the power to widen by an order at sessions: 43 Geo. 3, c. 59, s. 2, *ante*, p. 551.

may borrow money for repairing county bridges on the credit of the county rate, and may charge the rate with interest on the money borrowed, and with the payment of such further sum as shall secure the repayment of the money borrowed in fourteen years. By the 13 & 14 Vict. c. 64, provision is made for the repairs and rebuilding of bridges within cities corporate and boroughs, under the control of the councils of such cities and boroughs, and for the borrowing of money for such purposes. By the 22 Hen. 8, c. 5, s. 3, it was provided that where part of a county bridge shall be in one shire, &c., and part in another, the inhabitants of each shire, &c., shall be contributory.^(t) It has been questioned whether a borough, which has no bridge within its own limits, be not liable to contribute to the repairs of a county bridge.^(u) Where certain townships had enlarged a bridge to a carriage bridge, which they were before bound to repair as a foot bridge, it was held that they should still be liable to repair *pro ratâ*.^(v) So where a carriage bridge had been built before 1119, and certain abbey lands had been ordained for its repair, and the proprietors of those lands had always repaired the bridge so built; and in 1736 the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden bridge along the outside of the parapet of the carriage bridge, partly connected with it by brickwork and iron pins, and partly resting on the stone work of the bridge; it was held that this foot bridge was not parcel of the carriage bridge, which the proprietors of the abbey lands were bound to repair, but that the county was liable to repair it.^(w)

The methods of appointing surveyors, &c., for effecting the repairs or rebuilding of bridges, and the powers given to such surveyors, and persons employed under contracts, to procure materials for such purposes, are contained in different Acts of Parliament, the provisions of which do not fall within the object of this work.^(x)

*Where those upon whom the liability rests of repairing public bridges neglect their duty, such nonfeasance is a nuisance to the public, punishable by information, presentment, or indictment. An *information* was held to lie in the Court of King's Bench for the non-repair of a bridge in a case where it was considered that the 22 Hen. 8, c. 5, gave only a concurrent, but not an exclusive, jurisdiction to the sessions;^(y) but probably it would not be granted, except in some cases of a peculiar nature, in which the Court might be satisfied that the purposes of justice would not be effected by an indictment.^(z) The more usual course of proceeding is by indictment or presentment.^(a)

Although the 5 & 6 Will. 4, c. 50, repeals the 13 Geo. 3, c. 78, which enabled a justice on his own view to present a highway which was out of repair, that enactment is kept alive as to county bridges by the 43 Geo. 3, c. 59, which extended the enactments of the 13 Geo. 3, c. 78, to county bridges so far as applicable thereto, and consequently a single justice may still present a bridge out of repair on his own view.^(b)

The 22 Hen. 8, c. 5, s. 1, gave power to the justices of the peace to hear and determine, in their general sessions, all annoyances of bridges broken in the highways, and to make process, &c., as the King's Bench used to do. By sec. 5, where any bridge is in one shire, and the persons or lands which ought to be charged are in

(c) This provision is alluded to by Lord Mansfield, C. J., in *Rex v. Weston*, 4 Burr. 2511, and by counsel *arguendo* in *Rex v. Clifton*, 5 T. R. 501, 2. The usual proceeding at this time appears to be to indict each county separately, for neglecting to repair its own division.

(u) 1 Hawk. P. C. c. 77, s. 25; 1 Keb. 68.

(v) *Rex v. The West Riding of Yorkshire*, 2 East 353, note (a); and see *Rex v. Surrey*, 2 Campb. 455.

(w) *Rex v. Middlesex*, 3 B. & Ad. 201 (23 E. C. L. R.).

(x) See them collected in Burn's *Just.*, tit. *Bridges*, VI.; and see also 55 Geo. 3, c. 143. By the 43 Geo. 3, c. 59, s. 4, inhabitants of counties may sue for damages done to bridges in the name of the surveyor.

(y) *Rex v. Norwich*, 1 Str. 177.

(z) See *ante*, p. 509.

(a) 2 Inst. 701. It has been held that an action will not lie by an individual against the inhabitants of a county for an injury sustained from a county bridge being out of repair: *Russell v. The Men of Devon*, 2 T. R. 667.

(b) *Reg v. Brecon*, 15 Q. B. 813 (69 E. C. L. R.).

another shire; or where the bridge is within a city, or town corporate, and the persons or lands that ought to be charged are out of the said city; the justices of such shire, city or town corporate, shall have power to hear and determine such annoyances, being within the limits of their commission; and if the annoyance be presented, then to make process into every shire of the realm against such as ought to repair the same, and to do further in every behalf as they might do if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is.

Any particular inhabitant or inhabitants of a county, or tenant or tenants of land chargeable with the repairs of a public bridge, may be indicted for not repairing it, and will be liable to pay the whole fine assessed by the Court for the default of such repairs; and will be put to their remedy at law for a contribution from those who are bound to bear a proportionable share in the charge.(c) It is sufficient, in an indictment against a parish, to allege that the inhabitants thereof have from time whereof, &c., repaired and amended, and have been used and accustomed, &c., without stating any other ground of liability.(d) And so it is against a hundred, although it appears that a township has been annexed to it by statute within time *563] of legal memory, such statute *providing that the inhabitants of the township should do everything the same as the inhabitants of the hundred did, or were bound to do.(e) In the case of a corporation, if it were alleged that the mayor, aldermen, and burgesses had from time immemorial repaired, and it appeared that there was a period when the corporation was not so constituted, it would be bad. In such a case, the proper way would be, to allege that the corporation had immemorially repaired; and then, however constituted the corporate body might have been at different periods, the allegation would be sustained.(f) The indictment ought to show what sort of bridge it is; whether for carts and carriages, or for horses or footmen only; and if the duty to repair arise by reason of the tenure of certain lands, the indictment must show where those lands lie.(g) An indictment charging an individual with the repair of a bridge, *by reason of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but it is erroneous; and it seems that a count, charging an individual by reason of being owner of a navigation under a *private Act of Parliament*, must set forth the Act; and it is not sufficient to state that such party is chargeable, by being owner and proprietor of the property subject to the charge.(h) In presentments by the grand jury, it is said that there is no occasion to show who ought to repair; and that it is sufficient if the defect be shown, and the bridge stated to be public.(i) Where an indictment alleged that the defendant, and those whose estate he had in a certain mill, from time whereof the memory of man runneth not to the contrary, had repaired, and it appeared that the mill did not exist before the time of Hen. 8, it was held, that the liability from time out of memory was disproved.(k)

An indictment alleged that "from time whereof," &c., "there hath been and still is a certain common and public bridge over the river Cherwell," and that the inhabitants of the township of A. E. had repaired and of right ought to repair the part of the said bridge which lies in the said township. It appeared that the arch of the bridge was down to 1806 only nine feet wide as to breadth of road, but was widened in that year to the breadth of fifteen feet at the expense of the township. The road over it was a carriage road both before and after the widening. The defendants before the trial gave a written admission that the bridge in question was such a bridge as was described in the indictment. It was objected that the addi-

(c) 1 Hawk. P. C. c. 77, s. 3; Bac. Abr. tit. *Bridges*, where the reason given is, that cases of this nature require the greatest expedition; and bridges being of the utmost necessity are not to lie unrepaired till lawsuits are determined.

(d) *Rex v. Hendon*, 4 B. & Ad. 628 (24 E. C. L. R.).

(e) *Rex v. Oswestry*, 6 M. & S. 361. See *Rex v. Norwich*, 1 Str. 177, *ante*, p. 550.

(f) Per Holroyd, J., *Rex v. Oswestry*, 6 M. & S. 361. See a form there, note (a).

(g) 1 Hawk. P. C. c. 77, s. 5.

(h) *Rex v. Kerrison*, 1 M. & S. 435.

(i) 3 Chit. Crim. Law 592, citing Andr. 285.

(k) *Rex v. Hayman*, Loo. & M. 401, Tindal, C. J.

feet in width, the repair of which must devolve on the county, was such ion that the prescriptive liability to repair the said part situate in the ship was negatived by the proof; but the Court of Queen's Bench held was no misdescription. Either the whole of the bridge, including the t, was still an ancient bridge, and the liability the same as before; or the was *severable, so that there was an ancient bridge and something [*564 d either state of things would support the allegation.(l)

s no doubt that an indictment will lie against a corporation aggregate for repair or obstruction of a public bridge.(m) or against any members of oration who cause an obstruction to a public bridge.(n)

occupier of land charged with the repair of a bridge, is undoubtedly he performance of that duty, it is prudent to prefer the indictment against pier, and not against the owner, concerning whose liability doubts have

In a late case(p) the Court of Queen's Bench said, "With respect to ty at common law to the repair of bridges *ratione tenuræ*, the result of cities seems to be to throw the charge ultimately upon the owner, though as far as the public are concerned, the occupier may be the person s by indictment in case of non-repair,(q) and it would seem from those s that if the owner of land charged with the repair of a bridge *ratione* ffer it to be out of repair, and the occupier of the land be indicted and would be entitled to look for reimbursement to the owner, who ought to ired, and who holds the land by the service of repairing the bridge."

an infant, eleven years old, inherited land charged with the repair of a d his guardian in socage resided on the land, but the infant did not, casionally; it was held, that although the infant was actually seised, yet y the possession of his guardian, he was not such an owner or occupier d, as to be chargeable by indictment for the non-repair of the bridge, but guardian was such an owner and occupier.(r)

is that, if there were no other person against whom performance of the a bridge could be enforced, infancy would not exempt a party, liable in ects, from an indictment for non-repair.(r)

d down, that it is not sufficient for the defendants in an indictment for ing a bridge to excuse themselves by showing either that they are not repair the whole or any part of the bridge, without showing what other bound to repair it, and that in such case the whole charge shall be laid defendants by reason of their ill plea.(s) But it is submitted that, from o the case of highways, this doctrine must be understood only of indict- inst the county, and not of indictments against individuals, or bodies who are not of common right bound to repair; because, as it lies on the r specially to state the grounds on which such persons are liable, [*565 negative these parts of the charge under *the general issue.(t)

is been holden upon an information for not repairing a bridge, that the s, if not chargeable of common right, may discharge themselves upon the sue.(u) But it is clear that the inhabitants of a county, in order to ex- hemselves from the burden of repairing a bridge lying within it, must heir plea that some other person is liable to repair.(v) It has, however,

v. Adderbury East, 5 Q. B. 187 (48 E. C. L. R.). Lord Denman, C. J., and Pat- seemed to think the township liable to repair the added part.

. v. Birmingham and Gloucester R. Co., 3 Q. B. 223 (43 E. C. L. R.); Reg. v. i. R. Co., 2 Q. B. 315 (42 E. C. L. R.).

v. Betts, 16 Q. B. 1022 (71 E. C. L. R.); Reg. v. Scott, 3 Q. B. 543 (43 E. C.

Rex v. Sutton, 3 A. & E. 597 (30 E. C. L. R.).

er v. Greenhill, 3 Q. B. 148 (43 E. C. L. R.). See this case as to the construc- ts dealing with certain liabilities to repair bridges *ratione tenuræ*.

v. Bucknell, 7 Mod. 55, 98; 1 Hawk. P. C. c. 77, s. 3, and the cases there cited.

v. Sutton, 3 A. & E. 597 (30 E. C. L. R.),

wk. P. C. c. 77, s. 4; Bac. Abr. tit. *Bridges*; Burn's Just. tit. *Bridges*, V.

it. Crim. L. 592.

v. Norwich, 1 Str. 177, and see *ante*, p. 516.

v. Wilts, 1 Salk. 359; 2 Lord Raym. 1174.

been recently decided, that it is competent to the inhabitants of a county, upon the general issue, to give evidence of the bridge having been repaired by private individuals. But this evidence appears to have been considered barely admissible as a medium of proof that the bridge was not a public bridge, which undoubtedly the defendants had a right to prove by every species of evidence: and the Court seemed to think that it would have but little effect; though in order to ascertain whether a bridge be public, the mode of its construction, and the manner of its continuance, may be circumstances which, as they are connected with others, may have much or little weight.(w)

To an indictment for not repairing a bridge described as lying in two parishes, it is no plea that there has been a verdict and judgment against J. S. finding him liable to repair it *ratione tenuræ*, upon a presentment describing it as lying in one of the parishes; for he may be liable to repair only what is in one parish. The information was against the county of Essex for not repairing Dagenham Bridge, in the several parishes of Hornchurch and Dagenham; and the plea was that Knatchbull and Fanshaw had been presented for not repairing it *ratione tenuræ* of lands in Barking, and that a verdict and judgment had passed against Fanshaw; and to this there was a demurrer, because the presentment stated in the plea described the bridge as in Dagenham parish. And the Court said that Fanshaw might be bound to repair what was in Dagenham parish, and the county might be bound to repair the rest; and gave judgment for the King.(x)

It is said, that where the defendants plead that an individual ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves, the attorney-general, in this special case, may take a traverse upon a traverse, and insist that the defendants are bound to the repairs, and traverse the charge alleged against the individual: and that an issue ought to be taken of such second traverse; and that the attorney-general may afterwards surmise that the defendants are bound to repair it, and that the whole matter shall be tried by an indifferent jury.(y) But where the inhabitants of a county are indicted for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to *repair; as it is a traverse of a matter of law, and might be *566] made the subject of demurrer.(z)

Where to an indictment against a riding for not repairing a public carriage-bridge, the plea alleged that certain townships had *immemorially* used to repair the said bridge, it was held that evidence that the townships had *enlarged* the bridge to a carriage-bridge, which they had before been bound to repair as a foot-bridge, would not support the plea.(a) And, upon the same principle, where it was proved that a particular parish was bound by prescription to repair an old wooden foot-bridge, used by carriages only in times of flood, and that about forty years ago the trustees of a turnpike-road built on the same site a much wider bridge of brick, which had been constantly used ever since by all carriages passing that way; it was held that these facts did not support a plea pleaded by the county that the parish had *immemorially* repaired, and still ought to repair the said bridge.(b) Where the county was indicted for not repairing a bridge, and pleaded that one Marsack was liable to repair *ratione tenuræ*, it was held that this plea was not sustained by evidence that the estate of Marsack was part of a larger estate, which part Marsack purchased of the Lord Cadogan, who had retained the rest in his own hands, and had repaired the bridge as well before as after the purchase.(c)

(w) *Rex v. Northampton*, 2 M. & S. 262. If a bishop, &c., hath once or twice of alms repaired a bridge, this binds not; but yet it is evidence against him, that he ought to repair, unless he proves the contrary: 2 Inst. 700. See *Reg. v. Sutton*, *ante*, p. 549.

(x) *Rex v. Essex*, T. Raym. 384.

(y) 1 Hawk. P. C. c. 77, s. 5; Bac. Abr. tit. *Bridges*.

(z) *Ante*, p. 518, and the authorities there cited.

(a) *Rex v. The West Riding of Yorkshire*, 2 East 353, note (a); *Rex v. Middlesex*, 3 B. & Ad. 201 (23 E. C. L. R.).

(b) *Rex v. Surrey*, 2 Campb. 445. The facts would not have availed the county if the plea had been framed differently, as the county was clearly liable to the repair of the new bridge. See *ante*, p. 552.

(c) *Rex v. Oxfordshire*, 16 East 223.

The 1 Anne, st. 1, c. 18, s. 5, enacts, that all matters concerning the repairing and amending of bridges and the highways thereunto adjoining shall be determined in the county where they lie, and not elsewhere: but it seems that objection may be made to the justices where they are all interested, and that in such case the trial shall be had in the next county. (d) And no inhabitant of a county ought to be a juror for the trial of an issue, upon the question whether or not the county be bound to repair. (e) So that where the matter concerns the whole county, a suggestion may be made of any other county's being next adjacent: (f) and whether the county of the city, or the county at large, ought to repair, on a suggestion of these facts on the record, the *venire* will be awarded into the county adjacent to the larger district. (g)

Inhabitants of counties may be witnesses in prosecutions against private persons or corporate bodies for not repairing bridges. The 1 Anne, stat. 1, c. 18, s. 13, enacts that many private persons or bodies politic or corporate, were of right obliged to repair decayed bridges, and the highways thereunto adjoining, and that the inhabitants of the county, riding, or division, in which such decayed bridges or highways lay, had not been allowed, upon information or indictments against such persons or bodies for not repairing them to be legal witnesses; enacts, that all informations or indictments in the courts of record at Westminster, [567] or at the assizes or quarter sessions, the evidence of the inhabitants of the town, corporation, county, &c., in which such decayed bridge or highway lies shall be taken and admitted. Even before this statute, such evidence had been thought admissible from necessity. (h) Upon an indictment for not repairing a bridge and road, under a liability *ratione tenuræ*, inhabitants of the parish, in which the bridge and road lie, have been held competent for the prosecution, under the 54 Geo. 3, c. 170, s. 9. (i)

It was said in one case, (k) and decided in another, (l) that evidence of reputation could not be admitted to establish a liability to repair a bridge *ratione tenuræ*. But it has since been expressly held that such evidence is admissible to prove such

liability; for although the question may involve matter of private right, yet matters of public interest also depend upon it. Where, therefore, to a presentment that a bridge was out of repair the parish pleaded that A. was liable to repair it *ratione tenuræ*, and issue was joined on A.'s liability, it was held that evidence of reputation that A. ought to repair the bridge as alleged in the plea was admissible. (m)

Upon the trial of an indictment against a township for the non-repair of a bridge, evidence is admissible that the solicitor for the prosecution had interviews with one of the churchwardens and the surveyor of the township, and that they on those occasions admitted that their township had always repaired the bridge, and showed township books containing entries on the subject, although it was not proved that these parties were ratepayers; but they lived together in a house in the township, and there was no other proof that they occupied property there; for every inhabitant, whether actually rated or not, is liable on an indictment against the inhabitants, and is a defendant on the record. He may, though a defendant, be a competent witness by the 3 & 4 Vict. c. 46; but it does not follow that the Crown can compel him to give evidence against his interest. At all events he is a defendant on the record, and what a defendant on the record says is evidence against him in every case. (n)

(d) *Rex v. Norwich*, 5 Geo. 1, cited in 2 Burr. 859; Burn's Just. tit. *Bridges*, V.

(e) 1 Hawk. P. C. c. 77, s. 8.

(f) *Reg. v. Wilts*, 6 Mod. 307, and see 1 Salk. 380; 2 Lord Raym. 1174.

(g) *Rex v. Norwich*, 1 Str. 177; 3 Chit. Crim. L. 593.

(h) *Rex v. Carpenter*, 2 Show. 47.

(i) *Rex v. Hayman*, Moo. & M. 401, Tindal, C. J. See the 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83, *post*, *Evidence*.

(k) *Rex v. Antrobus*, 2 A. & E. 794 (29 E. C. L. R.), per Patteson, J.

(l) *Reg. v. Wavertree*, 2 M. & Rob. 353, Maule, J.

(m) *Reg. v. Bedfordshire*, 4 E. & B. 535 (82 E. C. L. R.). The plea alleged that three arches ought to be repaired by different persons, by reason of the tenure of three different manors, and the question rejected at the trial was whether a witness had heard from his deceased father, who ought to repair the second arch.

(n) *Reg. v. Adderbury East*, 5 Q. B. 187 (48 E. C. L. R.), Lord Denman, C. J.: "I should

As a prosecution for a nuisance to a public bridge has for its object the removal of the obstruction, or the effecting of the necessary reparations, the judgment of the Court upon a conviction will generally be regulated by the same principles as those which have been mentioned in relation to the judgment for a nuisance to a highway.^(o) The 1 Anne, stat. 1, c. 18, s. 4, enacts, that *no fine, issue, penalty, or forfeiture, upon presentments or indictments for not repairing bridges, or the highways at the ends of bridges, shall be returned into the Exchequer, but shall be paid to the treasurer, to be applied towards the repairs. But this seems only to relate to county bridges.

Where upon an indictment for not repairing a bridge the verdict was unsatisfactory, the practice formerly was to grant a rule for staying the judgment upon payment of the costs of the prosecution, in order that another indictment might be tried.^(p) But it would seem that the Court would now grant a new trial in such a case.^(q)

The 1 Anne, stat. 1, c. 18, s. 5, enacts, that no presentment or indictment for not repairing bridges, or the highways at the ends of bridges, shall be removed by *certiorari* out of the county into any other Court. But it has been decided that, notwithstanding these general words of the statute, an indictment for not repairing a bridge may be removed by *certiorari* at the instance of the prosecutor.^(r) And it has been resolved that this clause of the Act extends only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the 5 Will. & M. c. 11, had allowed the granting a *certiorari*.^(s) A *certiorari* lies to remove an order made by the justice concerning the repair of a bridge, pursuant to a private Act of Parliament; and the justices ought to return the private Act upon which their order is founded.^(t)

The 13 Geo. 3, c. 78, s. 64, empowered the Court trying an indictment for non-repair of a highway to award costs to the prosecutor if the defence was frivolous; and the 43 Geo. 3, c. 59, s. 1, enacted that all "matters and things in the said Act contained relating to highways," shall, so far as applicable, be extended and applied to county bridges "as fully and effectually as if the same and every part thereof were herein repeated and re-enacted." And the Court of Queen's Bench held that the clause as to costs in the 13 Geo. 3, c. 78, was substantively re-enacted in the 43 Geo. 3, c. 59, with reference to county bridges, and therefore was not repealed by the 5 & 6 Will. 4, c. 50, which repeals in general terms the 13 Geo. 3, c. 78, and consequently that the costs of an indictment for the non-repair of a bridge may still be ordered where the defence is frivolous.^(u)

The judge, who tries an indictment for the non-repair of a bridge, removed by *certiorari*, may certify after the assizes that the defence was frivolous, and by such certificate award payment of costs to the prosecutor, which will be enforced by the Court of Queen's Bench.^(v)

say that where persons are discharging a public duty, they are *prima facie* authorized to make communications of this kind, and their admissions are a proceeding, which must be evidence against those for whom they act."

(o) *Ante*, p. 523.

(p) *Rex v. Oxfordshire*, 16 East 223; *Rex v. Sutton*, 5 B. & Ad. 52 (27 E. C. L. R.) = 2 Nev. & M. 57.

(q) See *Reg. v. Russell*, 3 E. & B. 942 (77 E. C. L. R.), *ante*, p. 522.

(r) *Rex v. Cumberland*, 6 T. R. 194. Affirmed in Dom. Proc. 3 Bos. & Pull. 354. And see *ante*, note (p), p. 522.

(s) *Rex v. Hamworth*, 2 Str. 900; 1 Barnard 445. See as to the 5 W. & M., *ante*, p. 522.

(t) Dalt. 504; Burn's Justice, tit. *Bridges*, V.

(u) *Reg. v. Merionethshire*, 6 Q. B. 143 (51 E. C. L. R.).

(v) *Reg. v. Merionethshire*, *supra*; and see *Reg. v. Pembridge*, 3 Q. B. 901 (43 E. C. L. R.), note (y), *ante*, p. 527.

*CHAPTER THE THIRTY-FIRST.

[*

OF OBSTRUCTING PROCESS, AND OF DISOBEDIENCE TO ORDERS OF MAGISTRATES.

Sec. I.—Of Obstructing Process.

THE obstructing the execution of lawful process is an offence against public justice of a very high and presumptuous nature; and more particularly so when the obstruction is of an arrest upon criminal process. So that it has been holden that the party opposing an arrest upon criminal process becomes thereby *particeps criminis*: that is, an accessory in felony, and a principal in high treason.^(a)¹

And it should seem that the giving assistance to a person suspected of felony and pursued by the officers of justice, in order to enable such person to avoid being arrested, is an offence of the degree of misdemeanor, as being an obstruction to the course of public justice.^(b) Thus an indictment was preferred against the defendant for a misdemeanor in the obstruction of public justice by rendering assistance to one Olive, who was suspected of forgery and pursued by the officers of justice, in order to enable Olive to avoid being arrested. It appeared in evidence that Olive had committed a forgery, as stated in the indictment; and had afterwards, in state of desperation, thrown himself from the top of a house, by which he was greatly hurt; and that the defendant, who was a relation and commiserated his wretched condition, conveyed him secretly on board a barge from Gloucester to Bristol, and was actively employed at the latter place in endeavoring to enable him to escape from this country in a West India vessel. Advertisements had been printed and circulated, stating the charge against Olive, and offering a large reward for his apprehension; but it was not proved that any one of these advertisements had come to the knowledge of the defendant, or that the defendant was acquainted with the particular charge against Olive, or knew that he had been guilty of forgery, as alleged in the indictment. Upon this ground the defendant was acquitted; but no other objection was taken to the indictment.^(c)

*Formerly, one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places [570] where indigent persons assembled together to shelter themselves from justice (especially in London and Southwark) under the pretence of their having been ancient officers of the Crown, or the like;^(d) and it was found necessary to abolish the supposed privileges and protection of these places by several legislative enactments. 8 & 9 Will. 3, c. 27, 9 Geo. 1, c. 28, and 11 Geo. 1, c. 22, enact that persons aiding the execution of any process in the pretended privileged places therein mentioned, or abusing any officer in his endeavors to execute his duty therein, so as to receive bodily hurt, shall be guilty of felony, and transported^(e) for seven

¹ Blac. Com. 128; 2 Hawk. P. C. c. 17, s. 1, where *Hawkins* submits that it is reasonable to understand the books which seem to contradict this opinion to intend no more than that it is not felony in the party himself, who is attacked in order to be arrested, to resist himself from the arrest by such resistance.

his position is not warranted by the case; for it states that "Olive had committed forgery" and the position ought to be "a person guilty of felony," instead of "suspected of forgery." C. S. G.

² *Ex v. Buckle*, cor. Garrow, B., Gloucester Spring Ass. 1821.

³ The White Friars and its environs, the Savoy, and the Mint in Southwark, were of this description.

⁴ Penal servitude for seven and not less than three years by the 20 & 21 Vict. c. 3, s. 4.

Obstruction of law process, whether it be by active means or the omission of a legal officer, is an indictable offence; but the indictment must show what the process was, and in the hands of a proper officer, and the mode of obstruction: *State v. Strob.* 73. To constitute the offence of obstructing process in a criminal case there must be an active opposition, not merely taking charge of a debtor's property and keeping it out of view, and refusing, when called on by an officer, to place it in his hands: *Crumpton v. Newman*, 12 Ala. 199.

years; and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing, or for having executed the same, are declared to be felons without benefit of clergy. *(f)*

In some proceedings, particularly in those relating to the execution of the revenue laws, *(g)* the legislature has made especial provision for the punishment of those who obstruct officers and persons acting under proper authority. But in ordinary cases, where the offence committed is less than felony, the obstruction of officers in the apprehension of the party will be only a misdemeanor, punishable by fine and imprisonment. *(h)*

A party will not be guilty of the offence of obstructing an officer, or the process which such officer may be about to execute, unless the arrest is lawful. And in an indictment for this offence it must appear that the arrest was made by proper authority. Thus where an indictment for an assault, false imprisonment, and rescue, stated that the judges of the court of record of the town and county, &c., of P. issued their writ, directed to T. B., *one of the serjeants at mace* of the said town and county, to arrest W., by virtue of which T. B. was proceeding to arrest W. within the jurisdiction of the said Court, but that the defendant assaulted T. B. in the due execution of his office, and prevented the arrest; the Court held that it was bad, as it did not appear that T. B. was an officer of the Court; a serjeant at mace *ex vi termini* meaning no more than a person who carries a mace for some one or other. And the Court also held that there could not be judgment, after a general verdict on such a count, as for a common assault and false imprisonment; because the jury must be taken to have found that the assault and imprisonment were for the cause therein stated; and that cause appeared to have been the attempt by the officer to make an illegal arrest. *(i)* Lord Ellenborough, C. J., said, "process ought always to be directed to a proper known officer; otherwise, if it may be directed to any stranger, it might be resisted for want of knowledge that the party is an officer *571] of the Court. Then, taking the whole count together, the jury in effect find that there was an assault and imprisonment, but committed under circumstances which justified the defendant. For if a man without authority attempt to arrest another illegally, it is a breach of the peace; and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose; *(k)* and nothing further appears in this case to have been done." *(l)*

But where the process is regular, and executed by the proper officer, it will not be competent even for a peace officer to obstruct him, on the ground that the execution of it is attended with an affray and disturbance of the peace; for it is an established principle that if one, having a sufficient authority, issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command; as that would be to legalize confusion and disorder. *(m)* The following case upon an indictment for an assault and rescue proceeded upon this principle. Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected, and endeavored by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs, having been violently assaulted, struck one of the assailants, a woman, and it was thought for some time that he had killed her; whereupon, and before

(f) 4 Blac. Com. 128, 129.

(h) 2 Chit. Crim. L. 145, note *(a)*.

(k) *Sed quære*, and see *post*, tit. *Manslaughter in Resisting Officers*.

(l) Rex v. Osmer, 5 East 304.

(g) *Ante*, p. 172, *et seq.*

(i) Rex v. Osmer, 5 East 304.

(m) 1 East P. C. c. 5, s. 71, p. 304.

¹ On the trial of an indictment for resisting a constable while engaged in executing process against the defendant's property, the defendant is not entitled to show that the officer had not taken the oath of office, or given the security required by law; it being sufficient in such a case that the party was an officer *de facto*: *People v. Nopson*, 1 Den. 574. An officer *de facto*, acting *calore officii* is as well qualified to act, while thus in office, as if legally appointed and duly qualified: *Smith v. State*, 19 Conn. 493; *Aulanus v. Governor*, 1 Texas 653. In an indictment for resisting a deputy sheriff in the discharge of his duty, it is unnecessary to set forth the specific acts of resistance complained of: *St. v. Copp*, 15 N. H. 212.

her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which the constable proceeded to take them into custody upon the charge of murder, and at first offered to take care also of their prisoner; but their prisoner was soon rescued from them by the surrounding mob. The next morning, the woman having recovered, the bailiffs were released by the constable. Upon these facts, Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue.⁽ⁿ⁾

Where the obstruction of process by the rescue of a party arrested is accompanied, as is usually the case, with circumstances of violence and assault upon the officer, the offence may be made the subject of a proceeding by indictment; and, as will be shown more fully in a subsequent chapter,^(o) the rescue, or attempt to rescue a party arrested on a criminal charge is usually punished by that mode of proceeding. And the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a writ of rescous, or a general action of trespass *vi et armis*, or an action on the case; in all which damages are recoverable.^(p) And it has also been the frequent practice of the Courts to grant an attachment against such wrongdoers, it being the highest violence and contempt that can be offered to the process of the Court.^(q)

*The forcibly rescuing goods distrained, and the rescuing cattle by the breach of the pound in which they have been placed, have been considered [572 as offences at common law, and made the subject of indictment.^(r) In a late case where a defendant was indicted for rescuing goods distrained for church-rate, it seems not to have been doubted that such a rescue was an indictable offence.^(s) [It has before been stated, that an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace:^(t) but, as a mere trespass, without circumstances of violence, is not indictable;^(u) it has been doubted whether even a pound-breach, which has been considered as a greater offence at common law than a rescue,^(v) is an indictable offence, if unaccompanied by a breach of the peace.^(w) But, on the other hand, it has been submitted that, as a pound-breach is an injury and insult to public justice, it is indictable *as such* at common law.^(x)¹

Where a hayward had distrained a horse damage feasant on an inclosed piece of pasture, and it was rescued from him on the way to the pound, and before it was impounded; it was held that this was not indictable, for till the horse got to the pound the hayward was merely acting as the servant of the owner of the land; but it was said that if the hayward had driven cattle, which he had found straying in the lanes, to the pound, they would have been in the custody of the law from the first, and the rescue of them on the way to the pound would have been indictable.^(y)

(n) Anon., Exeter Sum. Ass. 1793; 1 East P. C. c. 5, s. 71, p. 305.

(o) *Post*, Of Rescue, &c.

(p) Bac. Abr. tit. *Rescue* (C.); Com. Dig. tit. *Rescous* (D.).

(q) Bac. Abr. *Ibid.*; Com. Dig. tit. *Rescous*, (D.) 6. But, in order to ground an attachment for a rescue, it seems there must be a return of it by the sheriff: at least, if it was on arrest on mesne process: Bac. Abr. *Ibid.*; 2 Hawk. P. C. c. 22, s. 34; Anon., 6 Mod. 41. And see, as to the return of the rescue by the sheriff: Com. Dig. tit. *Rescous*, (D.) 4; D. 5; Bac. Abr. tit. *Rescue* (E.); Rex v. Belt, 2 Salk. 586; Rex v. Elkins, 4 Burr. 2129; Anon., 2 Salk. 586; Rex v. Minify, 1 Str. 642; Rex v. Ely, 1 Lord Raym. 35; Anon., 1 Salk. 586; 1 Lord Raym. 589.

(r) Cro. Circ. Comp. 198; 2 Starkie's Cr. pl. 617; 2 Chit. Crim. L. 201, precedents of indictments for rescuing goods distrained for rent: and Cro. Circ. Comp. 199; 2 Chit. Crim. L. 204, 206, precedents of indictments for pound-breaches.

(s) Reg. v. Williams, 1 Den. C. C. 529; the point decided was that the distress warrant was unlawful.

(t) *Ante*, p. 91; Anon., 3 Salk. 187.

(u) *Ante*, p. 91.

(v) Mirror, c. 2, s. 26.

(w) 2 Chit. Crim. L. 204, note (b), referring to 4 Leon. 12.

(x) 2 Chit. Crim. L. 204, note (b), and the authorities there cited.

(y) Rex v. Bradshaw, 7 C. & P. 233 (32 E. C. L. R.), Coleridge, J. The learned judge

¹ On an indictment for pound-breach, the illegality of the distress is no defence: Comm. Beale, 5 Pick. 714.

It has been held in Ireland on an indictment for rescuing property distrained for poor-rate, that it is not necessary to prove the making of the rate, or that there is any sum due at the time of making the distress; but the warrant to collect, if in the form and with the requisites required by the Poor-law Act, will be sufficient *prima facie* evidence of the authority of the collector; and that the section which requires the sum to be collected to be specified in the warrant is satisfied by a reference in the warrant to the collector's book delivered at the time to the collector, and by such reference the book becomes incorporated with the warrant.^(z) But where on a similar indictment the warrant was in the same form as in the preceding case, but the occupiers were only described as "tenants of commons" in the collector's book, it was held that the collector had no authority to distrain ^{*573]} on the actual occupier, as the description in the book was insufficient.^(a)

The 6 & 7 Vict. c. 30, provides for the summary conviction of any person who releases any cattle distrained on any inclosed land.^(b)

The civil remedy, however, given by the 2 Will. & M. c. 5, s. 4, will, in most cases of a pound-breach, or a rescue of goods distrained for rent, be found the most desirable mode of proceeding, where the offenders are responsible persons. That statute enacts that, upon pound-breach, or rescous of goods distrained for rent, the person grieved shall, in a special action on the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use.^(c)

It is laid down in the books that, if a rescue be made upon a distress, &c., from the King, an indictment lies against the rescuer.^(d) And we have seen that a lessee, resisting with force a distress for rent, or forestalling or rescuing the distress, will be guilty of the offence of a forcible detainer.^(e)

SEC. II.—Of Disobedience to Orders of Magistrates.

Disobedience to an order of the justices of the peace at their sessions, made by them in the due exercise of the powers of their jurisdiction, is an indictable offence. Thus, a party has been holden to be guilty of an indictable offence, in disobeying an order of sessions for the maintenance of his grandchildren.^(f) In this case it was moved in arrest of judgment that, as the 43 Eliz. c. 2, s. 7, had annexed a specific penalty, and a particular mode of proceeding, the course prescribed by the Act ought to have been adopted, and that there could be no proceeding by indictment: but, after able argument, and great deliberation, the Court were of opinion that the prosecutor was at liberty to proceed at common law, or

seemed to think that if the horse had been rescued after it had been put in the pound, it would have been indictable.

(z) Reg. v. Brennan, 6 Cox C. C. 381. The warrant was headed, "General warrant to collect and levy poor-rate, Gorey Union," and directed the collector "to levy the several poor-rates, and arrears of poor-rates, in the annexed book set forth, from the several persons therein rated, or other persons liable to pay the said rates and arrears of rates," and was signed by the chairman of the guardians, two guardians, and the clerk of the union at a meeting of the board.

(a) Reg. v. Boyle, 7 Cox C. C. 428.

(b) See the 14 & 15 Vict. c. 92, s. 19, as to these offences in Ireland. By the 12 & 13 Vict. c. 92, s. 5, persons impounding cattle are to supply them with food; and by the 17 & 18 Vict. c. 60, persons who have supplied animals impounded with food may recover not exceeding double the value of the food supplied, or may sell the cattle in the manner therein specified.

(c) See, as to the proceedings upon this statute, Bradby on Distresses, 282, *et seq.*; B. Abr. tit. *Rescue* (C). See 5 & 6 Will. 4, c. 50, s. 75, which imposes a penalty on persons breaking the pound to rescue cattle, &c., found trespassing on highways.

(d) F. N. B. 102 (G.); Com. Dig. tit. *Rescous* (D.) 3.

(e) *Ante*, p. 428.

(f) Rex v. Robinson, 2 Burr. 799, 800.

¹ In an indictment at common law, charging defendant with rescuing property distrained by the sheriff for public dues, from a bailee to whose custody the sheriff had committed it, it must be averred that the defendant knew in what right the bailee held it: *Common v. Israel*, 4 Leigh 675.

the method prescribed by the statute; and that there could be no doubt but that an indictment would lie at common law for disobedience to an order of sessions. (g)

Upon the same principle it was holden that, where an Act of Parliament gave power to the King in council to make a certain order, and did not annex any specific punishment to the disobeying it, such disobedience was an indictable offence, punishable as a misdemeanor at common law. (h)

*Disobeying an order of one or more justices, when duly made, is also a common law offence, and therefore punishable by indictment. (i) Thus, it has been holden to be an indictable offence to disobey an order of justices directing a highway to be widened, under the 13 Geo. 3, c. 78. (k) And it seems that an indictment will lie for disobedience to an order of justices placing out an apprentice pursuant to the statute, when such disobedience is either by not receiving, turning off, or not providing for such apprentice. (l) So a power to remove a pauper being given to two justices by the 13 & 14 Car. 2, c. 12, the not receiving him is a disobedience of that statute for which an indictment will lie. (m) And, by Foster, J., "In all cases where a justice has power given him to make an order, and direct it to an inferior ministerial officer, and he disobeys it, if there be no particular remedy prescribed, it is indictable." (n) [*574]

Where an order of justices is a perfect nullity on the face of it, another order may be made, and an indictment will lie for disobeying it. Two justices made an order against the defendant as the putative father of a bastard child, and this order was served upon the defendant; but no payment was made by him under it. The justices, who made this order, having discovered that it was wholly void for not stating that the proof was in the presence and hearing of the defendant, issued a *supersedeas* of the order, which was served on the defendant, and a tender made, but declined by, him of the costs actually incurred by him in consequence of the first order. A regular order was subsequently made, and served on the defendant; and it was held, that as the first order was clearly void, it had no operation at all, and therefore the case must be treated as if it had not been heard at all, and consequently the second order was valid. (o)

A magistrate residing within a poor-law union, is only a guardian *ex officio*, under the Poor Law Amendment Act, while he is acting as such guardian. Where, therefore, two magistrates made an order of filiation under the 2 & 3 Vict. c. 85, upon the complaint of the guardians of the Teesdale Union, and both the magistrates resided within the Teesdale Union, and were, therefore, guardians *ex officio* of it, and one of them was a rated inhabitant of a township within the Teesdale Union, but not that township in favor of which the order was made; and he had on other occasions acted as a guardian *ex officio*, but neither *had [*575] acted as guardian in anything respecting this matter; it was held that the order was good. (p)

(g) *Id.* *Ibid.* See the principles upon which this decision proceeded, *ante*, p. 86. *et seq.*

(h) *Rex v. Harris*, 4 T. R. 202; 2 Leach 549.

(i) *Rex v. Balme*, Cowp. 650; *Rex v. Fearnley*, 1 T. R. 316.

(k) *Id.* *Ibid.*

(l) *Reg. v. Gould*, 1 Salk. 381; 2 Nol. c. 33, s. 3, p. 349.

(m) *Rex v. Davis*, 1 Bott. 361, pl. 378; Say. 163; Burn's Just. tit. *Poor*. Sec. XVII., p. i.

(n) Burn's Just. *Ibid.*

(o) *Reg. v. Brisby*, 1 Den. C. C. 416; 2 C. & K. 962 (61 E. C. L. R.). The judges seemed to think that as the first order was a nullity, it could not be superseded, which was in the nature of a writ of error. In *Reg. v. Marchant*, 1 Cox C. C. 203, which was an indictment for disobeying a bastardy order, the only points decided were as to the sufficiency of a notice by a board of guardians to the putative father, and as to the order showing that the evidence was taken on oath. In *Reg. v. Ferrall*, 2 Den. C. C. 51, the question was whether, under a clause in the Annual Mutiny Act, a soldier was freed from an indictment for disobeying a bastardy order; and the Court held that he was not, as it was a 'criminal matter;' but the recent Mutiny Acts are in different terms, which seem to have been adopted in order to prevent a soldier from being so indicted, though they are very ill selected for the purpose. See *Reg. v. Stamper*, 1 Q. B. 119 (41 E. C. L. R.), as to the jurisdiction of the sessions to award costs in an application for a bastardy order under the 4 & 5 Will. 4, c. 76, s. 73.

(p) *Reg. v. Cant*, 2 M. C. C. 271; C. & Mars. 521 (41 E. C. L. R.)

Where such an order is made, any person mentioned in it, and required to act under it, must, upon its being duly served upon him, lend his aid to carry it into effect. Thus where, upon a complaint made by an excluded member of a friendly society, two persons, A. and B., the then stewards of the society, were summoned, and an order made by two justices that such stewards and the other members of the society should forthwith reinstate the complainant; it was holden, that though this order was not served upon A. and B. until they had ceased to be stewards, yet it was still obligatory upon them, as members of the society, to *attempt* to reinstate the complainant; and that their having ceased to be stewards was no justification of entire neglect on their part.^(q) Lord Ellenborough, C. J., said at the trial, "The order is not confined to the stewards alone, but is made upon all the members of the society; and the defendants were members of the society independently of their being stewards, and were bound, as members, to see that the order was obeyed; or, at least, to have taken some steps for that purpose. As members, they might have done something; as stewards, indeed, they might, with greater facility, have enforced obedience to the order; but each member had in it his power to lend some aid for the attainment of that object." And when in the ensuing term a motion was made that a verdict might be entered for the defendants, on the ground that, having ceased to be stewards when the notice was served, they had not been guilty of a criminal default; the Court said, that if the defendants had shown that they did everything in their power to restore the party, in obedience to the order, they might have given it in evidence by way of excuse.^(r)

So an indictment lies against the president and stewards of a friendly society for disobeying an order of justices requiring them and the members of the said society to readmit a member, though it be sworn that the power of doing so is not in the president and stewards, but in a committee.^(s)¹

There must be personal service of an order on all persons who are charged with a contempt of it; and it was held, upon demurrer, to be a decisive objection to an indictment for a disobedience and contempt of an order of sessions, that it charged a contempt by six persons of an order, which was only stated to have been served on four of them.^(t)

The entire order of a Court to pay the expenses of a prosecution, under the 7 Geo. 4, c. 64, s. 26, must be served on the treasurer of the county. Where, therefore, an order was made to pay an aggregate sum, the details of which were annexed, and the attorney tore off the details, and served the order for the payment of the aggregate sum alone on the treasurer; it was held, on a case reserved, that he was not indictable for refusing to obey the order.^(u)

Upon an indictment for disobeying an order commanding the stewards of a friendly society to readmit A. B., it seems to be sufficient to prove that the order was served on one of the defendants, and that the others when A. B. applied to them to be readmitted said they would not, and did not care for the justice order.^(v)

It appears to have been holden not to be necessary, in an indictment against a public officer for disobedience of orders, to aver that the orders have not been

^(q) *Rex v. Gash*, 1 Starkie 41 (2 E. C. L. R.).

^(r) *Id.* Ibid. The motion was also made on another ground; namely, a defect in the jurisdiction of the magistrates: two magistrates of the county of Middlesex, where the meetings of the society were held, having made the order, though the society had been originally established in London, and its rules enrolled at the sessions for London. But the Court decided that the magistrates of Middlesex had jurisdiction. See 33 Geo. 3, c. 54, and 49 Geo. 3, c. 125, s. 1.

^(s) *Rex v. Wade*, 1 B. & Ad. 861. See this case as to what was a sufficient filing of the rules with the clerk of the peace within the 33 Geo. 3, c. 54, s. 2.

^(t) *Rex v. Kingston*, 8 East 41.

^(u) *Reg. v. Jones*, 2 Moo. C. C. R. 171; 9 C. & P. 40 (38 E. C. L. R.), s. c.

^(v) *Rex v. Gilkes*, 3 C. & P. 52 (14 E. C. L. R.), Abbott, C. J.

¹ An indictment lies against a corporation for neglecting to perform a duty required by the public good: *Susquehanna and Bath Turnpike Road Co. v. People*, 15 Wend. 357; *People v. Corporation of Albany*, 11 Wend. 539.

revoked; for the orders, being stated to have been given by those who were empowered by certain statutes to give them, must be taken to remain in force until they were revoked or contradicted (*w*) But an indictment for disobeying an order of justices must show explicitly that an order was made; and it is not sufficient to state the order by way of recital. (*x*) It is said to be more safe to aver that the defendant was requested to comply with the terms of the order. (*y*) But if the statement of the order having been served on all the defendants (which, as has been before observed, is a necessary statement) be omitted, the want of such an allegation will not be supplied by averring that they were all requested to perform the duties required by the order. (*z*)

Where an indictment for refusing to obey an order of justices to pay a church-rate, alleged that the rate "was duly made as by law in that behalf required, and that the same was afterwards duly allowed as by law in that behalf required," and that "the defendant was duly rated" in and by the said rate at the sum of sixteen shillings; it was objected that the facts ought to have been stated which constituted a due making and allowance of the rate and a due rating of the defendant; but it was held, first, that these introductory facts were alleged only to show that the justices had jurisdiction to make the order, and therefore they fell within the description of inducement, in which such a general allegation was allowed. Secondly, that the rest of the count showed that the justices had sufficient authority to make the order, as there was a sufficient information by competent persons to give them jurisdiction. (*a*) The same indictment stated that a church-rate had been "duly demanded of the defendant, and that he had refused and neglected to [*577 pay the rate to W. A. and J. C., who then were the churchwardens; and it was held that, though it did not state that they were churchwardens when the rate was demanded, it was sufficient that they were shown to be so when the rate was neglected and refused to be paid; for that was the offence. (*b*) The same indictment alleged that a justice made his warrant (summons), whereby, "after reciting as therein recited," he summoned the defendant, and the indictment did not state to whom the warrant was directed; and it was held that it was sufficient, for enough of the warrant was stated without mentioning the recital, and it was sufficiently averred that it was directed to the defendant. (*b*) The same indictment averred that a summons was issued on the 30th of May to appear on the 6th of June then next, and was "before the said 6th day of June, to wit, on the 30th of May" personally served on the defendant, who did not appear in pursuance of it; and it was held that it must be assumed that the justices satisfied themselves that it had been served a reasonable time before the day of appearance, otherwise they would have acted unjustly in making the order in the absence of the defendant, and the indictment is always favorable to the validity of an order. (*c*) On the same indictment it was also held that it is not necessary to set out the order according to the tenor; it is enough to set out the substance of it correctly. (*d*) The same indictment did not aver the church-rate to have been in force when the order to pay it was made, but it was held that, as it averred that the rate continued in force at the time of

(*w*) *Rex v. Holland*, 5 T. R. 807, 624, a case of an indictment against the defendant for malversations in office while he was one of the council at Madras.

(*x*) *Rex v. Crowhurst*, 2 Lord Raym. 1363.

(*y*) 2 Chit. Crim. L. 279, note (*g*), citing 1 T. R. 316, which is the case of *Rex v. Fearnley*, where an objection was taken to an indictment that it did not contain such statement; but the Court did not find it necessary to give any opinion upon the point.

(*z*) *Rex v. Kingston*, 8 East 41, 53.

(*a*) *Reg. v. Bidwell*, 1 Den. C. C. 222. The case was decided by Parke, B., alone. The information was on the oath of the churchwardens, and alleged that the rate was "duly made" and was "duly allowed;" that the defendant was at the time of the making and allowance thereof an inhabitant and occupier of a dwelling-house in the parish, and was "duly rated" by the said rate, &c. And Parke, B., held that this information was sufficient to give the justices jurisdiction, though open to the objection of informality in making a mixed allegation of fact and law, instead of stating facts only, and the learned Baron also held that the magistrates having to inquire into the merits of the case, and adjudicate upon them, their adjudication was binding, especially as it might have been appealed against, and was not.

(*b*) *Ibid.*

(*c*) *Ibid.*

(*d*) *Ibid.*

the indictment, it was quite sufficient.^(e) It was also held that such an indictment need not allege the date of the order,^(f) as that was immaterial.

An indictment alleged that an appeal was made by the defendants against a rate to the sessions, who dismissed the appeal, and ordered the defendants "immediately upon service of the said order, or a true copy thereof," to pay the churchwardens and overseers a sum for costs of the appeal, and that a true copy of the said order was afterwards personally served upon each of the defendants, and each of them had notice of the said order. Nevertheless, the defendants wilfully neglected and refused to pay. Upon the trial the Clerk of the Peace produced the minutes of the sessions, and read the order, which ordered the defendants "immediately upon service of this order, or a true copy thereof," to pay the costs. The Clerk of the Peace stated that "the costs were not taxed during the actual sitting of the sessions, but between the time of the Court adjourning and its meeting. I reported to the magistrates what I thought fit and proper costs; and the Court adopted it. I made a verbal statement, which the Court adopted. I gave both parties an opportunity of attending. The defendants did not attend. I wrote a letter to their solicitor. The appeal was dismissed for want of due notice." The defendants' attorney was *578] the person attending the appeal, and was present *when the order was made. There were four or five of the magistrates at the adjournment who were at the original sessions. A witness proved that he served each defendant with a paper, which he told them was a true copy of the order, as in fact it was, and at the time of service read to each the contents of a parchment writing, which was also a true copy of the order, and was produced on the trial. It was objected, first, that a notice to produce the copies served had not been given; evidence could not be given that the copy served was a true copy; but it was held that a notice to produce the paper served would have been notice to produce a notice, which is never required; secondly, that an order to pay "upon service of the said order, or a true copy thereof," was bad on the face of it; but it was held to be perfectly sufficient—that an order of sessions in that form was good. And the service was also good, whether the book of the sessions or the parchment was the order; for if the book was the original, it could not be shown at the time of the service, and if the parchment was the original, its contents were read over.^(g) And, lastly, that the adjourned sessions had no jurisdiction to fix the amount of costs; but the Court held that it was unnecessary to decide that point. The magistrates must be taken to have ordered in the first instance, in the presence of all the parties, that the defendants should pay such costs as the officer might find to be due; and the result of the evidence being that both parties had an opportunity of attending the taxation, and no objection being made when the amount was stated in Court, a state of things took place which amounted to a consent, and therefore the order was valid.^(h)

The 11 Geo. 2, c. 19, s. 16, enables two justices to put a landlord in possession of premises in any case where one year's rent is in arrear, and the tenant deserts the premises and leaves them uncultivated or unoccupied so as no sufficient distress can be had; and sec. 17 empowers the next justice or justices of assize, on the appeal of the tenant to award restitution to the tenant. Upon an indictment for disobeying the order of the justices of assize to restore possession to the tenant, it seems sufficient to put in the record made up by the justices of the peace, in which, after reciting the complaint and other proceedings, they declare that they put the landlord in possession, and it seems unnecessary to prove the complaint of the landlord.⁽ⁱ⁾

^(e) Ibid.

^(f) Ibid.

^(g) Per Coleridge, J., "An order of the quarter sessions is not like an order of justice out of sessions. It is the judgment of the Court, and that cannot be carried about: it is sufficient if a copy be shown."

^(h) Reg. v. Mortlock, 7 Q. B. 459 (53 E. E. L. R.).

⁽ⁱ⁾ Reg. v. Sewell, 8 Q. B. 161 (55 E. C. L. R.). The very ground of the appeal might be that the justices of the peace had acted without any complaint, and therefore the proof of the complaint could not be necessary. The Court held in this case that the orders of the justices of assize must be made by them as individual justices, and not as a Court, and therefore a certificate of such an order, signed by the deputy clerk of assize in the same way as an order of Court, is not sufficient. It seems also that the order should be

the trial of an indictment for not paying a sum of money pursuant to an sessions made on an appeal by the defendant against a certificate of two for stopping up, diverting, and turning a part of a public footway, the order of sessions, together with proof of the service of a copy of the upon the defendant, and a demand of the sum ordered thereby to be [579 which the defendant only answered that he did not owe anything, evidence to go to the jury, and it is not necessary to prove *aliunde* the of the certificate or the fact of the appeal. An order of sessions made h an appeal need not show the time at which the certificate of the justices ed with the clerk of the peace; for the sessions have no duty to inquire fact, unless the objection is raised before them. (k)

a trial of an indictment against the stewards of a friendly society for dis- an order of justices, which recites that the rules of such society had been such recital is not evidence of that fact, and it must be proved by other a order to show that the justices had jurisdiction to make the order under Geo. 3, c. 54, s. 2. (l) Upon the trial of such an indictment the Court will into the merits of the original case, nor will they hear objections to the which do not appear upon the face of it. (m) Upon the trial, therefore, of indictment it is no defence that the party ordered to be readmitted was e to be a member of the society, as that was matter of defence before the n) So, on a motion to arrest the judgment upon an indictment for dis- an order of justices for the payment of a fine upon a conviction, the Court 's Bench refused to hear any objections to the conviction which did not pon the face of it. (o) But if it appear on the face of the order that the had no jurisdiction to make it, the defendant should be acquitted, without t to bring a writ of error, though the want of jurisdiction be apparent on of the indictment. Where, therefore, certain justices, acting under the ; Act (14 Geo. 3, c. 78) had made an order that a building should be re- as an encroachment on a highway, but the building was not stated in the extend beyond the general line of the houses so as to be contrary to the is of the Act; it was held, upon an indictment for disobeying such order, defendant should be acquitted, although the objection appeared upon the p)

e an indictment stated that M. had been expelled from a friendly society, been deprived of certain relief from it, to which he was entitled, and that, himself aggrieved thereby, he made complaint thereof to two justices, and before them to the truth of the *said* complaint, and that the justices that he should be continued a member of the society, and that the stewards ciety unlawfully refused so to continue him as a member of the society, order when produced, recited only a complaint that the stewards had re- pay him the relief, but contained an order to pay the relief, and also that d be continued a member of the society; it was held that the defendants itled to be acquitted; *first, because the allegations of the indict- re not proved, as the defendants were only summoned to answer one [580 of complaint, and not two; and, secondly, because the adjudication to con- . as a member of the society was bad, for the 33 Geo. 3, c. 54, s. 15, con- jurisdiction of justices to the subject matter of the complaint. (q)

y the justices of assize, and that they alone, and none of the other commission- jurisdiction to make such an order.

g. v. Thornton, 2 Cox C. C. 493.

r v. Gilkes, 8 B. & C. 439 (15 E. C. L. R.).

x v. Mitton, 3 Esp. R. 200; s. c., Cald. 536.

x v. Gilkes, 3 C. & P. 52 (14 E. C. L. R.), Abbott, C. J.

x v. Mitton, 3 Esp. R. 200, in the note.

x v. Hollis, 2 Str. N. P. C. 536 (3 E. C. L. R.), Abbott, C. J.

x v. Soper, 3 B. & C. 857 (10 E. C. L. R.).

*581]

*CHAPTER THE THIRTY-SECOND.

OF ESCAPES.

AN escape is where one who is arrested gains his liberty before he is delivered by the course of the law. (a) And it may be by the party himself; either without force before he is put in hold, or with force after he is restrained of his liberty; or it may be by others; and this also either without force, by their permission, negligence, or with force, by the rescuing of the party from custody. Where the liberation of the party is effected either by himself or others, without force, it is more properly called an *escape*; where it is effected by the party himself with force, it is called *prison-breaking*; and where it is effected by others, with force, it is commonly called a *rescue*. (b) In the present chapter it is proposed to consider those acts without force, which more properly come under the title of *escape*.

There is little worthy of remark in the books respecting an escape effected by the party himself, without force: but the general principle appears to be, that, as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice, and elude the vigilance of their keepers, before they are put in hold, are guilty of an offence in the nature of a high contempt, and punishable by fine and imprisonment. (c) And it is also criminal in a prisoner to escape from lawful confinement, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the gaoler, or if he escape in any other manner, without using any kind of force or violence, he will be guilty of a misdemeanor; and if his prison be broken by others, without his procurement or consent, and he escape through the breach so made, he may be indicted for the escape. (d)

Upon an indictment for an escape from the house of correction, after conviction for a capital offence and conditional pardon, it was held that a certificate of the former conviction by the clerk of assize was not evidence, there being no Act which made it evidence. (e) But the 4 Geo. 4, c. 64, s. 44, to the intent that *582] prosecutions for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expense as possible, enacts (amongst other things), that in case of any prosecution for any escape, attempt to escape, breach of prison or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a certificate given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the per-

(a) *Terms de la Ley*.

(b) 1 Hale 590; 2 Hawk. P. C. c. 17, 18, 19, 20, 21.

(c) 2 Hawk. P. C. c. 17, s. 5; 4 Blac. Com. 129.

(d) 1 Hale 611; 2 Inst. 589, 590; Summ. 108; Staund. P. C. 30, 31; 2 Hawk. P. C. c. 18, ss. 9, 10.

(e) *Rex v. Smith*, East. T. 1788, MS., Bayley, J. So neither the production of the calendar of the sentences signed by the clerk of assize, and by him delivered to the governor of the prison, nor the evidence of a person who heard sentence passed, is sufficient to prove that a prisoner is in lawful custody under a sentence of imprisonment passed at the assizes; the record itself should be produced; unless other proof be provided by statute: *Reg. v. Bourdon*, 2 C. & K. 366 (61 E. C. L. R.), Maule, J.

¹ *State v. Doud*, 7 Conn. Rep. 384. But the court for such offence will not inflict a punishment exceeding that from which the offender escaped: *Ibid*. When an indictment for an escape charged that the defendant, being confined in a jail under conviction and sentence for larceny, escaped therefrom, it was held, that as only a convict can commit the offence charged, it was necessary, in order to support the indictment, to prove that the person charged with the escape was the same who was convicted of larceny: *State v. Murphy*, 5 Eng. 74.

be sufficient evidence to the Court and jury of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced. (f) It was decided upon the 56 Geo. 3, c. 27, s. 8 [now repealed], that a certificate of a former conviction, authorized by that statute, should set forth the effect and substance of the conviction; and that stating it to have been for any only was insufficient. The prisoner was indicted for being at large after a sentence of transportation for seven years: the indictment only stated that he had been convicted of felony, without specifying the nature of that felony; and the certificate to prove the former conviction was in the same form; and the judges ought this case decided by a former case of *Rex v. Sutcliffe*, and that both the indictment and certificate were insufficient. (g)

The 11 & 12 Vict. c. 42, ss. 12, 13, 14 and 15, provides for the apprehension of persons charged with indictable offences, who escape into Ireland, the Isles of Man, Guernsey, Jersey, Alderney, or Sark, and Scotland, and for the dealing with such persons after their apprehension; and the Act also provides for the apprehension of persons so charged who escape from these territories into England.

Escapes effected, or, perhaps, more properly, suffered by others than the party himself, without force, by permission or negligence, may be either—I. By officers; II. By private persons.

Sec. I.—Of Escapes suffered by Officers.

An escape of this kind must be from a justifiable imprisonment for a criminal matter, after an actual arrest.

As there must be an *actual arrest*, it has been holden, that if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. (h)

The arrest and imprisonment must be justifiable; for, if a party be arrested for a supposed crime, when no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape by suffering the prisoner to go at large. (i) But it seems that if a warrant of commitment plainly and expressly charge the party with treason or felony, though it be not strictly formal, the gaoler, suffering an escape, is punishable; and that where commitments are good in substance, the gaoler is as much bound to observe them as if they were made ever so strictly. (k) It is stated as a good general rule upon this subject that, whenever an imprisonment is so far irregular that it will be no offence in the prisoner to break out by force, it can be no offence in the officer to suffer him to escape. (l)

The imprisonment must not only be justifiable, but also for some *criminal matter*. If the escape of one committed for petit larceny (m) only was criminal; and it seems most agreeable to the general reason of the law that the escape of a person committed for any other crime whatsoever should also be criminal. (n) The imprisonment must also be *continuing* at the time of the escape; and its continuance must be grounded on that satisfaction which the public justice demands for the crime committed. So that if a prisoner be acquitted, and detained only for his trial, it will not be criminal to suffer him to escape, though the judgment were that

(f) See the 14 & 15 Vict. c. 99, s. 13, *post*, *Evidence*.

(g) *Rex v. Watson*, Mich. T. 1821, MS., Bayley, J., and R. & R. 468. The prisoner was committed to his original sentence. The 26 Geo. 3, c. 27, s. 3, authorized a certificate containing the effect and substance only, omitting the formal part, of every indictment, conviction, &c.

(h) 2 Hawk. P. C. c. 19, s. 1.

(i) *Ibid.* s. 2.

(k) *Ibid.* s. 24. A commitment to a *prison*, and not to a *person*, was held good in *Rex v. All*, 1 Lord Raym. 424.

(l) *Id.* *Ibid.* s. 2. And see *post*, chap. xxxiii.

(m) The distinction between grand and petit larceny was abolished by the 7 & 8 Geo. c. 29, s. 2, and 24 & 25 Vict. c. 96, s. 2.

(n) 2 Hawk. P. C. c. 19, s. 3; 1 Hale 592.

he should be discharged, "paying his fees;" he being in such case detained only as a debtor: but if a person, convicted of a crime, be condemned to imprisonment for a certain time, and also "until he pays his fees," it is said, that perhaps an escape of such person, after the time of his imprisonment is elapsed, without paying his fees, may be criminal; as it was part of the punishment that the imprisonment should be continued till the fees should be paid.^(o)

The next important inquiry upon this subject will be, whether the escape be *voluntary* or *negligent*, as the former is a much more serious offence than the latter.

Whenever an officer, having the custody of a prisoner charged with, and guilty of, a capital offence, knowingly gives him liberty with an intent to save him either from his trial or execution, such officer is guilty of a *voluntary escape*; and thereby involved in the guilt of the same crime of which the prisoner is guilty, and for which he was in custody.^(p) Hawkins says, that it seems to be the opinion of Sir M. Hale,^(q) that in some cases an officer may be adjudged guilty of a voluntary escape who had *no such intent to save the prisoner, but meant only to give him a liberty which, by law, he had no color of right to give; as if a gaoler should bail a prisoner who is not bailable: but he withholds his assent to that opinion, on the grounds that it is not sufficiently supported by authorities, and does not seem to accord with the purview of the 5 Edw. 3, c. 8, relating to the proper bailing of persons by the marshals of the King's Bench.^(r) He says also, that it seems to be agreed that a person who has power to bail is guilty only of a negligent escape, by bailing one who is not bailable; and that there are some cases wherein an officer seems to have been found to have knowingly given his prisoner more liberty than he ought to have had (as by allowing him to go out of prison on a promise to return; or to go amongst his friends, to find some who would warrant goods to be his own which he is suspected to have stolen), and yet seems to have been only adjudged guilty of a negligent escape.^(s) And he concludes by saying, that if, in these cases, the officer were only guilty of a negligent escape, in suffering the prisoner to go out of the limits of the prison, without any security for his return, he could not have been guilty in a higher degree if he had taken bail for his return; and that from thence it seems reasonable to infer that it cannot be, in all cases, a general rule that an officer is guilty of a voluntary escape by bailing his prisoner, whom he has no power to bail, but that the judgment to be made of all offences of this kind must depend upon the circumstances of the case; such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted.^(t)

It appears to have been holden, that it is an escape in a constable to discharge a person committed to his custody by a watchman as a loose and disorderly woman, and a street-walker, although no positive charge was made.^(u)

A *negligent* escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of.^(v) And, from the instances of this offence mentioned in the books, it seems that where a party so escapes the law will presume negligence in the officer. Thus, if a person in custody on a charge of larceny,

^(o) 2 Hawk. P. C. c. 19, s. 4. This seems to be a good reason; but Hawkins says that it is to be intended only where the fees are due to others as well as to the gaoler; for, otherwise, the gaoler would be the only sufferer by the escape; and that it would be hard to punish him for suffering an injury to himself only in the non-payment of a debt in his power to release.

^(p) Staund. P. C. 33; 2 Hawk. P. C. c. 19, s. 10; 4 Blac. Com. 129.

^(q) Sum. 113; 1 Hale 596, 597.

^(r) Post, p. 589.

^(s) Hawkins says, however, that it must be confessed that, in these cases, the prisoner was only accused of larceny, and that it does not appear whether he were bailable or not; and that, generally, the old cases concerning this subject are so very briefly reported that it is very difficult to make an exact state of the matter from them.

^(t) 2 Hawk. P. C. c. 19, s. 10.

^(u) Rex v. Bootie, 2 Burr. 864.

^(v) Dalt. c. 159; Burn's Just. tit. *Escape*, IV.

¹ It is a felony at common law for the keeper of a prison to voluntarily suffer a prisoner charged with felony to escape: *Weaver v. Comm.*, 5 Casey 445.

denly and without the assent of the constable, kill, hang, or drown himself, this is considered as a negligent escape in the constable.(w) And if a prisoner charged with a felony break a gaol, it is said that this seems to be a negligent escape; because he wanted either the due strength in the gaol that should have secured him, or the due vigilance in the gaoler or his officers that should have prevented it.(x) If it is submitted *that it would be competent to a person charged with a negligent escape under such circumstances to show in his defence that all [*585] the vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security. Undoubtedly an escape happening from defects in these particulars would come within the principle of guilty negligence in those concerned in the proper custody of the criminal; but neglect in not keeping gaols in a proper state of repair, by those who are made liable to the burthen of repairing them, appears in many instances to have been treated as an indictable offence, tending to the great hindrance and obstruction of justice.(y)

A person who has power to bail is guilty only of a negligent escape by bailing a person who is not bailable. Thus if a justice of peace bails a person not bailable by law, it excuses the gaoler, and is not felony in the justice; but a negligent escape, which he is fineable at common law, and by the justices of gaol delivery.(z) It is laid down as clear law, that whoever *de facto* occupies the office of gaoler is liable to answer for a negligent escape, and that it is in no way material whether or not his title to the office be legal.(a) But it seems that an indictment for a negligent escape will only lie against those officers upon whom the law casts the obligation of safe custody, and will not lie against the mere servants of such officer. Thus, where the indictment was against one of the yeoman wardens of the Tower for permitting Colonel Parker, who was committed for high treason, to escape, it appeared that the constable of the Tower had committed the offence to their special care: but the Court held that the defendants were not liable as officers as the law took notice of, and therefore could not be guilty of a negligent escape.(b) And upon the same principle another wardour of the Tower was acquitted also to have been acquitted of a negligent escape.(c) It appears, however, that a sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself; that the Court may charge either the sheriff or bailiff for such an escape; and that, if a deputy gaoler be not sufficient *to [*586] answer for a negligent escape, his principal must answer for him.(d)¹

(w) Dalt. c. 159.

(x) 1 Hale 600, where it is said that "therefore it is lawful for the gaoler to hamper a prisoner with irons, to prevent their escape." But see the note (a), *Ibid.*, where it is said that this liberty can only be intended where the officer has just reason to fear an escape, where the prisoner is unruly, or makes any attempt for that purpose; but that otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of England, by which gaolers are forbidden to put their prisoners to any pain or torment: Co. P. C. 34, 35. *Custodes gaolarum nemini sibi commissis non augeant, nec eos torqueant vel redimant, sed omni aevitid remota pietatisque adhibita judicis debite exequantur*: Flet. Lib. 1, cap. 26. And the *Mirror of Justices*, b. 5, s. 1, n. 54, says that it is an abuse that prisoners should be charged with irons, or put to any pain, before they be attainted of felony; and Lord Coke, in his comment on the statute of Westm. 2, c. 11, is express, that by the common law it might not be done: 1 Inst. 381.

(y) See the precedents of indictments for this offence: 4 Wentw. 363; Cro. Circ. Comp. 189; Cro. Circ. Ass. 398; 3 Chit. Crim. L. 668, 669.

(z) At common law, according to 25 Edw. 3, 39 (in the last edition of the year books misprinted 25 Edw. 3, 82, a) and by the justices of gaol delivery, by the 1 & 2 Ph. & M. c. 13. See 1 Hale 596, and as to escapes by admitting to bail or to improper liberty: *ante*, p. 583.

(a) 2 Hawk. P. C. c. 19, s. 28.

(b) Rex v. Hill and Dod, Old Bailey, Jan. 1694; Burn's Just. tit. *Escape*, III.

(c) Rex v. Rich, Old Bailey, Jan. 1694, MS, Bayley, J.

(d) 2 Hawk. P. C. c. 19, s. 29, and Rex v. Fell, 1 Lord Raym. 424; 2 Salk. 272. Hawkins says, "But if the gaoler who suffers an escape have an estate for life or years in the office, I do not find it agreed how far he in reversion is liable to be punished."

¹ The marshal is not liable for the escape of a prisoner committed to a state jail under process from the courts of the United States: *Randolph v. Donaldson*, 9 Cranch 76.

The difference between a voluntary and negligent escape will also require to be attended to in considering the effect of the *retaking* of a prisoner after he has been suffered to escape.

When an officer has *voluntarily* suffered a prisoner to escape, it is said that he can no more justify the retaking him than if he had never had him in custody before; because, by his own free consent, he hath admitted that he hath nothing to do with him; but if the party return, and put himself again under the custody of the officer, it seems that it may probably be argued that the officer may lawfully detain him, and bring him before a justice in pursuance of the warrant.^(e)

It seems to be clearly agreed by all the books, that an officer making fresh pursuit after a prisoner, who has escaped through his *negligence*, may retake him at any time afterwards, whether he find him in the same or a different county: and it is said generally in some books, that an officer who has negligently suffered a prisoner to escape, may retake him, wherever he finds him, without mentioning any fresh pursuit; and, indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason why he should have any manner of advantage from it.^(f) If the officer pursue a prisoner, who flies from him, so closely as to retake him without losing sight of him, the law regards the prisoner as being so much in his power all the time as not to adjudge such flight to amount to an escape: but if the officer once lose sight of the prisoner, it seems to be the better opinion that he will be guilty of a negligent escape, though he should retake him immediately afterwards.^(g) And if he has been fined for the offence it is clear that he will not avoid the judgment of his fine by retaking the prisoner.^(h) And it is also clear that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly retake him; but must, in such case, be content to submit to such fine as his negligence shall appear to deserve.⁽ⁱ⁾

The proceedings against persons charged with having suffered escapes must in general be by presentment or indictment, or they may be by information.^(k)

But where persons present in a Court of record are committed to prison by such Court, the keeper of the gaol, as he is bound to have them always ready to produce when called for, if he fail to produce them, will be adjudged guilty of an escape, *587] without further inquiry; unless he have some reasonable matter to allege, *in his excuse; as that the prison was set on fire, or broken open by enemies, &c., for he will be concluded by the record of the commitment from denying that the prisoners were in his custody.^(l) And some have holden.^(m) that if a gaoler say nothing in excuse of such an escape, it shall be adjudged voluntary; but it seems difficult to maintain that where it stands indifferent whether an escape be negligent or voluntary, it ought to be adjudged a crime of so high a nature, without a previous trial.⁽ⁿ⁾ With respect to other prisoners not committed in such manner, but in the custody of a gaoler or other person by any other means whatsoever, it seems to be agreed that the person who had them in custody is in no case punishable for an escape, until it be presented.^(o) But it is laid down as a rule, that though, where an escape is fineable, the presentment of it is traversable; yet that where the offence

(e) 2 Hawk. P. C. c. 19, s. 12, c. 13, s. 9; Dalt. c. 169; Burn's Just. tit. *Escape*.

(f) 2 Hawk. P. C. c. 19, s. 12.

(g) Staund. P. C. 33; 1 Hale 602; 2 Hawk. P. C. c. 19, ss. 6, 13.

(h) 2 Hawk. P. C. c. 19, ss. 12, 13.

(i) Staund. P. C. 33; 1 Hawk. P. C. c. 28, ss. 11, 12; 2 Hawk. P. C. c. 19, ss. 6, 13.

(k) *Rex v. The Gaoler of Shrewsbury*, 1 Str. 532, where the Court refused to grant an attachment against the gaoler for a voluntary escape of one in execution for obstructing an excise officer in the execution of his office, but ordered him to show cause why there should not be an information.

(l) 2 Hawk. P. C. c. 19, s. 15.

(m) Staund. P. C. 34; 1 Hale 599, 603.

(n) 2 Hawk. P. C. c. 19, s. 15.

(o) *Id.* Ibid. s. 16.

¹ If a person, legally committed or arrested, escape by force or otherwise, against the will of the officer having the custody of him, and flee into another state, the officer may lawfully pursue and retake him in that state: *Pearl v. Rawdin*, 5 Day 244. But the officer thus pursuing cannot, it seems, take the prisoner from the custody of an officer of another state, acting under process warranted by the laws of that state, nor resist such officer in the execution of such process: *Griffin v. Brown*, 2 Pick. 304.

amerciable only, there the presentment is of itself conclusive; such amerciements being reckoned amongst those *minima de quibus non curat lex*: (p) and this distinction is said to be well warranted by the old books. (q)

It is laid down in the books, that a person who has suffered another to escape cannot be arraigned for such escape as for felony, until the principal be attainted; on the ground that he is only punishable in this degree as an accessory to the felony, and that the general rule is, that no accessory ought to be tried until the principal be attainted; (r) but that he may be indicted and tried for a misprision before any attainder of the principal offender; for, whether such offender were guilty or innocent, it was a high contempt to suffer him to escape. If, however, the commitment were for high treason, and the person committed actually guilty of it, it is said that the escape is immediately punishable as high treason also, whether the party escaping be ever convicted of such crime or not; and the reason given is, that there are no accessories in high treason. (s)

Every indictment for an escape, whether negligent or voluntary, must expressly show that the party was actually in the defendant's custody for some crime, or upon some commitment upon suspicion; (t) and judgment was arrested upon an indictment which stated that the prisoner was in the defendant's custody, and charged with a certain crime, but it did not state that he was committed for that crime; for a person in custody may be charged with a crime, and yet not be in custody by reason of such charge. (u) *But where a person was committed to the custody of a constable by a watchman, as a loose and disorderly woman and a street-walker, it was holden, upon an indictment against the constable for discharging her, that by an allegation of his being charged with her, "so being such loose," &c. it was sufficiently averred that he was charged with her "as such loose," &c.; and it was also holden not to be necessary to aver that the defendant knew the woman to be a street-walker. (v) And every indictment should also show that the prisoner went at large; (w) and also the time when the offence was committed for which the party was in custody; not only that it may appear that it was prior to the escape, but also that it was subsequent to the last general pardon (x) If the indictment be for a voluntary escape, it must allege that the defendant feloniously and voluntarily permitted the prisoner to go at large; (y) and must also show the species of crime for which the party was imprisoned; for it will not be sufficient to say, in general, that he was in custody for felony, &c. (z) But it is questionable whether such certainty as to the nature of the crime, be necessary in an indictment for a negligent escape; as it is not in such case material whether the person who escaped were guilty or not. (a)¹

(p) Staund. P. C. c. 32, p. 36.

(q) 2 Hawk. P. C. c. 19, s. 21, and see *post*, p. 590, as to escapes fineable or amerciable.

(r) See *ante*, p. 67. But as all accessories may now be tried before their principals *ante*, pp. 67, 69, this reason fails, and there seems no doubt that a person who has suffered a felon to escape is an accessory after the fact: *Rex v. Burridge*, 3 P. Wms. 439, *post*, p. 607, and therefore a person who suffers or aids the escape of a felon may be tried for a substantive felony as an accessory after the fact; and see *Holloway v. Reg.*, 17 Q. B. 317 (79 E. C. L. R.), *post*, p. 605, *et seq.* In *Cro. Circ. Ass.* 338, is an indictment as for a misdemeanor against a gaoler, for wilfully permitting a prisoner to escape who was under sentence of imprisonment for the term of six months, after a conviction of grand larceny: but it seems that it ought to have been laid as a felony. See 2 Starkie *Crim. Plead.* 600, note (b), referring to *Rex v. Burridge*, 3 P. Wms. 497.

(s) 2 Hawk. P. C. c. 19, s. 26.

(t) *Id.* *Ibid.* s. 14.

(u) *Rex v. Fell*, 1 Lord Raym. 424; 2 Salk. 272.

(v) *Rex v. Bootie*, 2 Burr. 864; and see as to the sufficiency of such averments: *Rex v. Boyall*, 2 Burr. 832.

(w) 2 Hawk. P. C. c. 19, s. 14, where it is said that this is most properly expressed by the words *exivit ad largum*.

(x) 2 Hawk. P. C. c. 19, s. 14. But upon an indictment for an escape the Court will not intend a pardon; it must be shown by the defendant, by way of excuse: *Rex v. Fell*, 1 Lord Raym. 424.

(y) *Feloniè et voluntariè A. B. ad largum ire permisit*.

(z) 2 Hawk. P. C. c. 19, s. 14.

(a) *Id.* *Ibid.*

¹ In an indictment against a constable for an escape, it is sufficient to allege that the defendant permitted the prisoner to escape and go at large without alleging in addition

By the statute of Westminster, 3 Edw. 1, c. 3, the proceedings and trial for the offence of an escape were to be had before the justices in eyre: but it was adjudged that the jurisdiction of the Court of King's Bench was not restrained by that statute, that Court being itself the highest Court of eyre.^(b) The 31 Edw. 3, c. 14, enacts, that the escape of thieves and felons, and the chattels of felons, &c. from thenceforth to be judged before *any of the King's justices*, shall be levied from time to time, &c., by which it seems to be implied that other justices as well as those in eyre, may take cognizance of escapes: and it is certain that justices of gaol delivery may punish justices of the peace for a negligent escape, in admitting persons to bail who are not bailable.^(c)

The 4 Geo. 4, c. 64, s. 44, as to the evidence by the certificate of the clerk of assize, or clerk of the Court in which the offender was convicted, has already been mentioned.^(d)

In considering the punishment for this offence, it will be necessary again to attend to the distinction between a voluntary and negligent escape.

It seems to be generally agreed that a *voluntary escape* amounts to the same kind of crime as the offence of which the party was guilty, and for which he was in custody; whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed; and whether he were attainted, or only *589] accused of such crime, and neither indicted nor appealed.^(e) But the voluntary escape of a felon was within the benefit of clergy, though the felony for which the party was in custody were ousted.^(f) An escape suffered by one who wrongfully takes upon him the keeping of a gaol seems to be punishable in the same manner as if he were rightfully entitled to the custody; for the crime is in both cases of the same ill consequence to the public.^(g) But no one is punishable in this degree for a voluntary escape but the person who is actually guilty of it: therefore, the principal gaoler is only fineable for a voluntary escape suffered by his deputy.^(h) One voluntary escape is said to amount to a forfeiture of a gaoler's office.⁽ⁱ⁾

No escape will amount to a capital offence unless the cause for which the party was committed were actually such at the time of the escape: its becoming a capital offence afterwards, as by the death of a party wounded at the time of the escape, but not then dead, will not be sufficient.^(k)

Whenever a person is found guilty upon an indictment or presentment of a negligent escape of a criminal actually in his custody, he ought to be condemned to a certain sum, to be paid to the King as a *fine*.^(l) And it seems that, by the common law, the penalty for suffering the negligent escape of a person attainted was of course a hundred pounds, and for suffering such escape of a person indicted, and not attainted, five pounds: and that if the person escaping were neither attainted nor indicted, it was left to the discretion of the Court to assess such a

(b) Staund. P. C. c. 32, p. 35. *Eo que le banke le roy est un eire, et plus haut que un eire, car si le eire sea in un county, et le banke le roy veigne la, le eire cessera.*

(c) 2 Hawk. P. C. c. 19, s. 19, ante, p. 585.

(d) Ante, p. 582.

(e) 2 Hawk. P. C. c. 19, s. 22. And it is said to be no excuse of such escape that the prisoner had been acquitted on an indictment of death, and only committed till the year and day should be passed, to give the widow or heir an opportunity of bringing their appeal: Id. Ibid.

(f) 1 Hale 599.

(g) 2 Hawk. P. C. c. 19, s. 23.

(h) Rex v. Fell, 1 Lord Raym. 424; 2 Salk. 272; 1 Hale 597, 598.

(i) 2 Hawk. P. C. c. 19, s. 30.

(k) 2 Hawk. P. C. c. 19, s. 25.

(l) 2 Hawk. P. C. c. 19, s. 31, where the author says, "it seems most properly to be called a fine. But this does not clearly appear from the old books; for in some of them it seems to be taken as a *fine*, in others as an *amercement*; and in others it is spoken of generally as the imposition of a certain sum, and without any mention of either *fine* or *amercement*."

that he did escape and go at large: State v. Maberry, 3 Strobh. 144. It is not a valid objection to an indictment for an escape, that the defendant, who was charged therein with negligence as a lawful constable, had not been formally appointed and qualified as a constable, he having assumed to act as such: Ibid.

reasonable forfeiture as should seem proper. And it seems also, that if the party had escaped twice, these penalties were of course to be doubled: but that the forfeiture was no greater for suffering a prisoner to escape who had been committed on no several accusations, than if he had been committed but on one. (m) It is the latter opinion that one negligent escape will not amount to a forfeiture of a gaoler's office: yet if a gaoler suffer many negligent escapes, it is said that he puts it in the power of the Court to oust him of his office at discretion. (n)

Some regulations by statutes respecting the punishment of negligent escapes could also be noticed.

The 5 Edw. 3, c. 8, recites that persons indicted of felonies had removed the indictments before the King, and there yielded themselves, and had been incontinently taken to bail by the marshals of the King's Bench; and enacts that such persons shall be safely and surely kept in prison: and (after providing for the manner of such confinement, &c.) further enacts, that if any such prisoner be found [590] wandering out of prison by bail or without bail, the marshal being found guilty, shall have a year's imprisonment, and be ransomed at the King's will.

The 6 & 7 Vict. c. 26, s. 23, which was passed for regulating the prison at Millbank, enacts, that if any person having custody of any convict, or being employed by the person having such custody, in the manner mentioned in the Act, shall wilfully permit any such convict to escape, he shall be guilty of felony; and every such person who shall carelessly permit such an escape, shall be guilty of a misdemeanor. (o)

A negligent escape may be pardoned by the King before it happens, but a voluntary one cannot be so pardoned. (p) Upon an indictment for an escape a pardon must be shown by the defendant by way of excuse. (q)

Sec. II.—Of Escapes suffered by Private Persons.

The law with respect to escapes suffered by private persons is in general the same as in relation to those suffered by officers: it will be sufficient, therefore, to mention shortly the circumstances under which it is considered that a private person may be guilty of an escape, and the punishment to which he will be liable.

It seems to be a good general rule, that wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape if he suffer him to go at large before he has discharged himself, by delivering him over to some other who by law ought to have the custody of him. And if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person, who receives him and suffers him to go at large, it is said that both of them are guilty of an escape; the first, because he would not have parted with him till he had delivered him into the hands of a public officer: the latter, because, having charged himself with the custody of a prisoner, he ought, at his peril, to have taken care of him. (r)

But where a private person, having made an arrest for suspicion of felony, delivers over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody the prisoner escapes, he will not be chargeable. He cannot, however, excuse himself from the escape by alleging that he delivered the prisoner over to an officer, without showing to whom, in particular, by name, he so delivered him, that the Court may certainly know who is answerable. (s)

(m) 2 Hawk. P. C. c. 19, s. 33.

(n) Id. Ibid. s. 30.

(o) See the section, *post*, p. 615.

(p) 2 Hawk. P. C. c. 19, s. 32; and more fully: Id. c. 37, s. 28.

(q) Rex v. Fell, 1 Lord Raym. 424.

(r) 2 Hawk. P. C. c. 20, ss. 1, 2; 1 Hale 595; Sum. 112.

(s) 2 Hawk. P. C. c. 20, ss. 3, 4; 1 Hale 594, 595; Staund. P. C. 34; Sum. 112, 114. Hawkins Id. s. 4, says that if no officer will receive such prisoner into his custody, it seems to be the safest way to deliver him into the custody of the township where the person who arrested him lives, or perhaps of that where the arrest was made, which shall be bound to keep him till the next gaol delivery: but he says, "If such township refuse also to receive him, I do not see how the person who made the arrest can discharge himself of him before the next gaol delivery; unless he can in the meantime procure him to be bailed." The proper course, I apprehend, for a private person, who has arrested a

*591] *If an escape suffered by a private person were voluntary, he is punishable as an officer would be for the same offence; (t) and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the Court. (u)

When any person is convicted of "any escape or rescue from lawful custody on a criminal charge," the court may by the 14 & 15 Vict. c. 100, s. 29, sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labor during the whole or any part of such term of imprisonment.

*592]

*CHAPTER THE THIRTY-THIRD.

OF PRISON-BREAKING BY THE PARTY CONFINED.

WHERE a party effects his own escape *by force*, the offence is usually called *prison-breaking*; and such breach of prison, or even the conspiring to break it, was felony at the common law, for whatever cause, criminal or civil, the party was lawfully imprisoned; (a) and whether he were actually within the walls of a prison or only in the stocks, or in the custody of any person who had lawfully arrested him. (b) But the severity of the common law is mitigated by the statute *De frangentibus prisonam*, 1 Edw. 2, stat. 2, which enacts, "That none, from henceforth, that breaketh prison, shall have judgment of life or member for breaking of prison only; except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon, according to the law and custom of the realm." Thus though to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at common law; to break prison when lawfully confined upon any other inferior charge, is punishable only as a high misdemeanor, by fine and imprisonment. (c)

It will be proper to consider some of the points which have been holden in the construction of this statute.

Any place whatsoever wherein a person, under a lawful arrest for a supposed crime, is restrained of his liberty, whether in the stocks, or the street, or in the common gaol, or the house of a constable or private person, or the prison of the ordinary, is properly a *prison* within the meaning of the statute; for imprisonment is nothing else but a restraint of liberty. (d) The statute, therefore, extends as well to a prison in law as to a prison in deed. (e)

With respect to the regularity of the imprisonment, it is clear, that if a person be taken upon a *capias*, awarded on an indictment or appeal against him for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were or were not committed by him or any other person; for there is an accusation against him on record, which makes his commitment lawful, however he may be innocent, or the prosecution groundless. And if an innocent person be committed by a lawful *mittimus*, on such a suspicion of felony, actually done by some other, as will justify his imprisonment, though he be neither indicted nor *593] appealed, he is within the statute if he break the prison; for he was legally in custody, and ought to have submitted to it until he had been discharged by due course of law. (f)

But if no felony at all were done, and the party be neither indicted nor appealed, no *mittimus* for such a supposed crime will make him guilty within the statute, by person on suspicion of felony, is to take him as soon as he reasonably can before a magistrate, who will examine into the case, and either commit, bail, or discharge the party as the circumstances may require. C. S. G. See *Reed v. Cowmeadow*, 7 C. & P. 821 (32 E. C. L. R.), per Parke, B.; and *Edwards v. Ferris*, 7 C. & P. 542 (32 E. C. L. R.), Paterson, J.

(t) *Ante*, p. 588.

(u) 2 Hawk. P. C. c. 20, s. 6.

(a) 4 Blac. Com. 129; 1 Hale 607; Bract. I. 3, c. 9; 2 Inst. 588. See Arch. Q. B. P. 647, vol. 2, 3d edit.

(b) 2 Hawk. P. C. c. 18, s. 1.

(c) 4 Blac. Com. 130.

(d) 2 Hawk. P. C. c. 18, s. 4.

(e) 2 Inst. 589.

(f) 2 Hawk. P. C. c. 18, ss. 5, 6; 2 Inst. 590; Sum. 109; 1 Hale 610, 611.

breaking the prison; his imprisonment being unjustifiable. And though a felony be done, yet if there were no just cause of suspicion either to arrest or commit the party, his breaking the prison will not be felony if the *mittimus* be not in such form as the law requires; because the lawfulness of his imprisonment in such case depends wholly on the *mittimus*: but if the party were taken up for such strong cause of suspicion as will be a good justification of his arrest and commitment, it seems that it will be felony in him to break the prison, though he happen to have been committed by an informal warrant. (g)¹

The next inquiry will be as to the nature of the crime for which the party must be imprisoned, in order to make his breaking the prison felony within the meaning of the statute. It is clear that the offence for which the party was imprisoned must be a capital one at the time of his breaking the prison, and not become such a matter subsequent. (h) Though an offender breaking prison, while it is uncertain whether his offence will become capital, is highly punishable for his contempt, fine and imprisonment. (i) But it is not material whether the offence for which the party was imprisoned were capital at the time of the passing of the statute, or be made so by subsequent statutes; for, since all breaches of prison were felonies at the common law, which is restrained by the statute only in respect of imprisonment for offences not capital, when an offence becomes capital, it is as much out of the benefit of the statute as if it had always been so. (k)

If the crime for which the party is arrested, and with which he is charged in the *mittimus*, do not require judgment of life or member, and the offence be not at greater than the *mittimus* supposes it to be, it is clear, from the express words of the statute, that his breaking the prison will not amount to felony. (l) And though the offence for which the party is committed be supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if, in the event, it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain that the breaking of the prison on a commitment for it can be felony; as the words of the statute are, "except the cause for which he was taken and imprisoned require such a judgment." (l) And on the other hand, if the offence which was the cause of the commitment be in truth of such a nature as requires a capital judgment, but be supposed in the *mittimus* to be of an inferior nature, it may probably be argued that the breaking of the prison by the party is felony within the meaning of the statute; for the fact for which he was arrested and committed does, in truth, require judgment of life, though the nature of it be mistaken in the *mittimus*. (m) It is not material whether the party who breaks his prison were under an accusation only, or actually attainted of the crime charged against him; for persons attainted, breaking prison, are as much within the exception of the statute as any others. (n) [*594]

A person committed for high treason becomes guilty of felony only, and not of high treason, by breaking the prison and escaping singly, without letting out any other prisoner: but if other persons, committed also for high treason, escape together with him, and his intention in breaking the prison were to favor their escape as well as his own, he seems to be guilty of high treason in respect of their escape, because there are no accessories in high treason; and such assistance given

(g) 2 Hawk. P. C. c. 18, ss. 7, 15, c. 16, s. 13, *et seq.*; 2 Inst. 590, 591; Sum. 109; 1 Hale 610, 611.

(h) *Ante*, p. 589.

(i) 2 Hawk. P. C. c. 18, s. 14.

(k) 2 Hawk. P. C. c. 18, s. 13.

(l) See the statute, *ante*, p. 592.

(m) 2 Hawk. P. C. c. 18, s. 15. It should be observed, however, that Hawkins, after giving his reasons for these conclusions, says that no express resolution of the points appearing, and the authors who have expounded the statute (see 2 Inst. 590, 591; Sum. 109, 110; 1 Hale 609) seeming rather to incline to a different opinion, he shall leave these matters to the judgment of the reader.

(n) Staund. P. C. c. 32; 2 Hawk. P. C. c. 18, s. 16.

¹ A person confined in a gaol, by virtue of a void warrant, may lawfully liberate himself by breaking the prison, using no more force than is necessary to accomplish this object; nor is it a crime or misdemeanor in such person that while his sole object was to liberate himself, other persons lawfully confined for atrocious crimes in the same room with him, in consequence of such prison breach, made their escape: *State v. Leach*, 7 Conn. 752.

to persons committed for felony will make him who gives it an accessory to the felony, and by the same reason a principal in the case of high treason.(o)

The breach of the prison within the meaning of the statute must be an *actual breaking*, and not such force and violence only as may be implied by construction of law; therefore, if the party go out of a prison without any obstruction, the prison doors being open through the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, it is said that he is guilty of a misdemeanor only.(p) But the breaking need not be intentional; as where a prisoner made his escape from a house of correction, by tying two ladders together, and placing them against the wall of the yard, but in getting over threw down some bricks which were placed loose at the top (so as to give way upon being laid hold of), the judges were unanimously of opinion that this was a prison-breach.(q) And such breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison be broken by others without his procurement or consent, and he escape through the breach so made, it seems to be the better opinion that he cannot be indicted for the breaking, but only for the escape.(r) And the breaking must not be from the necessity of an inevitable accident happening, without the contrivance or fault of the prisoner; as if the prison should be set on fire by accident, and he should break it open to save his life.(s) It seems also that no breach of prison will amount to felony, unless the prisoner escape.(t)

*595] A party may be arraigned for prison-breaking before he is convicted *of the crime for which he was imprisoned (the proceeding differing in this respect from cases of escape or rescue), on the ground that it is not material whether he be guilty of such crime or not, and that he is punishable as a principal offender in respect of the breach of prison itself.(u) But if the party has been indicted and acquitted of the felony for which he was committed, he is not to be indicted afterwards for the breach of prison; for though, while the principal felony was untried, it was indifferent whether he were guilty of it or not, or rather the breach of prison was a presumption of the guilt of the principal offence, yet, upon its being clear that he was not guilty of the felony, he is in law as a person never committed for felony; and so his breach of prison is no felony.(v)

The indictment for a breach of prison, in order to bring the offender within the intention of the statute, must specially set forth his case in such manner that it may appear that he was lawfully in prison, and for such a crime as requires judgment of life or member: and it is not sufficient to say in general "that he feloniously broke prison;"(w) as there must be an actual breaking to constitute the offence.(x) So it is held in all the books to be necessary that such breaking be stated in the indictment.(y)

By the 4 Geo. 4, c. 64, s. 44, the certificate of the clerk of assize or other clerk of the court in which the offender was convicted, together with due proof of the identity of the person, is made evidence of the nature and fact of the conviction; and of the species and period of confinement to which such person was sentenced.(z)

The 4 Geo. 4, c. 64, is repealed by the 28 & 29 Vict. c. 126, and by sec. 37,

(o) 2 Hawk. P. C. c. 18, s. 17; Benstead's case, Cro. Car. 583; Limerick's case, Kel. 77.

(p) 1 Hale 611; 2 Inst. 590: *ante*, p. 582, 592.

(q) Rex v. Haswell, East. T. 1821, R. & R. 458. Richardson, J., thought that if this had been an escape only, it would not have been felony. See *ante*, p. 582, 592.

(r) 2 Hawk. P. C. c. 18, s. 10; Pult. de Pac. 1476, pl. 2, where it is said, that if a stranger breaks the prison, in order to help a prisoner committed for felony to escape, who does escape accordingly, this is felony; not only in the stranger that broke the prison, but also in the prisoner that escapes by means of this breach, as he consents to the breach of the prison by taking advantage of it.

(s) 1 Hale 611; 2 Inst. 590; Sum. 108.

(t) 2 Hawk. P. C. c. 18, s. 12.

(u) 2 Inst. 592; 1 Hale 611; 2 Hawk. P. C. c. 18, s. 18.

(v) 1 Hale 612, where the learned writer also says, that if the party should be first indicted for the breach of prison, and then be acquitted of the principal felony, he may plead that acquittal of the principal felony, in bar to the indictment for the breach of prison.

(w) 2 Hawk. P. C. c. 18, s. 20.

(x) *Ante*, p. 594.

(y) Rex v. Burridge, 3 P. Wms. 483; Staund. 31, a.; 2 Inst. 589, *et seq.*

(z) *Ante*, p. 582. See the 14 & 15 Vict. c. 99, s. 13, *post*, Evidence.

"every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress, or other disguise, or any letter, or any other article or thing, shall be guilty of felony, and on conviction be sentenced to imprisonment with hard labor for a term not exceeding two years."

Sec. 38. "Every person who, contrary to the regulations of the prison, brings or attempts by any means whatever to introduce into any prison any spirituous or fermented liquor or tobacco, and every officer of a prison who suffers any spirituous or fermented liquor or tobacco to be sold or used therein, contrary to the prison regulations, on conviction shall be sentenced to imprisonment for a term not exceeding six months, or to a penalty not exceeding twenty pounds, or both, in the discretion of the court, and every officer of a prison convicted under this section shall, in addition to any other punishment, forfeit his office and all arrears of salary due to him."

Sec. 39. "Every person who, contrary to the regulations of a prison, conveys or attempts to convey any letter or other document, or any article whatever not allowed by such regulations, into or out of any prison, shall on conviction incur a penalty not exceeding ten pounds, and if an officer of the prison, shall forfeit his office and all arrears of salary due to him, but this section shall not apply in cases where the offender is liable to a more severe punishment under any other provision of this Act."

The offence of prison-breaking and escape, by a party lawfully committed for any treason or felony, is, as we have seen, of the degree of felony,^(a) and will of course be punishable as such:^(b) but it should be observed, that it was a felony within clergy, though the principal felony for which the party was committed were ousted of clergy, as in case of robbery or murder.^(c) And in this it differs from the offence of a voluntary escape, which is punishable in the same degree as the offence for which the party suffered to escape was in custody.^(d) Where the prison-breaking is by a party lawfully confined upon any inferior charge, it is punishable as a high misprison, by fine and imprisonment.^(e)

*As prison-breach is a common law felony, if the person breaking prison is a convicted felon, it is punishable as such. The prisoner was found guilty [*596 upon an indictment, which charged that he had been convicted of horse-stealing, and sentenced to suffer death; and that his Majesty extended his mercy to him, on condition of being imprisoned and kept to hard labor, in the House of Correction at Brixton Hill, for two years: that he was committed to and confined in the said house of correction; and that he, before the expiration of the two years, did feloniously break the said house of correction, and make his escape out of it, and go at large. The judges were unanimously of opinion that this was punishable as a common law felony by imprisonment not exceeding a year, to begin from the passing of the sentence; and that, if thought right, the prisoner might be whipped three times in addition to the imprisonment.^(f)

The 1 & 2 Vict. c. 82, established a prison for young offenders at Parkhurst in the Isle of Wight; and sec. 12 provides for the punishment of any such offender who breaks prison or escapes from his place of confinement, &c.; and sec. 14 provides for the place of trial and evidence in such cases. The 6 & 7 Vict. c. 26, s. 22, an Act for regulating the prison at Millbank, provides for the punishment of

(a) *Ante*, p. 592.

(b) As this is a felony for which no punishment is specially provided, it is punishable under the 7 & 8 Geo. 4, c. 28, ss. 8, 9, and 1 Vict. c. 90, s. 5 (*ante*, p. 3), and the 20 & 21 Vict. c. 3, s. 2 (*ante*, p. 4), with penal servitude for not exceeding seven and not less than three years, or imprisonment for not exceeding two years, with or without hard labor, in the common gaol or house of correction, and solitary confinement for any portion of such imprisonment, or of such imprisonment with hard labor, not exceeding one month at a time, or three months in the space of one year, and the offender, if a male, may be once, twice, or thrice publicly or privately whipped, in addition to such imprisonment.

(c) 1 Hale 612.

(d) *Ante*, p. 588.

(e) 2 Hawk. P. C. c. 18, s. 21.

(f) *Rex v. Haswell*, East. T. 1821, R. & R. 458. It does not appear that the 31 Geo. 3, c. 46, was alluded to as applicable to this case. The statute, however (except sec. 7), has been repealed by 4 Geo. 4, c. 64. See note (b), *supra*.

any convict who breaks prison or escapes from his place of confinement, &c.; and sec. 26 provides for the trial and evidence in such cases. The 5 Vict. sess. 2, c. 29, s. 23, an Act for establishing a prison at Pentonville, provides for the punishment of any convict who breaks prison or escapes from his place of confinement, &c.; and sec. 28 provides for the trial and evidence in such cases.

The offence of prison-breaking is, in certain cases, made the subject of special enactment, and will be mentioned in the course of the work in the order in which the crimes are treated of to which those statutes relate.

*597]

*CHAPTER THE THIRTY-FOURTH.

OF RESCUE; AND OF ACTIVELY AIDING IN AN ESCAPE, OR IN AN ATTEMPT TO ESCAPE.

RESCUE, or the offence of forcibly and knowingly freeing another from arrest or imprisonment, is, in most instances, of the same nature as the offence of *prison-breaking*, which has been treated of in the preceding chapter.

Thus it is laid down, that whatever is such a prison that the party himself would, by the common law, be guilty of felony in breaking from it, in every such case a stranger would be guilty of as high a crime at least in rescuing him from it. But though, upon the principle that wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the party arrested for felony, or suspicion of felony, be in the custody of a private person or of an officer, yet if he be in the custody of a private person, it seems that the rescuer should be shown to have knowledge of the party being under arrest for felony.(a) In cases where the imprisonment is so far groundless or irregular, or for such a cause, or the breaking of it is occasioned by such a necessity, &c., that the party himself breaking the prison is, either by the common law or by the 1 Edw. 2, st. 2, *De frangentibus prisonam*, saved from the penalty of a capital offender; a stranger who rescues him from such an imprisonment is, in like manner, also excused.(b)

It has been stated in the preceding chapter, that, where a person committed for high treason breaks the prison and escapes, letting out other persons, committed also for high treason, he seems to be guilty of high treason, in case his intention in breaking the prison were to favor the escape of such other persons as well as his own:(c) and it is clear that a stranger who rescues a person committed for and guilty of high treason, knowing him to be so committed, is, in all cases, guilty of high treason.(d) It has been holden also, that he will be thus guilty whether he knew that the party rescued were committed for high treason or not: and that he would, in like manner, be guilty of felony by rescuing a felon, though he knew not that the party was imprisoned for felony.(e)

*598] *As the party himself seems not to be guilty of felony by breaking the prison, unless he *actually* go out of it,(f) so the breaking of a prison by a

(a) 1 Hale 606.

(b) 2 Hawk. P. C. c. 21, ss. 1, 2; 2 Inst. 589; Staund. P. C. 30, 31; *ante*, p. 592, *et seq.*

(c) *Ante*, p. 594.

(d) 2 Hawk. P. C. c. 21, s. 7; Staund. P. C. 11, 32; Sum. 109; 1 Hale 237.

(e) *Rex v. Benstead*, Cro. Car. 583, where it is said that it was resolved by ten of the judges (on a special commission), *seriatim*, that the breaking of a prison where traitors are in durance, and causing them to escape, was treason, although the parties did not know that there were any traitors there: and that, in like manner, to break a prison whereby felons escape, is felony, without knowledge of their being imprisoned for such offence. And see 1 Hale 606. But Hawkins (P. C. c. 21, s. 7), says that this opinion is not proved by the authority of the case (1 Hen. 6, 5), on which it seems to be grounded. It should be mentioned, however, that Benstead's case is spoken of in *Rex v. Burridge*, 3 P. Wms. 468, as having been cited and allowed to be law at an assembly of all the judges of England, except the Chief Justice of the Common Pleas, in Limerick's case, Kel. 77-

(f) *Ante*, p. 594.

stranger, in order to free the prisoners who are in it, is said not to be felony, unless some prisoner actually by that means get out of prison. (g)

The sheriff's return of a rescue is not of itself sufficient to put the party to answer for it as a felony, without indictment or presentment. (h) And it is the better opinion that he who rescues one imprisoned for felony cannot be arraigned for such offence as a felony, until the principal offender be first attainted, (i) unless the person rescued were imprisoned for high treason, in which case the rescuer may be immediately arraigned; all being principals in high treason. But it is said that he may be immediately proceeded against for a misprision only if the King please: (k) and if the principal be discharged, or found guilty only of an offence not capital, such as petit larceny, &c., though the rescuer cannot be charged with felony, yet he may be fined and imprisoned for a misdemeanor. (l)

The indictment for a rescue, like that for an escape, (m) or for breaking prison, (n) must specially set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. (o) And the word *rescussit*, or something equivalent to it, must be used to show that it was forcible and against the will of the officer who had the prisoner in his custody. (p)

The rescue of one apprehended for treason is itself treason: and the party rescuing one in custody for felony, or suspicion of felony, will, as we have seen, be guilty of a crime of the same kind; though not in all cases punishable in the same degree; for the rescuer was entitled to his clergy, though the crime of the prisoner rescued were not within clergy. (q) Accordingly it was held that rescuing a person under commitment for burglary was not a transportable offence, but was punishable only as a felony, within clergy, at common law. (r) The 1 & 2 Geo. 4, c. 88, s. 1, as since enacted, "that if any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, head-borough, or other person whatsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then, if the person or persons so offending shall be convicted of felony, and be entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the Court, by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported (s) beyond the seas for seven (t) [*599] years, or be imprisoned only, or be imprisoned and kept to hard labor in the common jail, house of correction, or penitentiary house, for any term not less than one (u) and not exceeding three years."

Where the party rescued was in custody for a misdemeanor only, the rescuer will be punishable as for a misdemeanor; for, as those who break prison are punishable for a high misprision, by fine and imprisonment, in those cases wherein they are saved from judgment of death by the 1 Edw. 2, stat. 2, *De frangentibus prisonam*; so also are those who rescue such prisoners, in the like cases, punishable in the same manner. (v) Where a prisoner was indicted for a misdemeanor in aiding and assisting in the rescue of a person, who was apprehended and was in custody under the warrant of a justice of the peace, which had been granted upon the certificate of a clerk of the peace of the county, reciting that a true bill for a misdemeanor had been found against the party apprehended; and it was objected that the warrant

(g) 2 Hawk. P. C. c. 18, s. 12; c. 21, s. 3.

(h) 1 Hale 606.

(i) See ante, p. 587, note (r).

(k) 2 Hawk. P. C. c. 21, s. 8.

(l) 1 Hale 598, 599.

(m) Ante, p. 587.

(n) Ante, p. 595.

(o) 2 Hawk. P. C. c. 21, s. 5. In *Rex v. Westbury*, 8 Mod. 357, it was holden that an indictment for a rescue of goods levied must set forth the *feri facias* at large; and that setting forth *quod cum virtute brevis, &c., de feri facias*, and a warrant thereon he levied, &c., and that the defendant rescued them, is not sufficient.

(p) *Rex v. Burridge*, 3 P. Wms. 483.

(q) 1 Hale 607.

(r) *Rex v. Stanley*, R. & R. 432.

(s) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, ante, p. 4.

(t) And not less than three years by the same clause, *Ibid*.

(u) See the 9 & 10 Vict. c. 24, s. 1, ante, p. 3.

(v) 2 Hawk. P. C. c. 21, s. 6; 4 Blac. Com. 130.

was illegal, as justices of the peace had only authority to issue warrants upon oath made of the facts, which authorized the issuing such warrants: it was held that the warrant was legal, and that the prisoner was guilty of a misdemeanor, in assisting in the rescue of the person apprehended under it.^(w)

It has been held to be a misdemeanor at common law to aid a person to escape from custody, who was confined under the remand of the Commissioners for the Relief of the Insolvent Debtors, and not on any criminal charge.^(x)

The rescue of a prisoner in any of the superior courts, committed by the justices, is a great misprision; for which the party, and the prisoner (if assenting) will be liable to be punished by imprisonment for life, forfeiture of lands for life, and forfeiture of goods and chattels, though no stroke or blow were given.^(y)

The aiding and assisting a prisoner to escape out of prison, by whatever means it may be effected, is an offence of a mischievous nature, and an obstruction to the course of justice; and the assisting a *felon* in making an actual escape, is an offence of the degree of felony.^(z) In a case which underwent elaborate discussion, the Court of King's Bench held, that where a person assisted a prisoner who had been convicted of felony within clergy, and, having been sentenced to be transported for seven years, was in custody under such sentence, to escape out of prison, the person so assisting was an accessory after the fact to the felony.^(a) The Court proceeded upon the ground that one so convicted of felony, within the benefit of clergy, and sentenced to be transported for seven years, continues a felon till actual *600] *transportation and service pursuant to the sentence; and that the assistance given in this case amounted, in law, to a receiving, harboring or comforting, such felon.^(b) But they held the indictment to be defective, in not charging that the defendant knew that the principal was guilty, or convicted of felony.^(c) The offence of aiding a prisoner to escape out of prison appears also to have been considered as an accessorial offence in a case of piracy. On a return to a *habeas corpus*, in a case of one Scadding, who had been committed to the Marshalsea by the Court of Admiralty, the cause appeared to be for aiding and abetting one Exon, who was indicted for piracy, to escape out of prison; whereupon all the Court held that, though the fact were committed by Scadding, within the body of the county, yet, because it depended upon the piracy committed by Exon, of which the temporal judges had no cognizance, and was as it were an accessorial offence to the first piracy, which was determinable by the admiral, they must remand the prisoner.^(d)

Aiding the escape of a clergyable felon, who had his clergy and been burnt in the hand, but ordered, under the 18 Eliz., to be imprisoned, would not, it should seem, have subjected the party to punishment as for aiding the escape of a felon.^(e)

Several statutes, some of which have been already mentioned, and others which will be referred to in the course of the work, especially provide for the punishment of those who rescue or aid in the escape of persons apprehended or committed for

(w) *Rex v. Stokes*, Stafford Sum. Ass. 1831, MSS.; C. S. G.; s. c., 5 C. & P. 148 (24 E. C. L. R.), Parke, J. J. A., and Patteson, J.

(x) *Reg. v. Allan*, C. & M. 255 (41 E. C. L. R.), Erskine and Wightman, JJ.

(y) 1 East P. C. c. 8, s. 3, pp. 408, 410; Bac. Abr. tit. *Rescue* (C.); 3 Inst. 141; 22 Edw. 3, 13.

(z) *Rex v. Tilley*, 2 Leach 671.

(a) *Rex v. Burridge*, 3 P. Wms. 439.

(b) The assistance, as stated in the special verdict in this case, was not particularly specified: the statement was, that the defendant (who was confined in the same gaol with the party whom he assisted to escape) "did wilfully aid and assist the said W. P., so being in custody as aforesaid, to make his escape out of the said gaol." But any assistance given to one known to be a felon, in order to hinder his suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory after the fact. *Ante*, p. 64.

(c) 3 P. Wms. 492. The prisoner was charged upon a second indictment as an accessory, knowing the principal to have been under sentence of transportation; and was tried upon this second indictment, convicted, and sentenced to be transported: *Id.* 499, 503. But such sentence was not warranted by law. See *Rex v. Stanley*, R. & R. 432.

(d) *Rex v. Scadding*, Yelv. 134; 1 East P. C. c. 17, s. 14, p. 810.

(e) See the judgment of Treby, C. J., in the Earl of Warwick's case, 13 St. Tr. 1018, as to the commitment under this statute being a collateral and new thing.

a particular offences enumerated in those Acts. There are also some special provisions by statutes upon this subject, which may be noticed shortly in this place.

By the 25 Geo. 2, c. 37, s. 9,^(f) "If any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue or set at liberty, any person, out of prison, who shall be committed for or found guilty of murder; or rescue, or attempt to rescue, any person convicted of murder going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony, and shall suffer death without benefit of clergy."^(g)

The annual Mutiny Acts provide for the punishment of persons *aiding the escape or attempt to escape of any prisoner from any military prison. [*601

The 52 Geo. 3, c. 156, s. 1, enacts, that "every person who shall knowingly and wilfully aid or assist any alien enemy of his Majesty, being a prisoner of war in his Majesty's dominions, whether such prisoner shall be confined as a prisoner of war in any prison or other place of confinement, or shall be suffered to be at large in his Majesty's dominions or any part thereof, on his parole, to escape from such prison or other place of confinement, or from his Majesty's dominions, if at large on parole," shall, upon conviction, be adjudged guilty of felony, and liable to be transported for life, or for fourteen or seven years.⁽ⁱ⁾

Sec. 2, every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole in quitting any part of his Majesty's dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of his Majesty's dominions, shall be deemed guilty of aiding the escape of such persons within the Act.

Sec. 3. "If any person or persons owing allegiance to his Majesty, after any such prisoner as aforesaid hath quitted the coast of any part of his Majesty's dominions, shall aid or assist such prisoner in his escape to or towards any other dominions or place, such persons shall also be adjudged guilty of felony, and be liable to be transported as aforesaid;" and such offences committed upon the high seas, and not within the body of any county, may be tried in any county within the realm.^(k) Previously to the passing of this Act, upon an indictment for a misdemeanor in unlawfully aiding and assisting a prisoner at war to escape, where it appeared that such prisoner was acting in concert with those under whose charge he was placed, in order to effect the detection of the defendant, who was supposed to have been instrumental in the escapes of other prisoners, and the prisoner in question neither escaped nor intended to escape; it was held that the offence was not complete, and that a conviction for such offence was therefore wrong.^(l)

The mere aiding an attempt of persons confined to make an escape, though no escape should ensue, is made highly penal by the 16 Geo. 2, c. 31, s. 1,^(m) which enacts, that "if any person *shall, by any means whatsoever, be [*602

^(f) Repeated by the 9 Geo. 4, c. 31, s. 1, "except so far as relates to rescues and attempts to rescue."

^(g) This punishment is abolished, and another substituted by the 1 Vict. c. 91, ss. 1, 2, see *ante*, p. 141. Principals in the second degree are punishable like principals in the first degree; and as to accessories, see *ante*, p. 67, *et seq.* By the alteration of the mode of the disposal of the bodies of murderers by the 24 & 25 Vict. c. 100, s. 3, *post*, *Murder*, sec. 10 of this Act seems to be virtually repealed. C. S. G.

⁽ⁱ⁾ Penal servitude for life or for not less than three years by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4. The principals in the second degree are punishable like the principals in the first degree; and as to accessories, see *ante*, p. 67, *et seq.*

^(k) By sec. 4, the Act is not to prevent offenders from being prosecuted, as they might have been if the Act had not been passed; but no person prosecuted otherwise than under the provisions of the Act is to be liable to be prosecuted for the same offence under the Act; and no person prosecuted under the Act is, for the same offence, to be otherwise prosecuted.

^(l) *Rex v. Martin*, Trin. T. 1811, R. & R. 196.

^(m) This Act is repealed by the 4 Geo. 4, c. 64, s. 1, as far "as relates to the escape of any prisoner from any gaol or prison to which this Act shall extend;" and by sec. 2 there is to be in every county in England and Wales one common gaol, and in every county not divided into ridings or divisions, and in every riding or division of a county (having distinct commissions of the peace, or distinct rates in the nature of county rates, applicable to the maintenance of a prison for such division) in England and Wales, at least one house

aiding or assisting to any prisoner to attempt to make his or her escape from any gaol, although no escape be actually made, in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny,⁽ⁿ⁾ or lawfully committed to or detained in any gaol, for treason or any felony, except petty larceny, expressed in the warrant of commitment or detainer;" every person so offending shall, on conviction, be adjudged guilty of felony, and be transported for seven years.^(o) And "in case such prisoner then was convicted or committed to or detained in any gaol for petty larceny,⁽ⁿ⁾ or any other crime, not being treason or felony, expressed in the warrant of his or her commitment or detainer as aforesaid, or then was in gaol upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds;" every person so offending, and being convicted, shall be deemed guilty of "a misdemeanor, and be liable to a fine and imprisonment."

Sec. 2. "If any person shall convey, or cause to be conveyed, into any gaol or prison, any vizor, or other disguise, or any instrument or arms proper to facilitate the escape of prisoners, and the same shall deliver or cause to be delivered to any prisoner in any such gaol, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper or underkeeper, of any such gaol or prison: every such person, although no escape or attempt to escape be actually made, shall be deemed to have delivered such vizor or other disguise, instrument or arms, with an intent to aid and assist such prisoner to escape, or attempt to escape; and in case such prisoner then was attainted or convicted of treason, or any felony, except petty larceny, or lawfully committed to or detained in any such gaol for treason, or any felony, except petty larceny, expressed in the warrant of commitment or detainer;" every person so offending, and being convicted, shall, in like manner, be deemed guilty of felony, and be transported for seven years.^(o) And "in case the prisoner to whom, or for whose use such vizor or disguise, instrument or arms, shall be so delivered, then was convicted, committed, or detained for petty larceny, or any other crime not being treason or felony, expressed in the warrant of commitment or detainer, or upon any process whatsoever, for any debt, damages, costs, sum or sums of money, amounting in the whole to the sum of one hundred pounds;" every person so offending, and being convicted, shall be deemed guilty of a misdemeanor, and be liable to a fine and imprisonment.

Sec. 3. "If any person shall aid or assist any prisoner to attempt to make his or her escape from the custody of any constable, headborough, tithingman, or other officer or person who shall then have the lawful charge of such prisoner, in order to carry him or her to a gaol, by virtue of a warrant of commitment for treason, or any felony (except petty larceny),^(p) expressed in such warrant; or if any person shall be aiding or assisting to any felon to attempt to make his escape from on board any boat, ship, or vessel, carrying felons for transportation, or from the contractor for the transportation of such felons, his assigns or agents, or any other person to whom such felon shall have been lawfully delivered, in order for transportation;" every person so offending, and being convicted, shall be deemed guilty of felony, and be transported for seven years.^(q)

of correction; and one gaol and one house of correction in the several cities, towns, and places mentioned in schedule A. annexed to the Act, and the provisions of the Act are to extend in the manner thereafter mentioned, to every such gaol and house of correction maintained at the expense of such county, riding, division, city, town, or place, and to the several gaols and houses of correction in the cities of London and Westminster: by sec. 76 and 5 Geo. 4, c. 85, s. 27, the Act does not extend to the hospital of Bethlehem and prison of Bridewell, nor to the King's Bench or Fleet prison, nor to the prison of the Marshalsea or Palace Courts, the Millbank Penitentiary, or Gloucester Penitentiary, nor to any ships or vessels provided for the reception and employment of convicts sentenced to transportation; and by the 5 Geo. 4, c. 85, s. 9, so much of the 4 Geo. 4, as relates to Canterbury, Lichfield, and Lincoln is repealed. It is very difficult, therefore, to say how far the 16 Geo. 2, c. 31, is now repealed. C. S. G.

(n) Abolished, see 24 & 25 Vict. c. 96, s. 2, Vol. II.

(o) Penal servitude for seven and not less than three years by the 20 & 21 Vict. c. 3, s. 2, ante, p. 4. Principals in the second degree are punishable like principals in the first degree; and as to accessories, see ante, p. 67, et seq.

(p) Ante, p. 602, note (n).

(q) Ante, p. 620, note (o).

Sec. 4. The prosecution for these offences must be commenced within a year.

The second section of this statute, relating to the conveying of instruments, &c., to any prison, in order to facilitate the escape of prisoners, makes the offender guilty, in cases where the prisoner is committed to or detained in any gaol for treason or felony *expressed* in the warrant of commitment.^(r) This has been taken to mean that the offence should be "*clearly and plainly expressed*;" so that a case where the commitment is *on suspicion* only is not within the Act, for there are two kinds of commitments, which essentially differ from each other; as a prisoner may be admitted to bail on a commitment for suspicion only, but not on commitment for treason or felony clearly and plainly expressed in the warrant.^(s) And this doctrine was recognized and acted upon in a subsequent case of an indictment upon the third section of the statute, which relates to the aiding a prisoner to escape from the custody of a constable having charge of him by virtue of a warrant of commitment for felony "*expressed*" in such warrant. The indictment stated that the commitment was on "*suspicion*" of burglary, and the warrant produced in evidence at the trial corresponded with this statement: and the judges were unanimously of opinion that a commitment *on suspicion* was not within the statute.^(t)

A majority of the judges decided that the Act does not extend to cases where an *actual escape* is made, but must be confined to cases of an attempt, without effecting the escape itself. They said, "The statute purports to be made for the further punishing of those persons who shall aid and assist persons attempting to escape, and makes the offence felony; it creates a new felony: but the offence of assisting a felon in making an actual escape was felony before: and therefore does not seem to fall within the view or intention of the legislature when they made this statute."^(u)

An indictment charging the defendant with aiding and assisting a prisoner to attempt to make an escape, need not state that the party aided did attempt to make the escape; for he could not have aided if no such attempt had been made.^(v) The delivering instruments to a prisoner, to facilitate his escape from prison, is within this statute, though the prisoner have been pardoned for the offence of which he was convicted, on condition of transportation.^(w) And a party within the Act, though there be no evidence that he knew of what specific offence the person he assisted had been convicted.^(x)

The record of the conviction of the prisoner, whose escape was to have been effected, having been produced by the proper officer, no evidence is admissible to contradict what it states; or to show that it had never been filed among the records of the county; notwithstanding the indictment refers to it with a *prout patet* as remaining amongst those records.^(y)

The 4 Geo. 4, c. 64, s. 43, intituled, "An Act for the Consolidating and Amending the Laws relating to the Building, Repairing, and Regulating of certain Gaols and Houses of Correction in England and Wales," enacts, that "if any person shall convey or cause to be conveyed into any prison to which the Act shall extend, any mask, vizor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in any such prison, or to any other person there for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such vizor or disguise, instrument or arms, with intent to aid and assist such prisoner to escape, or attempt to escape; and if any person shall, by any means whatever, aid and assist any prisoner to escape, or

^(r) *Ante*, p. 602.

^(s) *Rex v. Walker*, 1 Leach 97; but see the 11 & 13 Vict. c. 42, ss. 1, 23.

^(t) *Rex v. Greeniff*, 1 Leach 363; and *Rex v. Gibbon*, 1 Leach 98, note (a), s. p.

^(u) *Rex v. Tilley*, 2 Leach 662. But see now 4 Geo. 4, c. 64, s. 43.

^(v) *Ante*, p. 603, note (u).

^(w) *Rex v. Shaw*, R. & R. 526.

^(x) *Rex v. Shaw*, *supra*. An indictment at common law for aiding a prisoner's escape should state that the party knew of his offence: *Rex v. Young*, Trin. T. 1801, M.S., Bayley, J.

^(y) *Rex v. Shaw*, *supra*.

in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony; and, being convicted thereof, shall be transported beyond the seas for any term not exceeding fourteen years."^(z)

Sec. 44. To the intent that prosecutions for escapes, breaches of prison, and rescues, may be carried on with as little trouble and expense as possible, enacts, "that any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken." And it also enacts, that a *certificate* of the clerk of assize, or other clerk of the court in which the offender was convicted, together with due proof of the identity of the person, shall be sufficient evidence of the nature and fact of the conviction, and of the species and period of confinement to which such person was sentenced.^(a)

Where a count stated that the gaol thereafter mentioned, situate at the parish of the Holy Trinity, in Coventry, in the county of W., was a gaol to which the provisions of the 4 Geo. 4, *c. 64, extended, and that one Thompson was a prisoner in the said gaol, and that the defendant, at the parish aforesaid, feloniously did aid and assist Thompson, then and there being such prisoner, in attempting to escape from the said gaol; it was held on error that the count was good, though it did not allege the means by which the defendant aided Thompson in attempting to escape, and though it did not allege in direct terms that Thompson did attempt to escape.^(b) Another count stated that Thompson, being a prisoner in the said gaol, so situate as aforesaid, was meditating and endeavoring to effect his escape from the said gaol, otherwise than by due course of law, and in order thereto had procured a key to be made with intent to effect his escape by means thereof, and had made to the defendant, then being a turnkey of the said gaol, overtures to induce him to aid him to escape from the said gaol, and so was endeavoring to procure his escape and to escape from the said gaol; and that the defendant, whilst Thompson was such prisoner in the said gaol at the parish aforesaid, &c., feloniously did procure and receive into his possession the said key, being adapted to and capable of opening divers locks in the said gaol, with intent thereby to enable Thompson to escape from the said gaol, and so the jurors said that the defendant at the parish aforesaid feloniously did aid and assist Thompson in attempting to escape from the said gaol; and it was held that the introductory part of the count stated an attempt to escape and the means used with sufficient particularity, and sufficiently showed an offence within the 4 Geo. 4, c. 64, and that the count was not bad for want of a more particular venue to the acts charged in the introductory part as an attempt by Thompson to escape, and that the count was not double.^(c) It was also held, that the general averment of the gaol being a gaol to which the provisions of the 4 Geo. 4, c. 64, applied was sufficient, without showing how it came within them, and that it was not necessary to show more particularly that the gaol was a gaol for the county within the 5 & 6 Vict. c. 110, s. 2.^(d) It was further held, that aiding an escape is a substantive offence under the 4 Geo. 4, c. 64, s. 43, and therefore the count was not bad in charging the accessory without including the principal or alleging that he had been convicted, and at all events such an objection was too late after the trial.^(e) It was also held, that it was not necessary to show that the prosecution was commenced within a year after the offence, as was required by the 16 Geo. 2, c. 31, s. 4.^(f)

The 1 & 2 Vict. c. 82, established a prison for young offenders at Parkhurst, in the Isle of Wight; and sec. 13 provides for the punishment of persons rescuing or

(z) Penal servitude for fourteen and not less than three years by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4. The principals in the second degree are punishable like the principals in the first degree; and as to accessories, see *ante*, p. 67, *et seq.*

(a) See this provision more at large, *ante*, p. 582. See *ante*, p. 595.

(b) *Holloway v. The Queen*, 17 Q. B. 317 (79 E. C. L. R.); 2 Den. C. C. 287.

(c) *Ibid.*

(d) *Ibid.*

(e) *Ibid.*

(f) *Ibid.* It was also held that if one of the several counts be good, the Court may, under the 11 & 12 Vict. c. 78, s. 5, pronounce the correct judgment, or direct the inferior Court to pronounce it, on the good count.

aiding in the rescue of such offenders; and sec. 14 provides for the trial and evidence on the trial in such cases. The 6 & 7 Vict. c. 26, s. 23, an Act for regulating the prison at Millbank, provides for the punishment of persons rescuing or aiding in the rescue of convicts from that *prison; and sec. 26 provides for the trial and evidence in such cases. The 5 Vict. sess. 2, c. 29, s. 25, an [*606 Act for establishing a prison at Pentonville, provides for the punishment of persons rescuing or aiding in the rescue of convicts from that prison; and sec. 28 provides for the trial and evidence in such cases. The 10 & 11 Vict. c. 62, s. 8, an Act for the establishment of naval prisons, provides for the punishment of persons aiding the escape of prisoners from those prisons. The 23 & 24 Vict. c. 75, s. 12, an Act to make better provision for the custody of criminal lunatics, provides for the punishment of persons rescuing any person ordered to be confined in an asylum for criminal lunatics.

The 5 Geo. 4, c. 84, which was passed for the purpose of revising and consolidating the laws for regulating the transportation of offenders from Great Britain, which will be more particularly noticed in the next chapter, by sec. 22, provides, that if any person shall rescue or attempt to rescue, or assist in rescuing or attempting to rescue, any offender sentenced or ordered to be transported or banished, from the custody of the superintendent or overseer, or of any sheriff or gaoler, or other person, conveying, removing, &c., such offender, or shall convey or cause to be conveyed any disguise, instrument for effecting escape, or arms, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted. (g)

The two following sections relate to the indictment and the evidence, and will be found in the next chapter.

By the 23 & 24 Vict. c. 75, s. 12, "any person who rescues any person ordered to be conveyed to any asylum for criminal lunatics during the time of his conveyance thereto or his confinement therein, and any officer or servant in any asylum for criminal lunatics who through wilful neglect or connivance permits any person confined therein to escape therefrom, or secretes, or abets or connives at the escape of any such person, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for the term of five (27 & 28 Vict. c. 47) years, or to be imprisoned for any term not exceeding two years, with or without hard labor, at the discretion of the Court; and any such officer or servant who carelessly allows any such person to escape as aforesaid shall, on summary conviction before two justices of such offence, forfeit any sum not exceeding twenty pounds nor less than two pounds."

*CHAPTER THE THIRTY-FIFTH.

[*607

OF RETURNING, OR BEING AT LARGE, AFTER SENTENCE OF TRANSPORTATION;
AND OF RESCUING OR AIDING THE ESCAPE OF A PERSON UNDER SUCH SENTENCE.

As *exile* or *transportation* is a species of punishment unknown to the common law of England, and inflicted only under the sanction of enactments of the legislature, offences committed by not submitting to that punishment are principally dependent upon the provisions of particular statutes. (a) But as a party convicted

(g) The provisions of this Act are now applicable to prisoners sentenced to penal servitude, see *post*, p. 616.

(a) In 6 Ev. Col. Stat. Part. V. Cl. xxv. (G.) pp. 852, 853, the learned editor says, that the earliest Act which imposed the punishment of transportation was 39 Eliz. c. 4, which enacted that rogues, vagabonds, &c., might, by the justices in sessions, be banished out of the realm, and conveyed at the charges of the county to such parts beyond the seas as should be assigned by the privy council, or otherwise adjudged perpetually to the

of felony within benefit of clergy, and sentenced to be transported for seven years, continues a felon, till actual transportation and service, pursuant to the sentence; and as it is a felony at common law to assist a felon to escape out of lawful custody; it has been holden that, independently of any statutable enactments, a person assisting such felon convict, being in custody under sentence of transportation, to escape out of prison, is an accessory to the felony after the fact, provided it be such an assistance as in law amounts to a receiving, harboring, or comforting such felon. (b)

The 5 Geo. 4, c. 84, s. 1, recites, that the several laws in force for regulating the transportation of offenders from Great Britain, would expire at the end of the then present session of Parliament, and that it was expedient that the laws relative to that subject should be revised and consolidated into one Act; and then enacts that the Act shall take effect on the last day of that present session of Parliament; and that on and from that day all things remaining to be done, touching the punishment, imprisonment, correction, removal, transportation, discipline, employment, diet, and clothing of persons sentenced or ordered to transportation or banishment from any part of Great Britain, under any Acts theretofore or then in force, or pardoned on condition of being transported under any such Acts, shall be continued, done, and completed, under the provisions of that Act; and that all sentences and orders for transportation, all orders in council and other orders, warrants, instructions, directions, appointments, authorities, contracts, and securities, made, issued, or given under any of the said Acts, and in force at the time of the commencement of that Act, should continue in force under and by virtue of that Act, unless and until they should be revoked or superseded.

*608] *Sec. 2. "Every person convicted before any Court of competent jurisdiction in Great Britain, of any offence for which he or she shall be liable to be transported or banished, shall be adjudged and ordered to be transported or banished beyond the seas, for the term of life or years for which such offender shall be liable by any law to be transported or banished; and every sentence of transportation or banishment passed or to be passed on any offender, in any Court of competent jurisdiction in Great Britain, and every order for transportation or banishment made or to be made in pursuance of the sentence of any such Court or other competent authority, shall subject the offender to be conveyed beyond the seas, under the provisions of this Act; and whenever his Majesty shall be pleased to extend mercy to any offender convicted of any crime for which he or she is or shall be excluded from the benefit of clergy, upon condition of transportation beyond the seas, either for the term of life, or any number of years, and such intention of mercy shall be signified by one of his Majesty's principal secretaries of state to the Court before which such offender hath been or shall be convicted, or any subsequent Court with the like authority, such Court shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender; and in case such intention of mercy shall be so signified to the judge or justice before whom such offender hath been or shall be convicted, or to any judge of his Majesty's Court of King's Bench or Common Pleas, or to any baron of the Exchequer of the degree of the coif in England, such judge, justice, or baron, shall allow to such offender the benefit of a conditional pardon, and make an order for the immediate transportation of such offender, in the same manner as if such intention of mercy had been signified to the Court during the term or session in or at which such offender was convicted; and such allowance and order shall be considered as an allowance and order made by the Court before which such offender was convicted, and shall be entered on the records of the same Court by the proper officer thereof, and shall be as effectual to all intents and purposes, and have the same consequences, as if such allowance and order had been made by the same Court during the continuance thereof: and every such order, and also every order made by the Court of Justiciary in Scotland for the transportation of any offender,

gallies of this realm; and any rogue so banished, and returning again into the realm, was to be guilty of felony. And he says that the earliest statute then subsisting which notices the power of transportation was 22 Car. 2, c. 5.

(b) *Rex v. Burridge*, 3 P. Wms. 439.

whose sentence of death shall be remitted by his Majesty, shall subject the offender to be conveyed beyond the seas, under the provisions of this Act."

Sec. 3. "It shall be lawful for his Majesty, by and with the advice of his privy council, from time to time, to appoint any place or places beyond the seas, either within or without his Majesty's dominions, to which felons and other offenders under sentence or order of transportation or banishment shall be conveyed; and that when any offenders shall be about to be transported or banished from Great Britain, one of his Majesty's principal secretaries of state shall give orders for their removal to the ship to be employed for their transportation, and shall authorize and empower some person to make a contract for their effectual transportation to some of the places so appointed, and shall direct *security to be given for [*609 their effectual transportation, in the manner hereinafter mentioned."(c)

Secs. 4, 5, 7 provide for the delivery of offenders ordered to be transported to the contractors by the sheriff or gaoler, and for the giving of proper security by the contractors for their effectual transportation (except when such offenders are transported in King's ships). Sec. 6 gives authority to punish such offenders misbehaving themselves upon the voyage; and sec. 8 vests a property in their services during the term of transportation in the governor of the colony, &c., and his assignees.(d)

Sec. 10. "It shall be lawful for his Majesty from time to time, by warrant under his royal sign manual, to appoint places of confinement within England or Wales, either by land, or on board vessels to be provided by his Majesty in the river Thames, or some other river, or within the limits of some port or harbor of England or Wales, for the confinement of male offenders under sentence or order of transportation, which shall be under the management of a superintendent or overseer, to be appointed by his Majesty; and that it shall be lawful for one of his Majesty's principal secretaries of state to direct the removal of any male offender who shall be under sentence of death, but who shall be reprieved, or whose sentence shall be respited during his Majesty's pleasure, or who shall be under sentence or order of transportation, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from any putrid or infectious distemper, and fit to be removed from the gaol or prison in which such offender shall be confined, to any of the places of confinement so appointed; and every offender who shall be so removed shall continue in the said place of confinement or be removed to and confined in some other such place or places as aforesaid, as one of his Majesty's principal secretaries of state shall from time to time direct, until such offender shall be transported according to law, or shall become entitled to his liberty, or until one of his Majesty's principal secretaries of state shall direct the return of such offender to the gaol or prison from which he shall have been removed; and the sheriff or gaoler having the custody of any offender whose removal shall be ordered in manner aforesaid, shall with all convenient speed, after the receipt of any such order, convey or cause to be conveyed every such offender to the place appointed, and there deliver him to such superintendent or overseer, together with a true copy, attested by such sheriff or gaoler, of the caption and order of the Court by which such offender was sentenced or ordered for transportation, containing the sentence or order of transportation of each such offender, by virtue whereof he shall be in custody of such sheriff or gaoler: and also a certificate, specifying concisely the description of his crime, his age, whether married or unmarried, his trade or profession, and an account of his behavior in prison before and after his trial, and the gaoler's observations on his temper and disposition, and such information concerning his connexions and former course of life as may have come to the gaoler's knowledge; *and such superintendent or overseer shall give a receipt in writing to the [*610 sheriff or gaoler for the discharge of such sheriff or gaoler."(e)

(c) See the 11 Geo. 4, and 1 Will 4, c. 39, as to the delivery of convicts at one place instead of another, &c.

(d) See 9 Geo. 4, c. 83, s. 9, as to assignment of convicts.

(e) By the 10 & 11 Vict. c. 67, s. 2, "It shall be lawful for Her Majesty, by an order in writing, to be notified in writing by one of Her Majesty's principal secretaries of state, to direct that any persons under sentence or order of transportation in Great Britain

Secs. 11, 12, authorized his Majesty to appoint a superintendent, an assistant to the superintendent, and an overseer, for such places of confinement; specified the duties of the superintendent; and contained regulations for the cleansing, purifying, and clothing the offenders brought to such places. (f)

Sec. 13. "It shall be lawful for his Majesty, by any order or orders in council, to declare his royal will and pleasure, that male offenders convicted in Great Britain, and being under sentence or order of transportation, shall be kept to labor in any part of his Majesty's dominions out of England, to be named in such order or orders in council; and that whenever his Majesty's will and pleasure shall be so declared in council, it shall be lawful for one of his Majesty's principal secretaries of state to direct the removal and confinement of any such male offender, either at land or on board any vessel to be provided by his Majesty, within the limits of any port or harbor in that part of his Majesty's dominions which shall be named in such order in council, under the management of the said superintendent, and of an overseer to be appointed by his Majesty for each such vessel or other place of confinement; and that every offender who shall be so removed shall continue on board the vessel or other place of confinement to be so provided, or any similar vessel or other place of confinement to be from time to time provided by his Majesty, until his Majesty shall otherwise direct, or until the offender shall be entitled to his liberty." (g)

Sec. 15. "After the removal of any offender under this Act, the superintendent and overseer, who shall have the custody of him, shall, during the term of such custody, have the same powers over him as are incident to the office of a sheriff or *611] a gaoler, and shall in like manner be answerable for any escape of such offender; and if any offender shall during such custody be guilty of any misbehavior or disorderly conduct, the superintendent or overseer shall be authorized to inflict or cause to be inflicted on him such moderate punishment or correction as shall be allowed by one of his Majesty's principal secretaries of state; and such superintendent or overseer shall also, during such custody, see every offender fed and clothed according to a scale of diet and clothing to be fixed on and notified in writing by one of his Majesty's principal secretaries of state to the superintendent; and shall keep such offender to labor at such places, and under such regulations, directions, limitations, and restrictions, as by such secretary of state shall from time to time be prescribed; and in case of the absence of any such superintendent or overseer, or of the vacancy of his office, his duties or powers shall be discharged and exercised in all respects by the officer or person on whom the command of the place of confinement shall devolve."

shall be removed from the prisons in which they are severally confined to any other of Her Majesty's prisons or penitentiaries in Great Britain, there to be confined for such time as Her Majesty by any such order shall direct, not exceeding the time for which they might have been confined in the prisons from which they shall have been severally removed." The 16 & 17 Vict. c. 121, recites the 5 Geo. 4, c. 84; 9 & 10 Vict. c. 26, and 13 & 14 Vict. c. 39, and extends all the powers and provisions of sec. 10 of the 5 Geo. 4, c. 84, authorizing the appointment of places of confinement of males to the like places of confinement for females under sentence of transportation, and the removal to or from and the confinement in such places of females, and applies all the provisions of the recited Acts relating to the government of places appointed under sec. 10 to places appointed under this Act.

(f) The 9 & 10 Vict. c. 26, s. 1, repeals so much of the 5 Geo. 4, c. 84, as gives the custody and management of any male offenders out of England to the superintendent of convicts confined in England under sentence of transportation, and provides that his powers may be exercised by the governor of the colony. The 22 & 23 Vict. c. 25, s. 1, repeals such parts of the 5 Geo. 4, c. 84 "as relate to the control and management of offenders sent to be kept to hard labor at places out of England duly appointed for the purpose," and such parts of the 9 & 10 Vict. c. 26, "as relate to the appointment of superintendent, deputy superintendent, and overseer respectively in places out of England," and makes numerous provisions for the government of convict prisons abroad, the punishment of escapes and rescues, and the trial of such offences abroad.

(g) This clause is extended to male offenders sentenced in Ireland to be transported by the 10 & 11 Vict. c. 67, s. 1. See the 6 Geo. 4, c. 69, s. 1, for the punishment and trial of persons committing offences out of England, whilst kept to hard labor under this section.

By sec. 16, the superintendent is also empowered to act as a justice of the peace.

Sec. 17. "Whenever any convict adjudged to transportation by any Court or Judge, in any part of his Majesty's dominions not within the United Kingdom, or any convict adjudged to suffer death by any such Court or Judge, and pardoned on condition of transportation, has been or shall be brought to England in order to be transported, it shall and may be lawful to imprison any such offender in any place of confinement provided under the authority of this Act, until such convict shall be transported, or shall become entitled to his liberty; and that so soon as any such convict shall be so imprisoned, all the provisions, rules, regulations, laws, authorities, powers, penalties, matters and things aforesaid, concerning the custody, confinement, treatment, and transportation, of any offender convicted in Great Britain, shall extend and be construed to extend to every convict, who may have been or may be hereafter adjudged to transportation by any Court or Judge in any part of his Majesty's dominions not within the United Kingdom, and every convict adjudged by any such Court or Judge to suffer death, and pardoned on condition of transportation, and brought to England in order to be transported, fully and effectually to all intents and purposes, as if such convict had been convicted and sentenced at any session of gaol delivery holden for any county within England."

Sec. 18, it shall be lawful to keep to hard labor every offender under sentence or order of transportation, while he or she shall remain in the common gaol, if his or her health will permit; and if one or more of the visiting justices shall give a written order to that effect; and that it shall be lawful for one of his Majesty's principal secretaries of state, if he shall think fit, to order that any such offender removed from the common gaol to the house of correction, and there kept to hard labor. By sec. 19, the time during which any offender shall continue in any gaol or house of correction, or in any such place of confinement as aforesaid, under sentence or order of transportation, is to be reckoned in discharge or part discharge of the term of transportation or banishment. Secs. 20, 21, provide for the secure removal of offenders through any county to the seaports or places of confinement, and for the payment of the expenses of removal by the county in which the conviction took place.

Sec. 22. "If any offender who shall have been or shall be so sentenced or ordered to be transported or banished, or who shall have agreed or shall agree to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former Act, shall be afterwards at large within any part of his Majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender so being at large, being proved lawfully convicted, shall suffer death, as in cases of felony, without the benefit of clergy; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue, or attempt rescue, or assist in rescuing or attempting to rescue, any such offender from the custody of such superintendent or overseer, or of any sheriff or gaoler, or other person conveying, removing, transporting, or reconveying him or her, or shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or make, to such offender, every such offence shall be punishable in the same manner as if such offender had been confined in a gaol or prison, in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of twenty pounds for every such offender so convicted." (A)

The 4 & 5 Will. 4, c. 67, recites the preceding section, and enacts that "so much

(A) The judge, before whom a prisoner is tried for returning from transportation, has power to order the county treasurer to pay the prosecutor the reward under the 5 Geo. c. 84, s. 22: *Reg. v. Emmons*, 2 M. & Rob. 279, Coleridge, J.; *Reg. v. Ambury*, 6 Cox C. 79.

of the recited Act as inflicts the punishment of death upon persons convicted of any offence therein and hereinbefore specified, shall be, and the same is hereby repealed; and that from and after the passing of this Act, any person convicted of any offence above specified in the said Act of 5 Geo. 4, c. 84, or of aiding or abetting, counselling, or procuring the commission thereof, shall be liable to be transported⁽ⁱ⁾ beyond the seas for his or her natural life,^(k) and previously to transportation shall be imprisoned with or without hard labor, in any common gaol, house of correction, prison, or penitentiary, for any term not exceeding four years."^(l)

Sec. 23 of the 5 Geo. 4, c. 84, "In any indictment against any offender for being found at large, contrary to the provisions of this or of any other Act now made, or *613] hereafter to be made; *and also in any indictment against any person who shall rescue, or attempt to rescue, or assist in rescuing, any such offender from such custody, or who shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to any such offender, contrary to the provisions of this or of any other Act now made, or hereafter to be made, whether such offender shall have been tried before any Court or judge, within or without the United Kingdom, or before any naval or military court-martial, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, or sentence, or any pardon or intention of mercy, or signification thereof, of or against, or in any manner relating to such offender."

Sec. 24. "The clerk of the Court or other officer having the custody of the records of the Court where such sentence or order of transportation or banishment shall have been passed or made, shall, at the request of any person on his Majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only^(m) (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his or her transportation or banishment (not taking for the same more than six shillings and eightpence), which certificate shall be sufficient evidence of the conviction and sentence, or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any Court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any Court out of Great Britain, shall be received in evidence, if verified by the seal of the Court, or by the signature of the judge, or one of the judges of the Court, without further proof."

Where a certificate under the preceding section stated that the prisoner had been convicted for two larcenies, and sentenced to two several terms of transportation of seven years each for the said larcenies, Patteson, J., held that it sufficiently complied with the requisitions of the statute to be admissible in evidence in support of an indictment against a prisoner for escaping from custody whilst under sentence of transportation.⁽ⁿ⁾

The 1 & 2 Vict. c. 82, s. 3, which provides for the establishment of a prison for juvenile offenders at Parkhurst, in the Isle of Wight, enacts that any young offender under sentence of transportation or of imprisonment may be removed to Parkhurst; but that every offender so removed, who shall be under sentence of transportation, shall be within the provisions of the 5 Geo. 4, c. 84, if the Secretary of State afterwards orders him to be removed from Parkhurst; and by sec. 5 the Secretary may order any offender to be removed from Parkhurst as incorrigible, and in such case the offender is liable to be transported or confined under his original sentence, and is subject to all the consequences thereof in the same manner as if no order had

(i) Penal servitude by the 21 & 22 Vict. c. 3, s. 2, *ante*, p. 4.

(k) And not less than seven years by the 9 & 10 Vict. c. 24, s. 1, *ante*, p. 3 (as held in *Reg. v. Lamb*, 3 C. & K. 96), and not less than three years by the 20 & 21 Vict. c. 3, *ante*, p. 4.

(l) Neither the 5 Geo. 4, c. 64, nor the 4 & 5 Will. 4, c. 67, provide for the punishment of accessories after the fact; see, therefore, *ante*, p. 69.

(m) See *Rex v. Watson*, *ante*, p. 582.

(n) *Reg. v. Russell* 1 Cox C. C. 81.

been made to send him to Parkhurst; and by sec. 12, "if any offender who shall be ordered to be confined in Parkhurst prison shall at any time during the term of such confinement break prison, or escape from the place of his or her confinement, or in his or her conveyance to such place of confinement, [*614 or from any lands belonging to the prison, or from the person or persons having the lawful custody of such offender, he or she so breaking prison or escaping shall be punished, if under sentence of imprisonment, by an addition not exceeding two years to the term for which he or she at the time of his or her breach of prison or escape was subject to be confined, and if under sentence of transportation, in such manner as persons under sentence of transportation escaping from or breaking out of any other prison or place of confinement are liable to be punished; and if an offender so punished by such addition to the term of confinement shall afterwards be convicted of a second escape or breach of prison, he or she shall be adjudged guilty of felony;(o) and if any offender who shall be ordered to be confined in the said prison shall, at any time during the term of such confinement, attempt to break prison or escape from the place of his or her confinement, or shall forcibly break out of his or her cell, or shall make any breach therein with intent to escape, he or she so offending being convicted thereof, shall be punished by imprisonment for a term not exceeding twelve calendar months, in addition to the punishment to which he or she at the time of committing any such offence was subject."(p)

The 5 & 6 Vict. c. 29, s. 14, an Act for establishing a prison at Pentonville, authorizes the removal of male convicts under sentence of transportation to Pentonville; and by sec. 16, every such convict is to continue there until transported, conditionally pardoned, entitled to his freedom or until the Secretary of State directs his removal; but every such convict is to be within the provisions of the 5 Geo. 4, c. 84, if the Secretary directs his removal from Pentonville; and by sec. 22, the Secretary may order any convict to be removed as incorrigible from Pentonville; and in such case the convict is liable to be transported under his original sentence, in the same manner as if no order had been made to send him to Pentonville; and by sec. 24, "every convict who shall be ordered to be imprisoned in the Pentonville prison, who at any time during the term of such imprisonment shall break prison, or who, while being conveyed to such prison, shall escape from the person or persons having the lawful custody of such convict, shall be punished by an addition not exceeding three years to the term of his imprisonment, and if afterwards convicted of a second escape or breach of prison shall be adjudged guilty of felony;(o) and every convict in the Pentonville prison who at any time during the term of his imprisonment shall attempt to break prison, or who shall forcibly break out of his cell, or make any breach therein with intent to escape therefrom, shall be punished by an *addition not exceeding twelve calendar [*615 months to the term of his imprisonment."(q)

The 6 & 7 Vict. c. 26, s. 12, an Act for regulating the prison at Millbank, authorizes the removal of convicts under sentence of transportation to Millbank; and by sec. 14, every such convict shall continue there until transported, conditionally pardoned, entitled to his freedom, or until the Secretary of State directs his removal; but every such convict is to be within the provisions of the 5 Geo. 4, c. 84, if the Secretary directs his removal from Millbank; and by sec. 20, the Secretary may order any convict to be removed as incorrigible from Millbank; and in such case the convict is liable to be transported under his original sentence in the same manner as if no order had been made to send him to Millbank; and by sec.

(o) As no punishment is specially provided by this Act for this offence, it is punishable under the 7 & 8 Geo. 4, c. 28, ss. 8, 9; and 1 Vict. c. 90, s. 5, *ante*, p. 3; and the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4; and so are the principals in the second degree and accessories before the fact, *ante*, p. 67; and as to accessories after the fact, see *ante*, p. 69.

(p) Sec. 13 makes every person rescuing or aiding in the rescue of such offenders guilty of felony; and sec. 14 makes offenders triable where they are apprehended, or where the escape, &c., was, and makes the order of commitment evidence, and provides for the costs of the prosecution.

(q) Sec. 25 provides for the punishment of persons rescuing or aiding the rescue of convicts; and sec. 28 makes offenders triable at the Central Criminal Court, or where they are taken, and makes a copy of the order of commitment evidence.

22, "every convict in the Millbank prison who at any time during the term of his or her imprisonment shall break prison, or who, while being conveyed to such prison, shall escape from the person or persons having the lawful custody of such convict, shall be punished by an addition not exceeding three years to the term of his or her imprisonment, and if afterwards convicted of a second escape or breach of prison shall be adjudged guilty of felony;(r) and every convict in the Millbank prison who at any time during the term of his imprisonment shall attempt to break prison, or who shall forcibly break out of his or her cell, or make any breach therein with intent to escape therefrom, shall be punished by an addition not exceeding twelve calendar months to the term of his or her imprisonment."(s)

The 16 and 17 Vict. c. 99, an Act to substitute in certain cases other punishment in lieu of transportation, introduced the punishment of penal servitude; and secs. 1, 2, 3, 4, provided for the cases in which that punishment might be awarded; but these sections are repealed by the 20 & 21 Vict. c. 3, s. 1, and by sec. 2, the sentence of transportation is abolished and penal servitude substituted for it;(t) and by sec. 7, the 16 & 17 Vict. c. 99 and 20 & 21 Vict. c. 3, are to be read as one Act.

By the 16 & 17 Vict. c. 99, s. 5, "Whenever Her Majesty, or the Lord Lieutenant, or other chief governor or governors of Ireland for the time being, shall be pleased to extend mercy to any offender convicted of any offence for which he may be liable to the punishment of death, upon condition of his being kept to penal servitude for any term of years or for life, such intention of mercy shall have the same effect and may be signified in the same manner, and all Courts, justices, and others shall give effect thereto and to the condition of the pardon in like manner, *616] as in the cases where Her Majesty or the Lord Lieutenant or other chief governor or governors of Ireland, for the time, is or are now pleased to extend mercy upon condition of transportation beyond seas; the order for the execution of such punishment as Her Majesty, or the Lord Lieutenant or other chief governor or governors of Ireland for the time being, may have made the condition of her, his, or their mercy being substituted for the order for transportation."

Sec. 6. "Every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port or harbor of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other prison in the United Kingdom, or in any part of Her Majesty's dominions beyond the seas, or in any port or harbor thereof, as one of Her Majesty's principal secretaries of state may from time to time direct; and such person may during such term be kept to hard labor and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined."

Sec. 7. "All Acts and provisions of Acts now applicable with respect to persons under sentence or order of transportation shall, so far as may be consistent with the express provisions of this Act, be construed to extend and be applicable to persons under any sentence or order of penal servitude under this Act; and all the powers and provisions contained in the Act of the fifth year of King George the fourth, chapter eighty-four, authorizing the appointment by Her Majesty from time to time of places of confinement as therein mentioned for male offenders under sentence or order of transportation, and authorizing Her Majesty to order male offenders convicted in Great Britain and under sentence or order of transportation to be kept to hard labor in any part of Her Majesty's dominions out of England, shall extend and be applicable to and for the appointment by Her Majesty of like places of confinement in any part of the United Kingdom for offenders (whether

(r) The Act assigns no punishment to this felony; therefore it is punishable under the 7 & 8 Geo. 4, c. 28, ss. 8, 9; and 1 Vict. c. 90, s. 5, *ante*, p. 3; and 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4: and principals in the second degree are punishable like principals in the first degree; and as to accessories see *ante*, pp. 67, 69.

(s) Sec. 23 provides for the punishment of persons rescuing or assisting the rescue of convicts; and sec. 26 makes every offender triable at the Central Criminal Court, or where he is taken, and makes a copy of the order of commitment evidence.

(t) See sec. 2, *ante*, p. 4.

de or female) sentenced under this Act in any part of the United Kingdom, and and for the ordering of such offenders to be kept to hard labor in any part of Majesty's dominions out of England; and all the provisions of the said Act concerning the removal to or from and confinement in the places of confinement in out of England, appointed under the said Act, of the offenders therein mentioned, and all Acts and provisions of Acts now in force concerning or relating to the regulation and government of such places of confinement, and the custody, attachment, management, and control of or otherwise in relation to the offenders confined therein, shall, so far as the same may be consistent with the express provisions of the Act, extend and be applicable to and for the removal to and from and confinement in the places of confinement appointed under this Act of the offenders sentenced in any part of the United Kingdom, and otherwise be applicable to and in respect of such places of confinement and the offender to be confined therein."^(u)

Sec. 9. "It shall be lawful for Her Majesty, by an order in *writing under the hand and seal of one of Her Majesty's principal secretaries of State to grant to any convict now under sentence of transportation, or who may hereafter be sentenced to transportation, or to any punishment substituted for transportation by this Act, a license to be at large in the United Kingdom and the Channel Islands, or in such part thereof respectively as in such license shall be expressed, during such portion of his or her term of transportation or imprisonment, as upon such conditions in all respects as to Her Majesty shall seem fit; and it shall be lawful for Her Majesty to revoke or alter such license by a like order at Her Majesty's pleasure."

Sec. 10. "So long as such license shall continue in force and unrevoked, such convict shall not be liable to be imprisoned or transported by reason of his or her sentence, but shall be allowed to go and remain at large according to the term of such license."^(v)

Sec. 11. If it shall please Her Majesty to revoke any such license, a Secretary of State by warrant under his hand, may signify to any police magistrate of the metropolis that such license has been revoked, and may require such magistrate to issue his warrant for the apprehension of the convict, and the magistrate shall issue a warrant accordingly, and the warrant shall be executed by the constable to whom it shall be delivered for that purpose in any part of the United Kingdom, or Jersey, Guernsey, Alderney, or Sark, and the convict when apprehended shall be brought before the magistrate who issued the warrant, or some other magistrate of the same court; and he shall thereupon make out his warrant for the recommitment of the convict to the prison from which he was released, and such convict shall be recommitted accordingly "and shall thereupon be remitted to his or her original sentence, and shall undergo the residue thereof as if no such license had been granted."

The 20 & 21 Vict. c. 3, s. 3, reciting that the provisions applicable to persons under sentence of transportation extend to persons under penal servitude only when they are conveyed to and kept in places of confinement appointed under the 5 Geo. c. 84, and that it is expedient to extend the provisions, enacts that "any person now or hereafter under sentence or order of penal servitude may, during the term of the sentence or order, be conveyed to any place or places beyond the seas to which offenders under sentence or order of transportation may be conveyed, or to any place or places beyond the seas which may be hereafter appointed as herein mentioned; and all Acts and provisions now applicable to and for the removal and transportation of offenders under sentence or order of transportation to and from any places beyond the seas, and concerning their custody, management, and control, and the property in their services, and the punishment of such offenders if at large without lawful cause before the expiration of their sentence, and all other provisions now applicable to and in the case of persons under sentence or order of trans-

(u) Sec. 8. All the powers of a Secretary of State are in Ireland to be exercised by the Lord Lieutenant.

(v) Sec. 15. For the purposes of the Act the term "transportation" includes banishment beyond the seas.

*618] portation, shall apply to and in the case of persons under sentence or order of penal servitude, as if they were persons under sentence or order of transportation."

Sec. 4. "The provisions and powers of the said Act of the fifth year of King George the Fourth, authorizing the appointment (by Her Majesty, with advice of her privy council), of any place or places beyond the seas to which felons and other offenders under sentence or order of transportation shall be conveyed, and all other powers of Her Majesty, or the Lord Lieutenant or chief governor or governors of Ireland, for the like purpose, shall extend and be applicable to and for the appointment of any place or places beyond the seas to which offenders under sentence or order of penal servitude may be conveyed, as herein provided."

Sec. 5, reciting sec. 11 of the 16 & 17 Vict. c. 99, enacts that "any such convict may be recommitted by the magistrate issuing his warrant in that behalf, either to the prison from which he was released by virtue of his license, or to any other prison in which convicts under sentence of penal servitude may be lawfully confined."

Sec. 6. "Where in any enactment now in force the expression 'any crime punishable with transportation,' or 'any crime punishable by law with transportation,' or any expression of the like import, is used, the enactment shall be construed and take effect as applicable also to any crime punishable with penal servitude."

The *Mutiny Acts* also make provision for the punishment of persons returning from transportation after sentence by a *court-martial*. By the 26 & 27 Vict. c. 8, s. 15, persons committing the offences therein specified shall suffer death. By sec. 16, in all cases where a capital punishment shall have been awarded by a general court-martial, it shall be lawful for Her Majesty, or, in any place out of the United Kingdom or British Isles, for the commanding officer, to order the offender to be kept in penal servitude as therein-mentioned. By sec. 17, any officer or soldier guilty of embezzling stores may be sentenced to penal servitude. By sec. 18, whenever Her Majesty shall intend that any sentence passed by any court-martial shall be carried into effect for the term specified in such sentence, or for any shorter term, or shall be pleased to commute any sentence of death, the same shall be notified in writing to any judge of the Queen's Bench, Common Pleas, or Exchequer, in England or Ireland, and thereupon such judge shall make an order for the penal servitude of such offender, in conformity with such notification; "and every person so ordered to be kept in penal servitude shall be subject to every provision made by law and in force concerning persons under sentence of penal servitude; and from the time when such order of penal servitude shall be made, every Act in force touching the escape of felons, or their afterwards returning, or their being at large without leave, shall apply to such offender, and to all persons aiding and abetting, contriving, or assisting in any escape and intended escape, or the returning without leave of any such offender." The judge, who makes any such order of penal servitude, is to direct the said notification and order to be filed of record in the office of the clerk of the Crown of the Queen's Bench, who is on *619] application, to deliver a certificate in writing to such offender, or to any *person applying in his or her Majesty's behalf, "showing the Christian and surname of such offender, his offence, the place where the Court was held before which he was convicted, and the conditions on which the order of penal servitude was made, which certificate shall be sufficient proof of the conviction and sentence of such offender and also of the terms, on which such order for his penal servitude was made, in any Court and any proceeding wherein it may be necessary to inquire into the same."(*w*)

Provisions of a nature nearly similar are usually contained in the Acts relating to the regulating of the *royal marine forces* while on shore.(*x*)

The 10 & 11 Vict. c. 62, s. 7, authorizes offenders under sentence of a naval court-martial to be confined in naval prisons; and sec. 8 provides for the punishment of persons aiding the escape of such offenders.

The 6 & 7 Vict. c. 7, regulates the manner of remitting, either absolutely or

(*w*) Sec. 19 provides for the orders for penal servitude in the colonies.

(*x*) See the 26 & 27 Vict. c. 9.

conditionally, the whole or any part of the term of transportation in the colonies. The 6 Geo. 4, c. 69, regulates the punishment of offences committed by transports sent to labor in the colonies.

It may be useful to mention some of the points decided upon the statutes which formerly related to the offences treated of in this chapter.

Where an indictment alleged that the prisoner "was at large without any lawful excuse within Her Majesty's dominions, before the expiration of the time" for which he had been transported; Patteson, J., held the indictment bad for omitting the word "feloniously;" for the statute, by enacting that the offender "shall suffer death as in cases of felony," clearly made the offence felony.(y)

Where a capital convict had a conditional pardon and escaped, and the indictment against him stated that the King's pleasure was notified to the *Court*, and the *Court* thereupon ordered, &c., according to the terms of the pardon, and the notification was to the judge after the assizes were over, and he made the order; the judges were unanimous that the notification to the judge, and the order by him, was not a notification to the *Court*, or any order by the *Court*, and that the indictment was not proved.(z) But the 5 Geo. 4, c. 84, enacts that it shall be sufficient to allege in the indictment the order for transportation, without alleging any indictment, trial, &c., or any pardon or intention of mercy, or signification thereof.(a) The statute, however, requires that the *certificate* to be given in evidence shall contain the effect and substance of the indictment and conviction; and in a case which arose upon the 6 Geo. 1, c. 23 (now repealed), which required that the certificate should contain the effect and tenor of the indictment and conviction, and of the order and contract for transportation, and also upon the 24 Geo. 3, c. 56, s. 5 (now repealed), which required a certificate containing the effect and substance only, *omitting the formal part of the indictment and conviction, the indictment stated that the prisoner was convicted of grand larceny within benefit of [*620 clergy, and the certificate was in the same form; and the judges, upon the point being reserved, held that both were insufficient.(b) So also in another case, upon the 56 Geo. 3, c. 27, s. 8, which required the certificate to contain the effect and substance only (omitting the formal part) of the indictment and conviction, and order for transportation, it was held that an indictment which stated that the prisoner had been convicted of felony, without stating the nature of that felony, and a certificate which stated only that the prisoner had been convicted of felony, were insufficient; and the prisoner was remitted to his former sentence.(c) But where on an indictment for returning from transportation, the certificate put in alleged that the prisoner had been convicted of two larcenies, and sentenced to two several terms of transportation for seven years each for the said larcenies; Patteson, J., held that the certificate was sufficient.(d) So where on a similar indictment the certificate put in alleged that the prisoner was "in due form of law convicted of feloniously and burglariously breaking and entering the dwelling-house of T. D., and feloniously and burglariously stealing therein one piece of the current gold coin," &c., and "was thereupon ordered to be transported beyond the seas for the term of his natural life;" Williams, J., held that the certificate sufficiently stated the sentence of transportation.(e) So where on a similar indictment the certificate put in stated that "at the general quarter sessions of the peace of our Lady the Queen," holden at M. in the county of K., the prisoner was in due form of law tried and convicted; Patteson, J., held that the certificate sufficiently described the court by which the prisoner had been tried.(f) The prisoner was indicted under the 5 Geo. 4, c. 84, s. 22, for being at large before the expiration of the term for which he was transported. A certificate of the clerk of the peace was put in to prove the conviction and sentence, and it appeared therefrom that the prisoner had been convicted of larceny at the sessions, and sentenced to be trans-

(y) Reg v. Horne, 4 Cox C. C. 263.

(z) Rex v. Treadwell, Mich. Term, 1781, MS., Bayley, J.

(a) Sec. 23, *ante*, 612; and see also, *ante*, 608.

(b) Rex v. Sutcliffe, MS., Bayley, J., R. & R. 469, 470.

(c) Rex v. Watson, R. & R. 468.

(d) Reg v. Ambury, 6 Cox C. C. 79.

(e) Reg v. Russell, 1 Cox C. C. 81.

(f) Reg v. Horne, 4 Cox C. C. 263.

ported for fourteen years. It was objected that the sessions had no jurisdiction to pass that sentence for simple larceny, and therefore the judgment was a nullity: but it was held that the judgment was valid until it was reversed, and that was enough. *(g)*

The prisoner was indicted under the 5 Geo. 4, c. 83, s. 22, for being at large before the expiration of the term for which he had been transported. A certificate of the previous conviction and sentence was produced, in the following form:—
“I, John Gorst, deputy clerk of the peace for the county palatine of Lancaster, and clerk of the courts of general quarter sessions of the peace, holden in and for the said county, and having the custody of the records of general quarter sessions of the peace holden in and for the said county, do hereby certify that at the general quarter sessions of the peace, holden in Salford, in the said county,” &c.

*621] *This document was signed by J. Gorst, who acted as clerk of the peace for the said county. R. J. Harpur was the clerk of the peace for the county, but he never discharged the duties of the office but by deputy, and he had three deputies, E. Gorst, J. Gorst, and T. Burchall, who were attorneys and partners. Sometimes one and sometimes another of them attended the sessions and acted as clerk of the peace: at some sessions both E. & J. Gorst attended; there was no clerk of the court of sessions except the clerk of the peace. The sessions records for forty years past had been kept at the office of the three, at Preston. It was submitted that the certificate did not conform to the provisions of the statute, as Harpur was the clerk of the court, and had the legal custody of the records, and this certificate was only by his deputy; but Coltman, J., overruled the objection. *(h)*

Where an indictment stated the condition upon which the royal mercy was extended to have been general, whereas it was that the prisoner should be transported to places specified, the variance was held to be fatal. *(i)*

Where the prisoner had received a pardon on condition of transporting himself *beyond the seas*, within fourteen days from the day of his *discharge*, and it was incumbent on the prosecutor to prove the precise day on which the prisoner was discharged, it was holden that the daily book of the prison, containing entries of the names of the criminals brought to the prison, and the times when they were discharged, though generally made from the information of the turnkeys, or from their endorsements on the backs of the warrants, was good evidence to prove the time of the prisoner's discharge. *(k)* And it was held that though, if a convict on his trial for returning from transportation before his time was expired, should confess the fact, and acknowledge that he is the man, the Court would record such confession; yet, no such confession being made, it was necessary to produce the record of conviction, and give evidence of the prisoner's identity. *(l)*

Where a convict was sentenced to transportation for seven years, and received a *sign manual*, promising him a pardon, “on condition of his giving a security to transport himself for that period within fourteen days,” and upon his giving such security was discharged from prison, but neglected to transport himself within the fourteen days: it was holden that he could not be indicted for being unlawfully found at large before the term for which he had received sentence of transportation had expired, on the ground that such sign manual, and the recognizance entered into in consequence of it, were good evidence that he was *lawfully* at large: although he had not substantially performed the condition on which the promise of pardon was granted. *(m)*

(g) Reg. v. Finney, 2 C. & K. 774 (61 E. C. L. R.), Alderson, B., who consulted several of the judges.

(h) Reg. v. Jones, 2 C. & K. 524 (61 E. C. L. R.).

(i) Rex v. Fitzpatrick, R. & R. 512.

(k) Aickle's case, 1 Leach 391, 932.

(l) 1 Hawk. P. C. c. 47, tit. *Return from Transportation*, s. 21. The 5 Geo. 4, c. 84, s. 24, makes a certificate of the conviction, &c., sufficient evidence: *ante*, p. 613.

(m) Miller's case, 1 Hawk. P. C. c. 47, tit. *Return from Transportation*, s. 22, Cas. C. L. 69; 1 Leach 74; 2 Blac. R. 797. It appears that the judges considered that the sign manual was improperly worded by mistake of the officer: that it should have been “upon condition of the said Miller transporting himself, &c., and of his giving security to the satisfaction,” &c., and not merely “upon condition of his giving security,” &c., and that

*In the last case, the prisoner was referred to his original sentence of transportation, as not having performed the condition upon which his pardon [*622 was to be granted; that is, he was pardoned on condition of transporting himself within fourteen days.(n) And in another case it was holden, that a prisoner convicted of a capital crime, whose sentence was respited during the King's pleasure, and who, having received a pardon on condition of transportation for life, was afterwards found at large in Great Britain without lawful cause, should be referred to his original sentence.(o) In a subsequent case, where the prisoner, having been convicted of simple grand larceny, had received judgment of transportation to America for seven years, but had afterwards been pardoned, "on condition of transporting himself *beyond the seas* for the same term of years, within fourteen days from the day of his discharge, and of giving security so to do." and, upon giving the security required, had been discharged, but had not complied with the other part of the condition, by transporting himself, it was doubted whether he could be convicted of a capital felony in being found at large, *without any lawful cause*, before the expiration of the term, or whether he ought to be remitted to his former sentence. The former cases were cited as authorities that the prisoner's discharge was a *lawful cause* for his being at large, notwithstanding he had forfeited the recognizance of himself and his bail, by breaking the other part of the condition, in not transporting himself within the fourteen days: but one of the judges thought that, as the prisoner had not complied with the terms on which he was pardoned, he must be considered as having been at large without lawful authority, as soon as the fourteen days had expired. Another judge considered it as a doubtful question whether the non-performance of the condition had not *rendered the whole pardon null and void: and he also thought that the offence with which the prisoner was charged was not within the 16 Geo. 2, [*623 c. 15, because he had not agreed to transport himself to America; and that it was not within the 19 Geo. 3, c. 74, because that Act related only to pardons granted to offenders who had been convicted of felonies by which they were excluded from clergy.(p)

though the King might revoke his intended grace on account of this apparent fraud, yet, as he had not in fact revoked it, and as the prisoner had *literally* complied with the condition, he ought not to have been convicted upon an indictment for being found at large, *without any lawful cause*, before the expiration of his term. With respect, however, to a condition being considered *precedent* or *subsequent*, it has been holden that no precise technical words are requisite for that purpose; that it does not depend upon its being *prior* or *posterior* in the deed, but that it depends upon the nature of the contract, and the acts to be performed by the parties: *Robinson v. Comyns*, Cas. temp. Talb. 166; *Hotham v. The East India Co.*, 1 T. R. 645.

(n) *Miller's case*, 1 Leach 76.

(o) *Madan's case*, Old Bailey 1780; 1 Leach 223. In 1 Hawk. P. C. c. 47, tit. *Return from Transportation*, s. 23 (referring to Cas. C. L. 197), this case is cited as having decided that the prisoner was so referred back to his original sentence, on his being indicted for returning from transportation, and acquitted. But in the report in Leach, it is said that no indictment was ever preferred against the prisoner for the new felony; but that, being in custody, a notice was served upon him to show cause why execution should not be awarded against him on his former sentence: that after this notice he was put to the bar, and his identity and the record of his former conviction proved; and he not being prepared to prove the truth of certain facts alleged in his defence, the Court gave their opinion that, as he had broken the condition of the pardon, he remained in the same state in which he was at the time the pardon was granted, namely, under sentence of death, with a respite of that sentence during his Majesty's pleasure. The report further states, that afterwards it was submitted to the judges, whether the prisoner would not have been liable to suffer death without benefit of clergy, if he had been indicted and convicted under the 8 Geo. 3, c. 15, or whether he had been properly referred to his original sentence. No opinion of the judges is stated: but it appears that at the Old Bailey, April Sess. 1782, the prisoner was informed by the Court that it was his Majesty's pleasure that he should be transported to Africa for life.

(p) *Aickle's case*, Old Bailey 1785, *cor.* Gould, J., Hotham, B., and Adair, Recorder. The Recorder thought that the indictment was perfectly supported under the clause of the 16 Geo. 2, c. 15, adopted by 19 Geo. 3, c. 74, which made it a capital felony to be found at large in Great Britain within the term for which a convict, who was liable to be transported to America, had received sentence to be transported *beyond the seas*. But he thought that when the condition of the king's pardon was broken, the pardon was gone.

In the last-mentioned case, one point was clearly agreed upon, namely, that as the prisoner had, at the time of his discharge, a real intention to quit the kingdom within the time, but had been prevented from carrying it into execution by the distress of poverty and ill-health, these impediments amounted to a *lawful excuse*.(g)

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*CHAPTER THE THIRTY-SIXTH.

OF GAMING.

It seems that by the common law, the playing at cards, dice, &c., when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any sort of offence: but a person guilty of cheating, as by playing with false cards, dice, &c., may be indicted for it at common law, and fined and imprisoned according to the circumstances of the case and heinousness of the offence.(a)¹ We have seen that common gaming-houses are considered as nuisances in the eye of the law;(b) and that lotteries have been declared to be public nuisances, except as they may have been authorized by Parliament.(c) And when the playing is, from the magnitude of the stake, excessive, and such as is now commonly understood by the term *gaming*, it is considered by the law as an offence,

There being, however, a difference of opinion, it was intended to have submitted the case to the opinion of the twelve judges, if the prisoner had been found guilty.

(g) Aickle's case, 1 Leach, 396; and see Thorpe's case, Id. Ibid., note (a).

(a) Bac. Abr. tit. *Gaming* (A.), 2 Roll. Abr. 78.

(b) *Ante*, p. 443.

(c) *Ante*, p. 453.

¹ It is not necessary that there should be gaming or betting, in order to render the game of bowls or nine pins an unlawful game: *Comm. v. Stowell*, 9 Metc. 572. If a party plays at a game knowing that the others are betting, he is guilty of gaming under statutes passed to prohibit gaming: *Smith v. State*, 5 Humph. 163. Bowling alleys connected with taverns, where the players risk the price of the game, are unlawful: *State v. Records*, 4 Harring. 554. The actual keeping of a building furnished with bowling alleys, and suffering persons to resort there for hire, gain, or reward, is an offence within the statute of Massachusetts, whether the person keeping the same does so of his own will, or by the procurement, or as the agent or hired man of another, and whether for his own emolument or that of another: *Comm. v. Drew*, 3 Cush. 279.

Under the laws of North Carolina, the keeping of a gaming table called "a shuffle-board" is not indictable, as the game is not one of chance but of skill: *State v. Bishop*, 8 Ired. 266. Neither is the game of "ten pins" included among games of chance: *Ibid.* A steamboat is a public place within the meaning of the statute of Alabama against unlawful gaming: *Coleman v. State*, 13 Alab. 602. When a physician and a few friends present by invitation, played cards or dice at night with closed doors in his office, where he exhibited his medicines, received professional calls at all times, and, being unmarried, ate and slept, it was held that the office was not a public place within the statute of Alabama against gaming: *Clarke v. State*, 12 Alab. 492. Persons concealed in bushes and briars on land owned by a county for supporting its poor, and there gaming, will not be liable in Virginia to indictment for gaming in a public place: *Comm. v. Vandine*, 6 Gratt. 689.

Statutes against gaming are remedial, and are not to be construed strictly: therefore it is not necessary to allege, in an indictment for betting on an election, that the election was held, since the law requiring the election is presumed to be obeyed: *Cain v. State*, 13 Smedes & Marsh. 456. Where two persons agreed to make the gainer of the bet a present of a coat, it was held to be an attempt to evade the law, and a verdict of conviction was sustained: *Ibid.* On an indictment, under the statute of Mississippi, for betting on an election, it will not relieve him from the penalty imposed by the act, to show that he did not himself make the bet, but procured another to make it for him: *Williams v. State*, 12 S. & M. 58; *Iseley v. State*, 8 Blackf. 403. An indictment charging that the defendant "did unlawfully gamble by playing at a game of cards, and then and there unlawfully did bet and wager on the sides and hands of those that then and there did play," is not objectionable for duplicity: *Comm. v. Tiernan*, 4 Gratt. 545. An indictment for gaming, charging the defendant with "gaming, by then and there wagering and betting money on a certain unlawful game of cards," was held sufficient, without setting out the game played, the person with whom the bet was made, or the amount which was bet on the game: *State v. McBride*, 8 Humph. 66.

ing in its consequences most mischievous to society. In most cases, however, party was subjected only to pecuniary penalties, recoverable by information, by summary or civil proceedings: but there were some offences which, by statute, might be prosecuted by indictment. But these enactments have been repealed.

The 5 & 6 Will. 4, c. 41, s. 1, repealed so much of the 16 Car. 2, c. 7, 10 Will. 3, 9 Anne, c. 14, 11 Anne (I.), 12 Anne, stat. 2, c. 16, 5 Geo. 2 (I.), 11 & 12 Geo. 3 (I.), 45 Geo. 3, c. 72, and 6 Geo. 4, c. 16, as enacted that "any note, bill, mortgage shall be absolutely void." (d) The 8 & 9 Vict. c. 109, s. 15, repeals much of" the 16 Car. 2, c. 7, 10 Will. 3 (I.), 9 Anne, c. 14, and 11 Anne, c. 1, "as was not altered by the 5 & 6 Will. 4, c. 41." It seems, therefore, that, far as the subject of this chapter is concerned, the whole of these four last-mentioned Acts are repealed. The 8 & 9 Vict. c. 109, s. 15, also repeals "so much of the 18 Geo. 2, c. 34, "as relates to" the 9 Anne, c. 14, "or as renders any person liable to be indicted and punished for winning or losing, at play or by betting, at any one time, the sum or value of ten pounds, or within the space of twenty-four hours the sum or value of twenty pounds." This seems to repeal sections 1 and 8 of the 18 Geo. 3, c. 34. The 8 & 9 Vict. c. 109, s. 1, also repeals parts of the 33 Hen. 8, c. 9.

By the 8 & 9 Vict. c. 109, s. 17, "every person who shall, by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or [*625] persons, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, or with intent to cheat or defraud such person of the same, and, being convicted thereof, shall be punished accordingly."

This section comprises several distinct branches:—

I. Any fraud or unlawful device or ill-practice in playing at or with cards, dice, tables, or other games; and under this clause the offence consists in the fraud, unlawful device, or ill-practice, and it seems perfectly immaterial whether the game or bet be not lawful.

II. Any fraud or unlawful device or ill-practice in bearing a part in the stakes, wagers, or adventures on the sides or hands of them that do play; and here, too, the offence consists in the fraud, and not in the nature of the game.

III. Any fraud or unlawful device or ill-practice in betting on the sides or hands of them that do play; and here, also, the same remark applies.

IV. Any fraud or unlawful device or ill-practice in wagering on the event of any game, sport, pastime, or exercise; and here, also, the same remark applies. On the whole, therefore, the gist of every offence created by this section appears to be fraud, unlawful device, or ill-practice; and therefore it seems unnecessary to state the numerous civil cases decided on the following section.

The 8 & 9 Vict. c. 109, s. 18, enacts, that "all contracts or agreements, whether made orally or in writing, by way of gaming or wagering, shall be null and void; and no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, which shall have been deposited in the hands of any person to abide the event of which any wager shall have been made; provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be divided to the winner or winners of any lawful game, sport, pastime, or exercise." It is impossible to foresee that some of the points decided on the repealed enactments may not be useful in cases that may arise on the new Act, they are briefly mentioned. A foot race, whether the race were upon a given distance, or against a certain time, was a game prohibited by 9 Anne, c. 14.(e) And a wager that a man did not find within such a time a man who should carry on foot twenty-four

(d) The clause recites the 58 Geo. 3, c. 93, also, but it is omitted in the repeal.

(e) *Lynall v. Longbotham*, 2 Wils. 36. But see now *Batty v. Marriott*, note (A), *infra*.

stone weight ten miles in fifteen hours has been holden to be within the same principle.(f) But where A. betted B. that one C. would not run four miles in twenty-one minutes, it was adjudged not be within the statute, because as C. was not playing at such game, there could be no betting on his side within the statute; for C. might be running for his amusement, and not to win any bet.(g) It was, however, held, *626] that laying above ten pounds on a horse race was an illegal bet within the statute of Anne, on the ground that the statute ought to be extended to all sports as well as games, in order to prevent excessive betting.(h) And a wager of ten pounds to five pounds upon a horse race was within the statute, although the race was for a legal plate.(i) Cricket was also held an unlawful game within this statute.(k) It was held also, that if two persons played at cards from Monday evening to Tuesday evening, without any interruption, except for an hour or two at dinner, and one of them won a balance of seventeen guineas, this was won at one sitting within the statute.(l)

(f) *Brown v. Beckley*, Cowp. 282.

(g) *Lynall v. Longbotham*, 2 Wils. 36.

(h) 1 Hawk. P. C. c. 92, s. 52; *Goodburn v. Marley*, 2 Str. 1159; *Blaxton v. Pye*, 2 Wils. 309. And it has been holden that a wager on a horse race for less than £50 could not be recovered in an action: the 13 Geo. 2, c. 19, s. 2, having prohibited such races: *Johnson v. Bann*, 4 T. R. 1. and see *Bidmead v. Gale*, 4 Burr. 2432. And that a wager, though for more than £50, that the plaintiff could perform a certain journey in a post-chaise and pair of horses in a given time, could not be so recovered: *Ximenes v. Jaques*, 6 T. R. 499. Nor a like wager, that a single horse should go from A. to B. on the high road sooner than one of two other horses to be placed at any distance their owner should please; these being transactions prohibited by 16 Car. 1, c. 7, s. 2, and 9 Anne, c. 14, and not legalized by 13 Geo. 2, c. 19, or 18 Geo. 2, c. 34, which relate to *bonâ fide* horse-racing only: *Whaley v. Pajot*, 2 Bos. & Pul. 51. So it has been held that an innocent indorsee for valuable consideration could not recover on a bill given in payment of a bet above £10, lost at a legal horse race: *Shillito v. Theed*, 7 Bing. 405 (20 E. C. L. R.). So an agreement by which the defendant sold the plaintiff a horse for £200, if he trotted eighteen miles within an hour, but for one shilling if he failed, was illegal: *Brogden v. Marriott*, 3 Bing. N. C. 88 (32 E. C. L. R.). So a bet of £10 on a legal horse race was prohibited by the 9 Anne, c. 14: *Thorpe v. Coleman*, 1 C. B. 990 (50 E. C. L. R.). Where a plea stated that a horse race was about to be run, and that an illegal game called a lottery, not authorized by law, was set up by the defendant for certain subscribers of £1 each, to be paid to the defendant under regulations which amounted in substance to this, that the subscriber whose name should be drawn out of a box next after the name of the horse was drawn out of another box, which horse should be placed first in the race, should be entitled to receive from the defendant £100, it was held that this was an illegal lottery within the 10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119; and that, admitting that the transaction was more properly in the nature of a bet, it clearly fell within the 9 Anne, c. 14, s. 2: *Allport v. Nutt*, 1 C. B. 974 (50 E. C. L. R.); *Gatty v. Field*, 9 Q. B. 431 (58 E. C. L. R.), s. p., where it was doubted whether these cases would be affected by the 8 & 9 Vict. c. 109, s. 18, which passed after they arose. But in *Batty v. Marriott*, 5 C. B. 818 (57 E. C. L. R.), where two persons agreed to run a foot-race, and each of them deposited £10 with another person, the whole £20 to be paid over to the winner; it was held that the case was within the proviso in sec. 18 of the 8 & 9 Vict. c. 109, and the transaction lawful. But this case was doubted in *Parsons v. Alexander*, 5 E. & B. 263 (77 E. C. L. R.), where Lord Campbell, C. J., said, "the enacting part of the section includes all gaming and wagers, whether on lawful or unlawful games, not merely gaming and wagering among bystanders, but also between the players, and it applies as well to deposits to abide the event of a wager as to other bets. The proviso must be read in conjunction with that enactment. But for the case of *Batty v. Marriott*, I should have said that proviso was confined to cases in which persons contributed to a plate or something analogous to a plate." And it was held accordingly that where a defendant played with the plaintiff and others in a public billiard-room at billiards and at pool, at first for small stakes which he won, then for increasing stakes which he lost, and each player contributed from time to time during the game, and according to its chances, to a stake, which was carried off by the ultimate winner, the case was not within the proviso in sec. 18. So money lent for the purpose of playing at an illegal game, such as hazard, cannot be recovered back: *M'Kinnell v. Robinson*, 3 M. & W. 434. And it was ruled that no action could be maintained on a wager on a cock-fight: *Squires v. Whisken*, 3 Campb. 140. And see as to the offence of keeping a cock-pit, *ante*, p. 444.

(i) *Clayton v. Jennings*, 2 Blac. R. 706.

(k) *Jeffreys v. Walter*, 1 Wils. 220; *Hodson v. Terrill*, 3 Tyrw. 929; 1 O. & M. 757 (40 E. C. L. R.)

(l) *Bones v. Booth*, 2 Blac. R. 1226; *Hodson v. Terrill*, *supra*.

f a loser preferred an indictment against a winner on this statute of Anne, and grand jury found the bill, the Court would not permit an information to be laid against the defendant, although *the indictment was quashed, and, of course, the defendant never tried upon it; for the grand jury might find [*627] the bill for the same offence.(m)

Upon the ground that the judgment of the Court was only *quod convictus est*, was to be the foundation of an action to recover the penalty, it was urged in case, that it was necessary to prove the sum precisely as laid in the indictment; Lord Ellenborough, C. J., was of opinion that although, if the prosecutor had proved in the indictment that the defendants had won any bills of exchange of a specified amount, the allegation must have been proved as laid; yet that since the only was averred, and that under a *videlicet*, the prosecutor was entitled to recover winning of a smaller sum.(n)

Where a person lost money by gaming, and paid it by a check on a banker, which was cashed by the banker on a subsequent day in a different parish, it was held, that the offence prohibited by the 9 Anne, c. 14, s. 2, was committed where money was lost and won, and not where the check was cashed; and that such an action was substantially a gaming for ready money, and not a gaming on credit.(o) And a strong opinion was given that the statute was confined to gaming for ready money; for the statute was not confined to money lost, but extended to other things; and it was a very violent construction to suppose that it was intended to apply to goods that a party might have about his person at a gambling-house. Why should it not apply to horses, or wine, or any other commodity not of a portable nature, and which, therefore, could not be delivered until the following day at the least?(p)

An indictment alleged that the prisoner by fraud, unlawful device, and ill-practice, in playing at and with cards, unlawfully did win from one H. F. Bernard to a certain person unknown a certain sum of money, with intent to cheat the said H. F. Bernard of the same, and it was moved, in arrest of judgment, that the indictment was bad for not alleging the ownership of the money won; but, upon a case reserved, it was held that the indictment was sufficient, as it described the offence in the words of the statute.(q)

In the preceding case some of the judges intimated an opinion that the offence might be committed, although no money were actually paid; as the word "win" might be construed in the sense of obtaining a title to a sum of money by becoming winner of a stake; but such a construction is plainly inconsistent with the latter part of the clause, for how can a person, who merely obtains a title to a thing, "be deemed guilty of obtaining such money or valuable thing from such other person?" However, a case were to occur where every other ingredient of the offence were proved except the payment of the money, the party might be convicted of an attempt to commit the offence under the 14 & 15 Vict. c. 100, s. 9.

Where on an indictment under the 8 & 9 Vict. c. 109, s. 17, it *appeared [*628] that the prisoners began to play skittles in the prosecutor's presence; and one of them, appeared to be very drunk, and played so badly that he lost every time; and the others then persuaded the prosecutor to play with B., and stake large sums upon the game, for he was sure of winning; and the prosecutor accordingly did play with B. several games for large sums, every one of which he lost; the prisoners, having got all the the prosecutor's money, ran away; it was concluded that there must be fraud in the act of playing, and here the fraud was proved before the game commenced; and the Recorder held, that the fraud relied on must be a fraud put in practice during the game itself.(r)

m) 1 Hawk. P. C. c. 92, s. 56; Anon., 8 Mod. 187.

n) Rex v. Hill, 1 Starkie R. 359. And see Rex v. Gilham, 6 T. R. 265; Rex v. Burdett, 1 Lord Raym. 149, ante, p. 211; Rex v. Baynes, 2 Lord Raym. 1265.

o) Smith v. Bond, 11 M. & W. 549.

p) Ibid.

q) Reg. v. Moss, D. & B. C. C. 104.

r) Reg. v. Bailey, 4 Cox C. C. 390. The prisoners were convicted of a conspiracy to cheat. It was also contended that the game of skittles was not within the first clause of the section; that the words "other game" must be confined to the same sort of games

Where the three prisoners being at a public house with the prosecutor, one of them, in concert with the others, placed a pen case on the table and left the room, and whilst he was absent one of the others took the pen out of the case, and put a pin in its place, and the two prisoners induced the prosecutor to bet with the third prisoner when he returned that there was no pen in the case, and the prosecutor staked fifty shillings, and on the pen case being turned up another pen fell into the prosecutor's hand, and the prisoners took the money; it seems to have been considered clear that the case did not come within the 8 & 9 Vict. c. 109, s. 17.(s)

*629]

*CHAPTER THE THIRTY-SEVENTH.

OF OFFENCES RELATING TO DEAD BODIES.

It is an indictable offence to take up a dead body, even for the purpose of dissection. Upon an indictment for this offence it was moved in arrest of judgment, that if it were any crime, it was one of ecclesiastical cognizance only; that it was not made penal by any statute; and that the silence of Stamford, Hale, and Hawkins upon this subject, afforded a very strong argument to show that there was no such offence cognizable in the criminal courts. But the Court said, "that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal court, as being highly indecent, and *contra bonos mores*, at the bare idea alone of which nature revolted. That the purpose of taking up the body for dissection did not make it less an indictable offence; and that, as it had been the regular practice of the Old Bailey, in modern times, to try charges of this nature, many of which had induced punishment, the circumstance of no writ of error having been brought to reverse any of these judgments was a strong proof of the universal opinion of the profession upon this subject; and they, therefore, refused even to grant a rule to show cause, lest that alone should convey to the public an idea that they entertained a doubt respecting the crime alleged." (a) To sell the dead body of a capital convict for the purposes of dissection, where dissection is no part of the sentence, is a misdemeanor, and indictable at common law. (b)¹

It is an offence against decency to take a person's dead body, with intent to sell or dispose of it for gain and profit. An indictment charged (*inter alia*) that the prisoner a certain dead body of a person unknown lately before deceased wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit; and it being evident that the prisoner had taken the body from some burial ground, though from what particular place was uncertain, he was found guilty upon this count. And it was considered that this was so clearly an indictable offence, that no case was reserved. (c)

It is a misdemeanor at common law to remove without lawful authority a corpse as those previously specified, which were all games of chance; and that the game of skittles was more reasonably included within the latter branch of the clause: but no opinion was expressed on this point.

(s) *Reg. v. Hudson*, Bell C. C. 263. The prisoners were convicted of a conspiracy to cheat.

(a) *Rex v. Lynn*, 2 T. Rep. 733; 1 Leach 497; 2 East P. C. c. 16, s. 89, p. 652. In 4 Blac. Com. 236, 237, stealing a corpse is mentioned as a matter of great indecency; and the law of the Franks is mentioned (as in Montesquieu Sp. L. b. 30, ch. 19), which directed, that a person who had dug a corpse out of the ground, in order to strip it, should be banished from society, and no one suffered to relieve his wants till the relations of the deceased consented to his readmission.

(b) *Rex v. Cundick*, D. & R. N. P. C. 13, Graham, B.

(c) *Rex v. Giles, Bayley, J.*; MS., Bayley, J., R. & R. 366, note (b). And see *Rex v. Duffin*, R. & R. 365.

¹ *Comm. v. Loring*, 8 Pick. 370.

in a grave in a burying-ground of a congregation *of Protestant dis- [*630
sents; and is no defence to such a charge that the motive for removing
the corpse was pious and laudable. The indictment charged the defendant with
wrongfully entering a burial-ground belonging to a congregation of Protestants dis-
senting from the Church of England, and unlawfully and indecently opening the
grave of Louisa Sharpe, and unlawfully and indecently carrying away her body.

The defendant's mother and some other relations had been buried in one grave in
the burying-ground of a congregation of dissenters at Hitchin, with the consent of
those that were interested. The defendant's father had recently died, and the
defendant prevailed on the wife of the person who had the key of the burying-
ground to allow him to cause the said grave to be opened, upon the pretext that
he wished to bury his father in that grave, and in order to examine whether the
earth of the grave would admit his father's coffin. He caused the coffins of his step-
mother and two children to be taken out, and so came to the coffin of his mother,
which was under theirs, and was much decomposed, and caused the remains of this
mother, with the corpse therein, to be placed in a shell and carried to a cart and
then some miles away towards a churchyard where he intended to bury his
father's corpse with the remains of his mother. These acts were done without the
consent of the congregation or the trustees having the legal estate in the ground;
the jury found that the statement of the defendant that he intended to bury
his father there was only a pretext, and that his real intention from the beginning
was to remove his mother's corpse; but that he acted throughout without inten-
tional disrespect to any one, being actuated by motives of affection to his mother and
religious duty: and, upon a case reserved, Erle, J., delivered judgment: "We
are of opinion that the conviction ought to be affirmed. The defendant was wrong-
ful in the burial-ground, and wrongfully opened the grave, and took out several
bones, and carried away one. We say he did this wrongfully, that is to say, by
violation of the license which he obtained to enter and open from the person who
had the care of the place, was not given or intended for the purpose to which he
used it, and was, as to that purpose, no license at all. The evidence for the
prosecution proved the misdemeanor, unless there was a defence. We have con-
sidered the grounds relied on in that belief, and, although we are fully sensible of
the estimable motives on which the defendant acted, namely, filial affection and
religious duty, still neither authority nor principle would justify the position that
the wrongful removal of a corpse was no misdemeanor if the motive for the act
warranted approbation. A purpose of anatomical science would fall within that
category. Neither does our law recognize the right of any one child to the corpse
of a parent as claimed by the defendant. Our law recognizes no property in a
corpse, and the protection of the grave at common law, as contradistinguished from
ecclesiastical protection to consecrated ground, depends upon this form of indict-
ment, and there is no authority for saying that relationship will justify the taking
of a corpse away from the grave where it has been buried." (d)

"A man is bound to give Christian burial to his deceased child, if he has [*631
the means of doing so; but he is not liable to be indicted for a nuisance for
burying his child, if he has not the means of providing burial for it. He
may not sell the body, put it into a hole, or throw it into a river; but unless he has
the means of giving the body Christian burial, he is not liable to be indicted, even
though a nuisance may be occasioned by leaving the body unburied, for which the
sanitary officer would probably be liable." (e) The prisoner was indicted for having
refused and refused to bury the body of his deceased child, whereby a nuisance
was created. The prisoner, at the time of the death of his child, was a pauper
receiving parochial relief from a parish in the Leicester union, and soon after the

(d) Reg. v. Sharpe, D. & B. C. C. 160.

(e) Lord Campbell, C. J., in Reg. v. Vann, 2 Den. C. C. 325. The 7 & 8 Vict. c. 101, §. 1, enacts that it shall be lawful for guardians, or where there are no guardians, for the overseers to bury the body of any poor person, which may be within their parish or union respectively, and to charge the expense thereof to any parish under their control, to which such person may have been chargeable, or in which he may have died, or otherwise in which such body may be.

death of the child he applied to the relieving officer of that parish for assistance to bury the child. The relieving officer required the prisoner to sign an undertaking, on demand, to repay the guardians of the union the sum advanced by way of loan in payment for the coffin and ground for the child.^(f) This was refused by the prisoner, and the relieving officer refused to render him any assistance in the burial of the child, and the body in consequence remained unburied and occasioned a nuisance. The jury were directed that the prisoner was bound to provide for the burial of his deceased child, if he could by any lawful way procure the means of doing so; and that as the prisoner had been offered relief for the purpose of burial by way of loan, he was bound to receive it, and that consequently he was not excused from his liability to provide for the interment of the deceased, and was liable to be convicted for the nuisance. But, upon a case reserved, the judges were unanimously of opinion that this direction was wrong; for although it was perfectly true that the prisoner, *if he had the means*, was bound to provide for the burial of his child, yet he was not bound to incur a debt for that purpose, and consequently he was not bound to accept the loan on the terms proposed to him.^(g)

The refusal or neglect to bury dead bodies by those whose duty it is to perform the office, appears also to have been considered as a misdemeanor. Thus, Abney J., in delivering the opinion of the Court of Common Pleas, said, "The burial of the dead is (as I apprehend) the duty of every parochial priest and minister; and if he neglect or refuse to perform the office, he may, by the express words of Canon 86, be suspended by the Ordinary for three months. And if any temporal inconvenience arise, as a nuisance, from the neglect of the interment of the dead corpse he is punishable also by the temporal Courts, by indictment or information."^(h)

*632] ⁽ⁱ⁾It was held, after elaborate argument, that a child who has received the outward and visible form of baptism by a dissenting minister, not being a lawful minister of the Church of England, nor episcopally ordained, is to be considered as baptized, and is entitled to have the burial service read at its interment by the clergyman of the parish in which it dies; and that the refusal to read the service over a child so baptized brings the party so refusing within the provision of Canon 86, and the Court is bound to pronounce that the party is subject to suspension for three months, and also to the costs of the proceedings.⁽ⁱ⁾

The right of sepulture in the parish churchyard is a common law right; but the mode of burial a subject of ecclesiastical cognizance alone. If therefore a clergyman were absolutely to refuse to bury the body of a dead person brought for interment in the usual way, it seems that the Court of Queen's Bench would grant a *mandamus* to compel him to inter the body; but that Court will not grant a *mandamus* to compel a clergyman to bury a body in an unusual and extraordinary manner, *e. g.* in an iron coffin.^(k)

Every person dying in this country and not within certain exclusions laid down by the ecclesiastical law, has a right to Christian burial; and that implies the right to be carried from the place where his body lies to the parish cemetery.^(l) The common law casts on some one the duty of carrying to the grave, decently covered, the dead body of any person dying in such a state of indigence as to leave no funds

^(f) This was done under an order of the poor law commissioners and an order of the guardians.

^(g) *Reg. v. Vann, supra.*

^(h) *Andrews v. Cawthorne*, Willes 537, note (a). Abney, J., cited a case, H. 7 G. 2, B. R. where the Court made a rule upon the Rector of Daventry, in Northamptonshire, to show cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish. See this case as stated in *Mastin v. Escott*, reported by Dr. Curteis, p. 268, and the affidavits used in it, in the Appendix to that case, p. 291, *et seq.*

⁽ⁱ⁾ *Mastin v. Escott*, decided in the Arches Court of Canterbury, May 8th, 1841, by Sir H. Jenner, and reported by Dr. Curteis. The ground of this decision was that a child baptized by a layman was validly baptized, and a Wesleyan minister, by whom the child was baptized, could be considered, with reference to this question, in no other light than as a layman. In *Kemp v. Wickes*, 3 Phill. Rep. 264, a similar decision had been made with reference to a person baptized by a minister of the Calvinistic Independents.

^(k) *Rex v. Coleridge*, 2 R. & Ald. 806.

^(l) Per Lord Denman, C. J., *Reg. v. Stewart*, 12 A. & E. 773.

for that purpose.(m) It should seem that the person under whose roof a poor person dies is bound to carry the body, decently covered, to the place of burial: he cannot keep him unburied, nor do anything which prevents Christian burial; he cannot, therefore cast him out, so as to expose the body to violation, or to offend the feelings or endanger the health of the living: and, for the same reason, he cannot carry him uncovered to the grave. It will probably be found, therefore, that where a pauper dies in any parish house, poor house, or union house, that circumstance casts on the parish or union, as the case may be, to bury the body; not by virtue of the statute of Elizabeth, but on the principles of the common law.(n) But the duty is not cast upon the overseers, where the death does not take place under the roof of any parish house, or that which, under the circumstances, may be considered as such. A married woman residing with her husband in a parish was admitted as an in-patient in a hospital in that parish, and died in it, and the husband was unable from poverty to take the body away and bury it; he was receiving weekly relief from the parish and he believed that he was settled in it. The parish officers *had been requested to bury the body, but had refused. The Court of Queen's Bench held that the burial of a pauper receiving relief, but not dying in any parish house, was not within the objects of 43 Eliz. c. 2, expressed or implied; and, after laying down the principles above stated, held that those principles would rather cast the burden on the hospital than on the parish, and formed an additional, though not a necessary reason for holding that the parish was not bound to bury the body.(o)

The 7 & 8 Vict. c. 101, s. 31, makes it lawful for guardians, or where there are no guardians for overseers, to bury the body of any poor person which may be within the parish or union, and to charge the expense to any parish within their control to which such person may have been chargeable, or in which he may have died, or otherwise in which such body may be; and unless the guardians, in compliance with the desire of such person expressed in his lifetime, or by any of his relations, or for any other cause, direct the body to be buried in the churchyard or burial-ground of the parish to which such person has been chargeable (which they are authorized to do), every dead body which the guardians or any of their officers duly authorized shall direct to be buried at the expense of the poor-rates shall (unless the deceased person or the husband or wife or next of kin of such deceased person have otherwise desired) be buried in the churchyard or other consecrated burial-ground in or belonging to the parish, division of parish, chapelry or place in which the death may have occurred; and, after providing for the burial fees, the clause forbids any officer connected with the relief of the poor to receive any money for the burial of the body of any poor person, or to act as undertaker for personal gain or reward, or to receive any money from any dissecting school or school of anatomy or hospital or from any person to whom any such body may be delivered, or to derive any personal emolument for or in respect of the burial or disposal of any such body, under a penalty recoverable before two justices of the peace.(p)

The 2 & 3 Will. 4, c. 75, "An Act for regulating Schools of Anatomy," authorizes the Secretary of State for the Home Department to grant "a license to practice anatomy to any fellow or member of any college of physicians or surgeons, or to any graduate or licentiate in medicine, or to any person lawfully qualified to practice medicine in any part of the United Kingdom, or to any professor or teacher of anatomy, medicine, or surgery, or to any student attending any school of anatomy, on application from such party for such purpose, countersigned by two of his Majesty's justices of the peace acting for the county, city, borough, or place wherein such party resides, certifying that, to their knowledge or belief, such party so applying is about to carry on the practice of anatomy."

(m) Per Lord Denman, C. J., *Ibid.*

(n) *Ibid.*

(o) *Reg. v. Stewart, supra.*

(p) The 18 & 19 Vict. c. 79, s. 1, where the burial-ground of a parish is closed or overcrowded, empowers the guardians or overseers to bury the poor in a neighboring parish; and sec. 2 empowers them to enter into agreement with cemetery companies and burial boards for the burial of the poor.

Sec. 2 The Secretary of State may appoint inspectors of places where anatomy is carried on; and by sec. 3, may direct what *district such inspectors shall *634] superintend. Sec. 4, every inspector is to make a quarterly return to the Secretary of State of every body that, during the preceding quarter, has been removed for examination to every separate place in his district where anatomy is carried on, distinguishing the sex, and, as far as is known at the time, the name and age of each person whose body was so removed.

Sec. 5. Inspectors may visit and, inspect, at any time, any place, within their district, notice of which place has been given, that it is therein intended to practice anatomy.

Sec. 7. "It shall be lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless, to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination."

Sec. 8. "If any person, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, shall direct that his body after death be examined anatomically, or shall nominate any party by this Act authorized to examine bodies anatomically to make such examination, and if, before the burial of the body of such person, such direction or nomination shall be made known to the party having lawful possession of the dead body, then such last-mentioned party shall direct such examination to be made, and, in case of any such nomination as aforesaid, shall request and permit any party so authorized and nominated as aforesaid to make such examination, unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination."

Sec. 9. No body is to be removed for anatomical examination from the place where such person died until after forty-eight hours from the death, nor unless a certificate, stating in what manner such person came by his death, shall have been given by the medical man who attended such person, or who examined the body after death.

Sec. 10. "It shall be lawful for any member or fellow of any college of physicians or surgeons, or any graduate or licentiate in medicine, or any person lawfully qualified to practice medicine in any part of the United Kingdom, or any professor, teacher, or student of anatomy, medicine, or surgery, having a license from his Majesty's principal Secretary of State or chief secretary as aforesaid, to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted or directed so to do by a party who had at the time of giving such permission or direction lawful possession of the body, and who had *635] power, in pursuance of the provisions of this Act, to *permit or cause the body to be so examined, and provided such certificate as aforesaid were delivered by such party together with the body."

Sec. 11. Such persons are to receive a certificate with the body, and transmit it and a return of the time the body was received, and other matters, to the inspector of the district.

Sec. 12. Notice is to be given to the Secretary of State of places where anatomy is intended to be practiced.

Sec. 13. Bodies are to be removed in a decent coffin or shell, and after undergoing anatomical examination are to be decently interred in consecrated ground, or in some public burial-ground, in use for persons of that religious persuasion to which the person whose body was so removed belonged.

Sec. 14. "No member or fellow of any college of physicians or surgeons, nor any graduate or licentiate in medicine, nor any person lawfully qualified to practice medicine in any part of the United Kingdom, nor any professor, teacher, or student

of anatomy, medicine, or surgery, having a license from his Majesty's principal Secretary of State or chief Secretary as aforesaid, shall be liable to any prosecution, penalty, forfeiture, or punishment for receiving or having in his possession for anatomical examination, or for examining anatomically, any dead human body, according to the provisions of this Act."

Sec. 15. The Act is not to prohibit *post mortem* examinations directed by competent authority.

Sec. 18. "Any person offending against the provisions of this Act in England or Ireland shall be deemed and taken to be guilty of a misdemeanor, and being duly convicted thereof, shall be punished by imprisonment for a term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the Court before which he shall be tried; and any person offending against the provisions of this Act in Scotland shall, upon being duly convicted of such offence, be punished by imprisonment for a term not exceeding three months, or by a fine not exceeding fifty pounds, at the discretion of the Court before which he shall be tried."

Sec. 19. "The words 'person' and 'party' shall be respectively deemed to include any number of persons, or any society, whether by charter or otherwise; and the meaning of the aforesaid words shall not be restricted although the same may be subsequently referred to in the singular number and masculine gender only."

The prisoner, the master of a workhouse, was indicted for disposing of the dead bodies of some of the paupers who died in the workhouse, for the purpose of dissection, and for gain and profit to himself. He had in collusion with an undertaker caused the bodies of several paupers to be shown to their relatives in coffins, and every appearance of regular funerals to be gone through, and the relatives followed to the cemetery what they supposed to be the body of the deceased, when in reality just before the funeral left the workhouse, other coffins were substituted for those the relatives had seen, and the bodies were in the evening taken to Guy's Hospital for dissection, all the necessary formalities required by the 2 & 3 Will. 4. c. 75, having been duly complied with. In no case did the relatives of the deceased persons in *terms require that their bodies should be buried without anatomical examination; and indeed they appeared to have believed that the bodies were buried without any such examination. It did not appear that the prisoner made any regular charge to the hospital or surgeons in respect of the bodies supplied to them; but in 1856 he received £19 10s., and in 1857 £26 from Guy's Hospital as gratuities for his trouble in going through the formalities, giving the notices and obtaining the certificates required by the Anatomy Act, and the amount paid him was in proportion to the number of bodies supplied. These payments were in contravention of the 7 & 8 Vict. c. 101, s. 31. The jury found that the prisoner caused the dead bodies of four paupers to be delivered to the undertaker, and delayed the burial of them for an unreasonable length of time, in order that they might be dissected in the meantime, and that he did so for gain and profit for himself; and that he caused the appearance of a funeral of such bodies to be gone through, with a view to prevent their relatives requiring the bodies to be interred without being subject to anatomical examination, and that, but for such supposed funeral, the relatives would have required the bodies to be buried without anatomical examination. It was objected that the prisoner having lawful possession of the bodies as master of the workhouse, might lawfully do what he had done, as no relative had required the bodies to be buried without anatomical examination; and upon a case reserved it was held that this objection was valid, as all that was done by the prisoner was done according to law, for he had legal possession of the bodies, and he did with them that which the law authorized him to do. And though he fraudulently prevented the relatives from requiring the bodies to be buried without anatomical examination, yet that did not take away the protection given to him by the statute.(q)

(q) *Reg. v. Feist*, D. & B. C. C. 590. This decision seems clearly wrong, as the master of a workhouse is plainly merely the servant of the guardians or parish officers, and the possession of the workhouse is in them: *Governors of the Poor of Bristol v. Waite*, 5 A. & E. 1 (31 E. C. L. R.). And the master of a workhouse has no more possession of the things in the workhouse than any servant of the things in his master's house. The dealing with the dead bodies by the prisoner was, therefore, a wholly illegal act. The Court

Provision has been made by statute for the suitable interment of such dead bodies as may be cast on shore from the sea. The 48 Geo. 3, c. 75, enacts that the churchwardens and overseers of parishes in England, in which any dead body shall be found thrown in, or cast on shore from the sea, shall, upon notice of the body lying within their parishes, cause the same to be forthwith removed to some convenient place; and with all convenient speed to be decently interred in the churchyard or burial-ground of such parishes: and if the body be thrown in, or cast on shore in any extra-parochial place, where there is no churchwarden or overseer, a similar duty is imposed upon the constable or headborough of such place.^(r)

*637] It is further enacted, that every minister, parish clerk, and *sexton of the respective parishes, shall perform their duties as is customary in other funerals, and admit of such dead body being interred, without any improper loss of time; receiving such sums as in cases of burials made at the expense of the parishes.^(s) The statute provides also as to the expenses of such burials, and the raising of money to defray them; gives a reward of five shillings to the persons first giving notice to the parish officers, or to the constable or headborough of an extra-parochial place, of any dead body being cast on shore; and imposes a penalty of five pounds on persons finding dead bodies and not giving notice, and on parish officers neglecting to execute the Act.^(t) An appeal to the quarter sessions is also given to any person thinking himself aggrieved by anything done in pursuance of the Act.^(u)

The preventing a dead body from being interred has been considered as an indictable offence. Thus, the master of a workhouse, a surgeon, and another person, were indicted for a conspiracy to prevent the burial of a person who had died in a workhouse.^(v) And though Hyde, C. J., upon a question how far the forbearance to sue one who fears to be sued, is a good consideration for a promise.^(w) cited a case where a woman who feared that the dead body of her son would be arrested for debt was holden liable, upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix;^(x) yet the other judges are said to have doubted of this;^(y) and in a recent case Lord Ellenborough, C. J., said it would be impossible to contend that such a forbearance could be a good consideration for an assumpit.^(z) Lord Ellenborough, C. J., continued, "to seize a dead body upon any such pretence would be *contra bonos mores*, and an extortion upon the relatives." And in a subsequent part of the case, his Lordship said, "As to the case cited by Hyde, C. J., of a mother who promised to pay on forbearance of the plaintiff to arrest the dead body of her son, which she feared he was about to do, it is contrary to every principle of law and moral feeling: such an act is revolting to humanity, and illegal."

A gaoler has no right to detain the body of a person who died in prison for any debts due to himself. Where, therefore, a gaoler refused to deliver up the body of a person, who had died while a prisoner in execution in his custody, to the execu-

intimated that possibly the prisoner and undertaker might have been indicted for a conspiracy to prevent the relatives making the requisition; or that the prisoner might be indicted for preventing the requisition being made. *Quære*, whether an indictment would have lain for causing the funeral service to be performed over the empty coffins?

(r) 48 Geo. 3, c. 75, s. 1.

(s) *Id.* *Ibid.*, s. 2.

(t) *Ibid.*, ss. 1, 3, 4, 5, 6, 7, 8, 12, 13, 14.

(u) *Id.*, sec. 10.

(v) *Rex v. Young*, cited in *Rex v. Lynn*, 2 T. R. 734.

(w) *Quick v. Coppleton*, 1 Vent. 161.

(x) The name of the case is not mentioned; but it is said that Hyde, C. J., cited it as a case that occurred in the Court of Common Pleas when he sat there.

(y) *Quick v. Coppleton*, 1 Vent. 161.

(z) *Jones v. Ashburnham*, 4 East 460.

¹ A case of this nature was brought by indictment before the Supreme Court of Massachusetts, in the county of Barnstable. It was tried at *nisi prius*, before Chief Justice Parsons; the defendants were convicted, and a small fine imposed upon them, upon the ground that they were ignorant that it was an offence. In this case the corpse was arrested upon a civil process for debt, on its way to the grave, in the public highway, in the presence of the friends of the deceased, and of a procession which attended the funeral.

ors of the deceased, unless they would satisfy certain claims made against the deceased by the gaoler, the Court of Queen's Bench issued a *mandamus*, peremptory in the first instance, commanding that the body should be delivered up to the executors. (a) And a gaoler is indictable at common law for detaining the body of a person who has died in gaol in order to compel the payment of certain claims made by the gaoler. An indictment stated that a prisoner had died in gaol, and the body remained in gaol in the *possession of the defendant, then being [638] the gaoler; and the executors requested him to deliver up the body to them, and suffer them to take it away, in order that they might bury it: and it thereupon became the defendant's duty to deliver up the body, but that he refused to do so, and unlawfully, and in abuse of his office, without legal authority or excuse, and against the will of the executors, detained the body a long time in gaol, until the defendant unlawfully and indecently buried the body without any rite of Christian burial, or any funeral ceremony or observance, in a place not being a consecrated burial-ground, or a customary or fit place for burial, (to wit), a yard within the precincts of the gaol. The second count alleged a refusal to deliver up, &c., unless the executors would not account with the defendant concerning certain claims of money, which he pretended to have against the deceased's estate, and pay the defendant what should appear due; that the defendant wrongfully detained, &c., under pretext of such claims, the executors not accounting, &c., until, &c., when he buried, &c. Maule, J., said, at the close of the case, that the notion of a gaoler being authorized to detain a dead body on account of pecuniary claims was a mistake, and that a gaoler doing so was guilty of a misconduct in his public character, for which he was liable to prosecution. (b)

An indictment will lie for wilfully obstructing and interrupting a clergyman in reading the burial service, and interring a corpse; but such an indictment must allege that the person obstructed was a clergyman, and that he was in the execution of his office, and lawfully burying the corpse; and it must also show how the party was obstructed, as by setting out the threats and menaces used. And it is not sufficient to allege that the party did unlawfully, by threats and menaces, prevent the burial. (c)

There is one case in which the too speedy interment of a dead body may be an indictable offence; namely, where it is the body of a person who has died of a violent death. In such case, by Holt, C. J., the coroner need not go *ex officio* to make the inquest, but ought to be sent for, and that when the body is fresh; and to bury the body before he is sent for, or without sending for him, is a misdemeanor. (d) It is also laid down that if a dead body in prison, or other place, thereupon an inquest ought to be taken, be interred or suffered to lie so long that it putrefy before the coroner has viewed it, the gaoler or township shall be amerced. (e)

*CHAPTER THE THIRTY-EIGHTH.

[639]

OF GOING ARMED IN THE NIGHT-TIME FOR THE DESTRUCTION OF GAME, AND OF ASSAULTING GAMEKEEPERS.

BEFORE proceeding to the proper subject of this chapter, it may be well to say a few words as to the property in game, in order to remove doubts which have

(a) Reg. v. Fox, 2 Q. B. 247 (42 E. C. L. R.).

(b) Reg. v. Scott, 2 Q. B. 248 (42 E. C. L. R.). It is said that it was alleged that there were some necessary allegations wanting in the indictment; but they are not specified.

(c) Rex v. Cheere, 4 B. & C. 902 (10 E. C. L. R.); 7 D. & R. 461. See Rex v. How, 2 Str. 699. See the 24 & 25 Vict. c. 100, s. 36, *ante*, p. 418.

(d) Reg. v. Clark, 1 Salk. 377; Anon., 7 Mod. 10; 2 Hawk. P. C. c. 9, s. 23, note (4).

(e) 2 Hawk. P. C. c. 9, s. 23. And see an indictment against a township for a misdemeanor, in burying a body without notice to the coroner: 2 Chit. Cr. L. 256.

sometimes been expressed. The law of England has never recognized the very unreasonable doctrine of the Roman law, that any trespasser had a right to the game that he caught or killed on any man's land.(a) It is quite clear that, by the Constitutions of Canute concerning forests, every freeman was entitled to take and dispose of the game on his own land, and that no one had a right to enter on the lands of another for such a purpose.(b) And an examination of the year books and other ancient authorities shows that by the common law the owner of land had a possessory property in the game upon his land, so long as it continued upon that land, and he might maintain an action of trespass against any one who entered upon the land, and killed or took any game thereon and carried it away, and recover damages as well for the trespass as for the value of the game. The property in living game was called possessory, because it depended on the possession of the game by reason of the possession of the land, whereon it was, and as soon as it quitted the land of its own free will the possessory property ceased. But if the game were taken or killed on the land, the property which before was merely possessory became absolute in the owner of the land. Two cases alone need be cited to show how clearly this law was settled. To an action of trespass on a warren and carrying away a pheasant, the defendant pleaded that the pheasant was found on his own land, and he let fly his falcon at it, and the falcon pursued and caught the pheasant in the warren, and the defendant followed and took the pheasant; and it was held that the defendant might lawfully take the pheasant, though he was liable for the entry into the warren.(c) So where C. brought an action of trespass against M. for entering his close and carrying away a dead hart, M. pleaded *640] that he was the forester of the Queen of the free chase of B., and that the plaintiff entered the forest and chased a hart out of the forest, and that the defendant as the forester made fresh pursuit after the hart, and the hart was killed on the land of the plaintiff before the defendant came there, and that the defendant seized the hart for the Queen; it was held that this justification was good; for the hart was the property of the owner of the chase, and the plaintiff had done wrong in chasing the hart out of the forest, and it was not reasonable that he should take advantage of his own wrong.(d) It is to be observed that in

(a) Just. Inst. L. II., tit. 1, 12.

(b) The law on this subject is stated in different terms in different authors in consequence of different translations having been made of the original Saxon: 4 Inst. 320. The law may be found, Spelm. Glos. tit. *Foresta*, p. 242, No. 30, Edit. 1687; 4 Inst. 320; 2 Blac. Com. 414, who cites it as chapter 77, and says that it was the ancient law of the Scandinavian continent, citing Stiernhook de jure Sweon. 1, 2, c. 8. Deac. G. L. 40, citing also a license of Canute to the same effect. In 2 Blac. Com. 414, a similar law of Edward the Confessor, chapter 36, is cited. In 4 Inst. 293, a charter of the Empress Maud is cited containing a similar law. From a comparison of these several authorities, the following seems to be substantially correct: *Sit quilibet liber homo dignus venatione sua in silva et in agris sibi propriis et in dominio suo, sed absteineat omnis homo a venariis regis.*

(c) 38 Edw. 3, 10. The decision in this case is stated according to the statement of Brook, J., in 12 Hen. 8, 10: "If I let my falcon fly in my own land at a pheasant, and he kills the pheasant in your land, you do not gain any property in the pheasant; but I can take the pheasant, and shall not be punished except for the entry into your land; for it was by my industry and labor, and when my falcon had caught it, it was in my possession." And see 12 Mod. 145, per Holt, C. J., in the next note; and observe that the pheasant was not started in a warren, &c., but simply on the defendant's own land.

(d) 12 Hen. 8, 9. This is the case relied upon by Holt, C. J., in *Sutton v. Moody*, 1 Lord Raym. 250; 3 Salk. 290; 2 Salk. 556; Holt 608; Comb. 458; 12 Mod. R. 145; 5 Mod. R. 375. It is clear that there is a mistake in the reports of *Sutton v. Moody* as to the *obiter dictum* of Holt, C. J., that "if A. starts a hare in the ground of B., and hunts it into the ground of C., and kills it there, the property is in A. the hunter." There is nothing in the 12 Hen. 8, 9, to support any such dictum; on the contrary, the principle of the decision is directly the other way. For this dictum makes A. derive a benefit from his own wrongful act in hunting the hare out of the land of B.; and it is plain that there is a further mistake, for Holt, C. J., having stated that "the privilege of warren gives no greater property in the rabbits to the warrener; for the property arises to the party from the possession" of the land, is made to say immediately after the passage above cited, "if A. starts a hare, &c., in a forest or warren of B., and hunts it into the ground of C., and kills it there, the property remains all the while in B., the proprietor of the warren, because the privilege continues." So that the judgment is contradictory. But I find in 12 Mod. 145, that the dictum was not delivered until after judgment in the case; for Holt,

both these cases the plaintiff claimed the property in the game by reason of its having been killed on his land, and in neither case was any objection made to the declaration.(e) The decisions, therefore, in the *Earl of *Lonsdale v. Rigg*,(f) and *Blades v. Higgs*,(g) that the owner of land has a property in the game killed upon his land are right according to all the authorities. [*641

An action lies against the owner of a dog, who, knowing the animal to have a propensity for destroying game, permits it to be at large, and the dog in consequence "breaks and enters" the plaintiff's wood, and chases and destroys young pheasants, which had been hatched under hens, and when about eight weeks old had been removed into the wood, together with the coops and hens; the hens being kept in the coops, and the pheasants allowed to run in and out at pleasure, and the property damaged being game, is no answer to the action, because the law recognizes in the proprietor of land a qualified right to game whilst it is upon the land.(gg)

The defendant was convicted of having by night unlawfully entered certain open land, the property of Lord Sidmouth, with a net, for the purpose of taking game. The land in question had a hedge on either side of it, and a metalled road running through it; while between the road on both sides and the hedge is waste land varying in extent. The fields on each side belong to Lord Sidmouth, who is lord of the manor. The waste land, except where there are patches of grass, is covered with brambles and furze as high as five feet, and there is no sign of any traffic in or use of the said waste land. The net was found across the road, and fastened to one hedge, and reaching not quite to the hedge on the other side, the defendant standing

C. J., says, "when we gave judgment on this case, I mentioned 12 Hen. 8, 9;" and, after stating the point decided, he adds, "they held also that if a man start game in his own ground, and hunt it into his neighbor's ground and there kill it, yet in regard to his first starting and pursuit, the property is still in him; and it may be inferred from that case that if I start game in one man's ground, and hunt it into another man's ground and there kill it, the property is in me, because the party in whose ground it was started having no privilege, he cannot come and take it." So that, probably, all Holt, C. J., really said was that it might be contended that such was the law. It has, however, been supposed that this *obiter dictum* was deliberately sanctioned in *Churchward v. Studdy*, 14 Inst. 249. There the plaintiff's hounds put up a hare in a third person's land, and ran it into the defendant's land, where it ran between the legs of a laborer, when one of the dogs caught her and the laborer took her up alive, and the defendant took her from him and killed her, and the laborer swore he took the hare up in aid of the hunters; *Chambre, J.*, cited on the dictum in question, and the plaintiff had a verdict, and a rule for a new trial was obtained "on the supposition that there was no evidence that the hare had been in any manner reduced into the possession of the plaintiff before it had been taken from the laborer by the defendant; and that the laborer was not to be considered as having taken up for either of the parties;" but when the report had been read, the counsel in support of the rule admitted that he was not aware that the laborer had proved that he had taken up the hare in aid of the hunters, and the rule was discharged. The dictum, therefore, was not discussed at all in this case, and it rests on the loose reports of *Sutton v. Moody*; and it is difficult to conceive that so great a judge as Lord Holt could ever have uttered so unreasonable a dictum as that a man, by trespassing on another's land and driving his game out of it, could divest his property in it and vest it in himself—*omnia in favorem soliatoris*. See per Littleton, 9 Edw. 4, 35.

(e) It would occupy far too much space to do more than refer to some of the old authorities for the benefit of any one who may have to investigate the subject. They—are 8 Ed. 5; 3 Hen. 6, 55; 11 Hen. 6, 34; 10 Hen. 6, 16; 18 Hen. 6, 21; 14 Hen. 8, 2; 18 Hen. 8, 10; 10 Hen. 7, 6; where Keble said, "as to these deer being wild beasts and *nullius in bonis*, according to Bracton, and the property in no one; yet by the common law before the statute of Westminster 1st, if a stranger had killed a deer in my park, although my writ did not mention the value, yet the jurors ought to assess the damages as well for the value of the deer as for the breaking of the close;" 10 Hen. 7, 30; 42 Edw. 3, 2; *Abbot of Whithy's case*, 8 Edw. 3, Rot. 42, cited 4 Inst. 305; *Abbot of Dien's case*, 7 Hen. 6, 36, cited 4 Inst. 305; *Dyer* 326, cited *Ibid.*; 43 Edw. 3, 8; 43 Edw. 3, 13; 44 Edw. 3, 12; The case of *monopolies*, 11 Rep. 87; 4 Inst. 303, 304; *Keilw.* 30; 2 Roll. Ab. 565.

(f) 11 Exch. R. 654; 1 H. & N. 923.

(g) 12 C. B. (N. S.) 501 (104 E. C. L. R.); 8 Law T. 834; 13 C. B. (N. S.) 844 (106 E. C. L. R.), affirmed in error in Exch. Ch., and afterwards in the House of Lords, 12 Law T. 315. In 12 C. B., Willes, J., is reported to have spoken of "the dictum of Lord Holt in *Sutton v. Moody*." Now, the only point decided in that case was, that the plaintiff had a property in the rabbits by the possession of the land; what Holt, C. J., therefore said on that subject was on the very point in the cause.

(gg) *Read v. Edwards*, 17 C. B. (N. S.) 245 (112 E. C. L. R.).

between the end of the net and the hedge. Where the net was set, there was nine feet of waste on one side and three feet of waste on the other side of the road, which itself was eleven feet wide. At another point there were eighteen feet of waste on one side and twelve feet on the other side of the road, and at 403 feet distant from the net there were sixty-four feet waste on one side and eight feet on the other side. An accomplice of the defendant had been seen on the waste 163 feet from the net, and he ran along the waste land to the place where the net was set. The Court of Queen's Bench held that this land was not open land within the 9 Geo. 4, c. 69, s. 1. (*hh*) This case seems to have been argued in anything rather than a satisfactory manner, and the decision can only be supported on the ground that the 7 & 8 Vict. c. 29, had the effect of taking such land out of the 9 Geo. 4, c. 69. The 7 & 8 Vict. c. 29, was a gross legislative blunder. If a road pass over land, no one has any right whatever to use that land for any other purpose than for the purpose of passing over it, and if he do use it for any other purpose, he is a trespasser just as much as if he had gone on a field where there was no road at all. In truth, as to every act done on land over which a road passes other than for the purpose of using it as a road, the land is in point of law just exactly in the same position as if the road did not exist. If in this case an action of trespass had been brought by Lord Sidmouth against the defendant for entering this land, and he had pleaded that he had entered to use the road, which is the only justification he could have set up, he would have been answered by alleging that he entered the land for other purposes, and by proving that he endeavored to take game on the land. This proves that the defendant unlawfully entered. Then the words "open or enclosed" in the 9 Geo. 4, c. 69, s. 1, are plainly used, not for the purpose of limiting the generality of the words "any land," but to prevent any doubt as to unenclosed land being within the clause. See the 57 Geo. 3, c. 90, in note (*v*), p. 659 of Vol. I.; and the case being clearly within the 9 Geo. 4, c. 69, s. 1, the manifest blunders of the 7 & 8 Vict. c. 20 ought not to have led to this decision. That Act recites that the provisions of the 9 Geo. 4, c. 69, "have of late years been evaded and defeated, by the destruction, by armed persons at night, of game or rabbits, not upon open or enclosed lands, as described in the said Act, but upon public roads and highways, and other roads and paths leading through such lands, and also at the gates, outlets, and openings between such lands and roads, highways, and paths." Now the first remark is that it exhibits gross ignorance of law to suppose that a person killing game on a highway that runs through an enclosed field is not within that Act; but it is still more absurd to suppose that any one killing game on a road other than a highway, *i. e.* on a private road, is not within that Act, and yet such is the recital of that Act. It adds but little to the absurdity of this Act that, being passed with the clear intention of extending the whole of the 9 Geo. 4, c. 69 to the places mentioned in it, it only extends it to the cases where game or rabbits are actually taken or destroyed, and does not include the cases where everything is done to take or destroy game or rabbits, but none is taken or destroyed; and this leads to the very remarkable absurdity that the Act does not hit the very case at which it was undoubtedly aimed, *viz.* the offence within sec. 9 of the 9 Geo. 4, c. 69, which makes three "persons entering for the purpose of taking game," &c., guilty of a misdemeanor; for it only extends the penalties imposed by the 9 Geo. 4, c. 69 upon persons "taking or destroying" game—not upon persons entering for the purpose of taking or destroying game—to persons "taking or destroying any game or rabbits" in the places mentioned in the 7 & 8 Vict. c. 29. In truth, that Act only empowers justices summarily to convict under sec. 1 of the 9 Geo. 4, c. 69, in cases where game or rabbits are actually taken or destroyed. A more thoroughly blundering piece of legislation cannot be found. It was clearly wholly unnecessary, as the 9 Geo. 4, c. 69, when properly construed, extends to every case, and the proper course is to treat the latter Act as wholly superfluous.

The 9 Geo. 4, c. 69, s. 1, reciting the 57 Geo. 3, c. 90. and that "the practice of going out by night for the purpose of destroying game has nevertheless very much increased of late years, and has in very many instances led to the commission of murder, and of other grievous offences; and it is expedient to repeal the said

1 Act, and to make more effectual provisions than now by law exist for re-
 ng such practice," enacts "that the said recited Act shall be, and the same is
 repealed, except so far as the same repeals any other Acts; and if any
 1 shall, after the passing of this Act, by night, unlawfully take or destroy any
 or rabbits in any land, whether open or inclosed, or shall by night unlawfully
 or be in any land, whether open or inclosed, (h) with any gun, net, engine, or
 instrument, for the purpose of taking or destroying game, (i) such offender
 upon conviction thereof before two justices of the peace, be committed for
 at offence to the common gaol or house of correction for any period not ex-
 g three calendar months, there to be kept to hard labor, and at the expiration
 h period shall find sureties by recognizance, or in Scotland by bond of caution,
 lf in ten pounds, and two sureties in five pounds each, or one surety in ten
 ls, for his not so offending again for the space of one year next following; and
 e of not finding such sureties, shall be further imprisoned and kept to hard
 for the space of six calendar months, unless such sureties are sooner found;
 i case such person shall so offend a second time, and shall be thereof convicted
 i two justices of the peace, he shall be committed to the common gaol or house
 rection for any period not exceeding six calendar months, there to be kept to
 labor, and at the expiration of such period shall find sureties by recogni-
 or bond as aforesaid, himself in twenty pounds, and two sureties in ten
 s each, or one surety in twenty pounds, for his not so (k) offending again for
 ace of two years next following; and in case of not finding such sureties,
 be further imprisoned and kept to hard labor for the space of one [*642
 unless such sureties are sooner found; and in case such person shall so
 l a third time, he shall be guilty of a misdemeanor, and being convicted thereof,
 be liable, at the discretion of the Court, to be transported (l) beyond seas for
 (m) years, or to be imprisoned and kept to hard labor in the common gaol, or
 of correction, for any term not exceeding two years; and in Scotland, if any
 n shall so offend a first, second, or third time, he shall be liable to be punished
 e manner as is hereby provided in each case."

2. "Where any person shall be found upon any land committing any such
 e as is hereinbefore-mentioned, it shall be lawful for the owner or occupier of
 land, or for any person having a right or reputed right of free warren or free
 thereon, or for the lord of the manor or reputed manor wherein such land
 be situate, and also for any gamekeeper or servant of any of the persons herein-
 oned, or any person assisting such gamekeeper or servant, to seize and appre-
 such offender upon such land, or in case of pursuit being made, in any other
 to which he may have escaped therefrom, and to deliver him as soon as may
 to the custody of a peace officer, in order to his being conveyed before two
 es of the peace; and in case such offender shall assault or offer any violence
 any gun, crossbow, firearms, bludgeon, stick, club, or any other offensive
 n whatsoever, towards any person hereby authorized to seize and apprehend
 he shall, whether it be his first, second, or any other offence, be guilty of a
 misdemeanor, and being convicted thereof, shall be liable, at the discretion of the
 t, to be transported beyond seas for seven years, or to be imprisoned and kept
 rd labor in the common gaol or house of correction for any term not exceeding
 ears; and in Scotland, whenever any person shall so offend, he shall be liable
 punished in like manner. (n)

See *Tapsell v. Croskey*, 7 M. & W. 441, as to this word in the Turnpike Act, 3 Geo.
 126.

It is to be observed that the word "rabbits" is here omitted; so that if poachers
 for the purpose of taking rabbits, but have not either taken or destroyed any, they
 committed no offence within sec. 1, and therefore sec. 2 gives no authority to appre-
 them. Section 9 extends to poachers entering with intent to take both game and
 ts, and is, therefore, in this respect, more extensive than sec. 1. See *Rex v. Ball*,
 M. C. C. R. 330, *post*, p. 647.

See *In re Reynolds*, 1 Sess. C. 51, that a conviction that the defendant should enter
 recognizances that he should not offend again, omitting the word "so" is bad.

Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

And not less than three years by the same clause: *Ibid*.

By sec. 3, a justice may issue his warrant to apprehend any person charged on the

Sec. 4. "The prosecution for every offence punishable upon summary conviction by virtue of this Act shall be commenced within six calendar months after the commission of the offence; and the prosecution for every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this Act, shall be commenced within twelve calendar months after the commission of such offence."^(o)

Sec. 8. "On every conviction under this Act for a first or second offence the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence; and the clerk of the peace shall immediately on such return make or cause *643] to be made a memorandum of such conviction in a register to be kept by him of the names and places of abode of the persons so convicted, and shall state whether such conviction be the first or second conviction of the offending party."

Sec. 9. "If any persons, to the number of three or more together, shall by night unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any of such persons being armed with any gun, crossbow, firearms, bludgeon, or other offensive weapon, each and every of such persons shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol delivery, or of the Court of Quarter Sessions of the county or place in which the offence shall be committed, shall be liable at the discretion of the Court to be transported^(p) beyond the seas for any term not exceeding fourteen^(q) years, nor less than seven years, or to be imprisoned and kept to hard labor for any term not exceeding three years; and in Scotland, any person so offending shall be liable to be punished in like manner."^(r)

Sec. 12. "For the purposes of this Act the night shall be considered, and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise."

Sec. 13. "For the purposes of this Act the word 'game' shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards."

The 7 & 8 Vict. c. 29, reciting the 9 Geo. 4, c. 69, ss. 1, 2, and that "the provisions of the said Act have of late years been evaded and defeated, by the destruction by armed persons at night of game or rabbits, not upon open or enclosed lands, as described in the said Act, but upon public roads and highways, and other roads and paths leading through such lands, and also at the gates, outlets and openings between such lands, and roads, and highways, and paths, so that not only has the destruction of game or rabbits not been prevented, but the risk of murder and other grievous offences contemplated by the said Act has been increased, and great danger and alarm occasioned to persons using such roads, highways, and paths; and that it is expedient that the remedies provided by the said Act against such offences as herein-before mentioned should be extended and applied to the like offences committed upon such roads, highways, and paths," enacts, "that from and after the passing of this Act all the pains, punishments and forfeitures imposed by the said Act upon persons by night unlawfully taking or destroying any game or rabbits in any land, open or enclosed, as therein set forth, shall be applicable to and imposed

oath of any credible witness with any offence punishable under the Act upon summary conviction.

^(o) Sec. 5 gives the form of conviction for offences under the Act; as to which see *Rex v. Mellor*, 2 Dowl. P. R. 173. Sec. 6 gives an appeal to any person aggrieved by any summary conviction; and sec. 7 takes away the *certiorari*. See *Rex v. Mellor*, *supra*, and *Rex v. Hester*, 4 Dowl. P. R. 589.

^(p) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

^(q) And not less than three years by the same clause: *Ibid*.

^(r) By sec. 10, in Scotland the sheriff of the county within which the offence shall have been committed shall have a cumulative jurisdiction with the justices of the peace in regard to the same; and the conviction in Scotland may be proved in the same manner as a conviction in any other case according to the law of Scotland; and by sec. 11, in all cases in Scotland of a third offence, or in other cases in Scotland where a sentence of transportation may, by the provisions of this Act, be pronounced, the offender shall be tried before the High Court or Circuit Court of Justiciary.

pon any person by night unlawfully taking or destroying any game or rabbits on any public *road, highway, or path, or the sides thereof, or at the openings, [*644 outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path where the offender shall be and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and all the persons authorized by the said Act to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said Act under this Act; and the said Act, and all the powers, provisions, authorities and jurisdictions therein or thereby contained or given, shall be as applicable for carrying this Act into execution as if the same had been herein specially set forth.”(s)

In consequence of the easy manner in which poachers escaped detection and apprehension by the power to apprehend them being confined to cases where they were found upon the land committing the offence, the 25 & 26 Vict. c. 114, was passed. Sec. 1, defines game to include one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game; and sec. 2, makes it lawful for “any constable or peace officer in any county, borough, or place in Great Britain and Ireland, in any highway, street or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of a gun, or nets or engines used for the killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon such person, cart, or other conveyance, to seize and detain such game, article or thing;” and the constable or peace officer is in such case to apply for a summons citing such person to appear before two justices in petty sessions, as provided by the 18 & 19 Vict. c. 106, s. 9, in England and Ireland, and before a sheriff or any two justices in Scotland, and “if any such person shall have obtained such game by unlawfully going on any land in search or pursuit of game,(t) or shall have *used any such article or thing as aforesaid for unlawfully killing [*645 or taking game, or shall have been accessory thereto, such person shall on being convicted thereof forfeit and pay any sum not exceeding five pounds,” and shall forfeit the game, guns, parts of guns, nets and engines, and the justices are to direct them to be sold or destroyed, and the proceeds of the sale and penalty to be paid to be treasurer of the county or borough; and if no conviction takes place the game, article or thing or the value thereof shall be restored to the person from whom it was seized.”(u)

(s) This Act seems to have been a manifest mistake in legislation, for there is no reason whatever in point of law why the 9 Geo. 4, c. 69, did not include all highways. And *leg. v. Pratt*, 4 E. & B. 869 (82 E. C. L. R.), where it was held that a person might be convicted of a trespass in pursuit of game on a highway under the 1 & 2 Will. 4, c. 30, s. 0, is a strong authority to that effect. The law is clear that subject to the right of passage the soil and every right incident to the soil of a highway is in the owner of the soil, and every one who goes on a highway, not in the exercise of the right of way, but for any other purpose is a trespasser: *Ibid.* See also *Mayhew v. Wardley*, 8 Law T. 504; 14 B. (N. S.) 550, where a man who standing in a highway, shot a partridge in a field adjoining, was held to be properly convicted of a trespass in pursuit of game on the highway.

(t) It is not necessary under this clause to prove from what particular land the game was taken. The only question is, whether it was unlawfully taken from any land; and if a man be found in the night with recently killed game, or with guns or nets, or with both, the inference may be drawn that he has been on some land, without showing what land, in the unlawful search and pursuit of game: *Brown v. Turner*, 13 U. B. (N. S.) 485 106 E. C. L. R.); *Evans v. Botterill*, 8 Law T. 272; s. c., 3 B. & S. 787.

(u) Sec. 3, any penalty in England is recoverable under the 1 & 2 Will. 4, c. 32; in Scotland under the 2 & 3 Will. 4, c. 68; and in Ireland under the Petty Sessions Ireland Act, 1851. Sec. 4 extends the provisions of the 11 & 12 Vict. c. 43, to proceedings under this Act. Sec. 5 takes away the *certiorari*, &c.; and sec. 6 gives an appeal against any conviction under the Act.

If a constable sees game or rabbits upon a person, it is not necessary that there should be a search to authorize a proceeding under the 25 & 26 Vict. c. 114, s. 2, for it cannot be intended that if a man is seen coming out of a plantation with game or rabbits in his possession it should be necessary to go through the process of searching him. *(uu)*

On an indictment against two prisoners for unlawfully wounding a policeman, with intent to resist their lawful apprehension, it appeared that the policeman saw a horse and cart between one and two o'clock in the night approaching L. One man was leading the horse, and seven or eight more were in the cart. Suspecting that they had been in pursuit of game, the policeman laid hold of the horse's rein, and asked them their names and business. The men in the cart called out to the man who was leading the horse to pull out his stick and knock the policeman down. The man pulled out his stick, and put himself in a fighting attitude. The policeman drew his staff, and said, "You are poachers; I shall search the cart." The men tried to prevent him looking into the cart, and a scuffle ensued, in which the policeman was knocked down by a blow from behind, which struck out one of his eyes. The two prisoners were afterwards apprehended, as they were driving the cart into L.; they were then alone, and the cart contained nothing but a wooden peg, a pocket-knife, and dog collar. Martin, B., held that the 25 & 26 Vict. c. 114 does not authorize the policeman to apprehend the persons whom he suspects of having been unlawfully in search of game: and therefore there was no intent in the prisoners to resist their lawful apprehension; and that the prisoners could only be found guilty of unlawfully wounding if the policeman was authorized to search the cart; and that it was not shown that the policeman had any cause of suspicion whatever. That it was not shown that either of the prisoners struck the blow, and there was no such common intent as would render the prisoners liable for the act of the man who did strike the blow. The only common intent proved was that of resisting the unlawful search, which, so far as appeared, the prisoners had a right to do. The man who struck the blow was alone guilty of the excess, and the prisoners must be acquitted. *(vv)* It deserves consideration whether the existence of a common intent is not in all cases a question for the jury, and whether in this case there was not abundant evidence in the declaration, "Pull out your stick and knock him down," and in the other facts, of a common purpose to inflict unnecessary violence.

On another indictment against the same prisoners for assaulting the policeman in the execution of his duty, in addition to the facts proved on the previous trial, it was proved that a Mr. Franks had sent word to the policeman, a few hours before the cart was stopped, that eight men, a cart and horse, and two dogs, were going from Leicester in the direction of a village three or four miles distant, and it was proposed to give evidence that the prisoners were habitual poachers, for the purpose of showing what was passing in the policeman's mind; but Martin, B., held that such evidence could not be given, and that the other evidence did not show sufficient cause of suspicion. Good cause to suspect means a reasonable ground of suspicion, upon which a reasonable man may act. It was obvious that eight men might reasonably go out of a town, with a horse and cart and two dogs, for a multitude of purposes besides that of unlawfully taking game; and the policeman had, from those circumstances alone, no more cause to suspect them of having committed the latter offence than of committing almost any other offence known to the law. There was no good cause of suspicion in these circumstances, and therefore the policeman was not in the execution of his duty. *(ww)* The decision that evidence is not admissible in such a case of the prisoners being habitual poachers, deserves reconsideration. The common law has always taken notice of habitual misconduct, and it has even been held that an indictment charging a man that he, being of bad fame and dishonest conversation, *fuit nocte vagans* is good; for this is to be intended *communis nocte vagans*. *Willow's case*, Latch 173, and see note (o), p. 809 of Vol. I. No one can doubt that habitual conduct necessarily leads any reasonable mind to form a conclusion; and to exclude evidence of what must operate on the mind, is to exclude evidence of what may have been the chief cause of an action.

(uu) Hall v. Knox, 4 B. & S. 515 (116 E. C. L. R.).

(vv) Reg. v. Spencer, 3 F. & F. 854.

(ww) Reg. v. Spencer, 3 F. & F. 857.

Where two persons drove along a highway in a trap, and one got out and entered a field with a gun and dog, and shot a hare, and then returned to the trap and gave the hare to the other in the trap, which had remained where the one had got out of; it was held that the one who remained in the trap might be convicted of aiding and abetting the other in committing a trespass in pursuit of game in the daytime, against the 1 & 2 Will. 4, c. 32, s. 30.(xx)

Where a person standing on land where he had a right to shoot shot a pheasant in the ground in an adjoining close, and then entered that close and picked up the dead pheasant, the Court of Common Pleas held that he was guilty of a trespass in pursuit of game, as the shooting the bird and going on the land to pick it up was a continuous transaction.(yy)

But the preceding case was doubted in a case where the defendant, being on his own land, shot a pheasant, which rose on that land and fell dead on the land of another person, and the defendant went and fetched the bird, taking his dog and gun with him; and the Court of Queen's Bench held that the defendant was not guilty of a trespass in search of game against the 1 & 2 Will. 4, c. 32, s. 30; for that section only applies to living game.(zz)

Where a bill of indictment had been preferred within a year after the commission of an offence under the 9 Geo. 4, c. 69, against the prisoner and Robins, and ignored as to the prisoner, but found against Robins, who was convicted, and four years afterwards a fresh bill was found against the prisoner; it was considered to be clear that preferring the first bill was the commencement of a prosecution, but it was doubted whether the condition in sec. 4, requiring a prosecution by indictment to be commenced within twelve calendar months, had been complied with by preferring the bill, which was ignored. And *Adam v. The Inhabitants of Bristol*(v) was referred to; where, in an action for an injury to property by rioters on the 7 & 8 Geo. 4, c. 31, which requires the action to be commenced within three months, the party had commenced an action within three months and died, and her executor brought an action within forty days after her death, but more than three months after the damage was done, and it was contended that the condition having been once complied with, the executor had a right to bring an action within a reasonable time; but the Court held that the action was not brought in time(w)

On the trial of an indictment for night-poaching, it appeared that the offence was committed on the 12th of January, 1844; the indictment was found at the sittings held on the 1st March, 1845: but the warrant by which the defendant was committed on the present charge was on the 11th of December, 1844; and Pollock, J. B., held that the warrant of commitment must be taken to show the commencement of the prosecution, and therefore the prosecution was shown to have been commenced within twelve calendar months after the commission of the offence.(x)

*Upon an indictment for night-poaching under the 9 Geo. 4, c. 69, laying [646] information before a magistrate is the commencement of the prosecution. The offence was committed on the 4th of December, 1845. The information before the magistrates and warrant were on the 19th of the same month. One prisoner was apprehended and committed on the 5th of September, 1846; the other on the 1st of October in the same year: the indictment was preferred on the 5th of

(xx) *Stacey v. Whitehurst*, 18 C. B. (N. S.) 344 (114 E. C. L. R.).

(yy) *Osbond v. Meadows*, 12 C. B. (N. S.) 10 (104 E. C. L. R.).

(zz) *Kenyon v. Hart*, 11 Law T. 733.

(v) 2 A. & E. 389 (29 E. C. L. R.); 4 N. & M. 144.

(w) *Rex v. Killminster*, 7 C. & P. 228 (32 E. C. L. R.), Coleridge, J. The prisoner was acquitted, otherwise the point would have been reserved for the opinion of the judges. See *Rex v. Wallace*, 1 East P. C. 186, where in a case of coining it was held that the information and proceedings before the magistrate, and not the preferring the bill, was the commencement of the proceedings, and that a variance between the manner of laying the offence in the indictment and charging it in the commitment, made no difference. See also *Rex v. Phillips*, R. & R. 369, where it was held that proof by parol that the prisoner was apprehended for treason respecting the coin, within the three months limited by the 1 & 9 Will. 3, c. 26, was not sufficient if the indictment was after the three months, and the warrant to apprehend or commit, or depositions were not produced to show on what transactions, or for what offence, or at what time the prisoners were committed.

(x) *Reg. v. Austin*, 1 C. & K. 621 (47 E. C. L. R.).

April, 1847; and, upon a case reserved, the judges were unanimously of opinion that the prosecution was commenced in time.^(y)

But where on the trial of an indictment for night-poaching it appeared that the offence was committed some time in 1853, and a warrant for the defendant's apprehension granted at that time, but not served, the defendant having absconded, and on the defendant's return after six years' absence, the present proceedings were instituted and the preceding cases were cited: Pollock, C. B., said, "None of these cases go to the extent contended for in this case. I am of opinion that the issuing of this warrant was not a commencement of proceedings within the statute," and the prisoner was accordingly acquitted.^(z)

Parker and Smith were indicted for night-poaching on the 26th of January, 1861, and a warrant dated the 5th of February, 1861, was proved to be under the hand of a magistrate, and this warrant recited that information had that day been given of the offence, but no information was given in evidence. Smith was apprehended under this warrant on the 27th November, 1862, and Parker on the 14th January, 1864; and, upon a case reserved, it was held that, in order to show that the prosecution was commenced in due time, the information ought to have been given in evidence.^(zz) This case was only argued for the prisoners, and the decision is unsatisfactory. It was objected that it was not alleged in the warrant that the information was in writing, as required by sec. 8 of the 11 & 12 Vict. c. 42. It did not therefore appear that any legal information was ever laid. The answer is, that the form given by the statute for a warrant does not recite that the information was in writing; as the warrant did recite an information, it was sufficient.^(aa) At all events, the warrant was evidence that the prosecution was pending at its date; under that warrant the prisoner had been apprehended, examined, and committed, and any objection as to the information was far too late at the trial.

On an indictment for night-poaching it appeared that some tame pheasants were in coops about 150 yards from a house; but they were not shut up, and could run about, and on this night they were roosting in trees close by. Common hens were in the coops, having been used for rearing the pheasants. The prisoners went to the coops, and one said, "There is nothing here but an old hen;" they were looking in other coops when they were apprehended. It was held that these birds could not be considered game within the meaning of the statute. As long as they were under the charge of the hen, as long as she was their guardian, and while they were about her, and running about with her, he who took them was guilty of larceny.^(a)

An indictment alleged that the prisoner was duly convicted before three justices, for that he by night after the expiration of the first hour after sunset and before the beginning of the first hour before sunrise, did by night unlawfully enter a certain close, &c., describing it, with a gun for the purpose of then and there taking and destroying game; and the prisoner was thereupon adjudged for his said offence, the same being his first offence, to be imprisoned, &c.; and that the prisoner afterwards was duly convicted before two justices, for that he by night unlawfully did enter and be in certain inclosed land, &c., describing it, "with certain instruments for the purpose of killing, taking, and destroying game thereon, this being his second offence;" and was thereupon adjudged, &c. It was objected on error: 1. That the second conviction alleged was not valid, because the first conviction
*647] *did not appear to have been set out in it; but it was held that all that was necessary in such an indictment in order to give the Court jurisdiction was

(y) Reg. v. Brooks, 1 Den. C. C. 217; 2 C. & K. 402 (61 E. C. L. R.).

(z) Reg. v. Hull, 2 F. & F. 16. This case is so badly reported, that it is impossible to see what was really decided. If the last proceedings had no connection with the warrant, or information on which it issued, that may have been the ground of the decision. See *Rex v. Killminster*, *supra*.

(zz) Reg. v. Parker, L. & C. 459.

(aa) See *Haylock v. Sparke*, 1 E. & B. 471 (72 E. C. L. R.).

(a) Reg. v. Garnham, 8 Cox C. C. 451, Pollock, C. B., and Williams, J. Pollock, C. B., also said, "I take it if a man go into a London market, and buy pheasants' eggs, and hatch them under a common hen, when the birds became free from control they would come under the game laws."

to show that there had been two former convictions under the statute, and that was shown here. 2. It was objected, that the second conviction only said that the prisoner entered "with certain instruments," not specifying what they were, or even that they were used for the purpose of killing game; but it was held that, as it was alleged that the offence was committed by night in the land with instruments for the purpose of taking and destroying game, the latter words being applicable to the instruments as well as to the presence of the party, got rid of all the difficulty. 3. It was objected, that the second conviction did not allege that the prisoner entered for the purpose of taking game "by night," and that the first conviction did not allege that the act was done by night on the particular close; but it was held that the expression "by night" preceding the whole clause quite cured the difficulty as to time. Lastly, it was objected, that the first conviction was "the first hour before sunrise," instead of "last hour before sunrise," and that this was impossible; but the objection was overruled.(b)

An indictment under the 9 Geo. 4, c. 69, s. 1, for a third offence set out the previous convictions, one of which alleged that the prisoner "entered into certain inclosed land in the parish of A. B. for the purpose of taking and destroying game in the night," and Maule, J., held that the indictment was bad for not alleging the entry by night.(c)

Although three or more poachers are out by night armed, and are guilty of an offence within sec. 9, still they are liable to be apprehended under sec. 2, as they are guilty of an offence under sec. 1, as well as under sec. 9.(d) If persons are found actually in the commission of an offence against sec. 1, they may be apprehended by the persons authorized to apprehend by sec. 2, although no notice be given to them of the cause for which they are apprehended; for the circumstances constitute sufficient notice.(e) And it is not necessary that there should be a written authority; it is sufficient if the party were employed as a watcher of game preserves by the lord of the manor.(f) And although the persons mentioned in sec. 2 have no authority to apprehend unless the poachers are found upon the manor or land of the persons therein specified;(g) yet if a poacher be found on the manor by *a servant of the lord, and run off it, but being pursued return upon it again, [648] the servant may apprehend him, for it is the same as if he had never been off the manor.(h) Where a wood was neither the property of the master of an assistant gamekeeper, nor in his occupation, nor within any manor which belonged to him, and he had only the permission of the owner to preserve the game there, it was held that the assistant gamekeeper had no authority to apprehend poachers in the wood.(i) So the gamekeeper of a person who rents the shooting over land has no right to apprehend a poacher; for a person who rents the shooting is neither the owner nor the occupier of the land.(k) Unless a poacher be found in pursuit of game between

(b) *Cureton v. The Queen*, 1 B. & S. 208 (101 E. C. L. R.). In *Fletcher v. Calthrop*, 6 Q. B. 880 (51 E. C. L. R.), a conviction which alleged that the defendant entered certain inclosed land by night "with a net for the purpose of taking game, to wit, partridges and pheasants," was held bad, because it did not state the intent to take the game there. This decision has always appeared to be questionable, and in *Cureton v. The Queen*, *Cockburn, C. J.*, and *Hill, J.*, strongly expressed their doubts as to its correctness. It seems clear that a man does not enter a close with intent to take game unless it be to take game in that close, but he enters it for some other purpose, *e. g.* to cross it and kill game in another close. If a man gets into a railway carriage in London on his way to his moors in Scotland, can it be said that he enters the carriage with intent to kill grouse?

(c) *Reg. v. Merry*, MSS. C. S. G.; 2 Cox C. C. 240.

(d) *Rex v. Ball*, R. & M. C. C. R. 330. See note (a), *ante*, p. 641.

(e) *Rex v. Payne*, R. & M. C. C. R. 378; *Rex v. Davis*, 7 C. & P. 785 (32 E. C. L. R.), *Parke, B.*; *Rex v. Taylor*, 7 C. & P. 266, *Vaughan, B.* See these and other similar cases, *post*, tit. *Manslaughter, Resisting Officers*.

(f) *Rex v. Price*, 7 C. & P. 178 (32 E. C. L. R.), *Parke, J. J. A.*, and *Coleridge, J.*

(g) *Rex v. Addis*, 6 C. & P. 388 (25 E. C. L. R.), *Patteson, J.*; *Rex v. Davis*, 7 C. & P. 785 (32 E. C. L. R.), *Parke, B.*

(h) *Rex v. Price*, *supra*, note (f). The authority given by sec. 2 to apprehend "in case of pursuit in any other place to which he may have escaped," seems not to have been adverted to in this case.

(i) *Rex v. Addis*, *supra*, note (g).

(k) *Reg. v. Price*, 5 Cox C. C. 277, *Patteson and Talfourd, JJ.*; *Reg. v. Wood*, 1 F. & F.

the expiration of the first hour after sunset and the beginning of the last hour before sunrise, there is no power to apprehend him under sec. 2.(l)

In consequence of the many cases which had occurred in which questions had arisen as to the right to apprehend persons committing offences in the night, and especially in poaching cases,(m) the 14 & 15 Vict. c. 19, s. 11, was framed.(n) It recites that "doubts have been entertained as to the authority to apprehend persons found committing indictable offences in the night," and enacts that "it shall be lawful for any person whatsoever to apprehend any person, who shall be found committing any indictable offence in the night, and to convey him or deliver him *649] to some constable or *other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law."

It is to be observed that this clause only applies to the apprehension of persons committing *indictable* offences; whilst, therefore, it authorizes the apprehension of any persons committing an offence under sec. 9, it does not authorize the apprehension of any person committing an offence under sec. 1; for that section only creates summary offences, except indeed in the case of a third offence after two previous convictions.

It is proper also to add, that "night," as used in sec. 11 of the 14 & 15 Vict. c. 19, is not defined by sec. 13 of that Act; for that section only defines "the time at which the night shall commence and conclude in any offence against the provisions of this Act;" and sec. 11, neither creates nor mentions any offence, but simply authorizes the apprehension for any indictable offence committed in the night, whether that offence be an offence at common law or created by statute; and consequently the time, with reference to this section, at which night begins and ends in each case will depend on the common law or the statute applicable to the offence, and in night-poaching the time is fixed by 9 Geo. 4, c. 69, s. 12.(o)

Where on an indictment for murder of a gamekeeper in a conflict with more than

470, Martin, B.; s. p., where the gamekeeper's master "had the right of shooting over" the land: *Reg. v. Wesley*, 1 F. & F. 528, Lord Campbell, C. J.; s. p., where the gamekeeper's master had "permission by parol to shoot over the land."

(l) *Rex v. Tomlinson*, 7 C. & P. 183 (32 E. C. L. R.), Coleridge, J. See the case, *post*, tit. *Manslaughter, Resisting Officers*. By the 24 & 25 Vict. c. 96, s. 17 (which will be found in vol. 2), any person in the day-time taking or killing any hare or coney in any warren, or ground lawfully used for the breeding or keeping of hares or conies, or at any time setting or using therein any snare or engine for the taking of hares or conies, is subjected to a penalty of not exceeding £5; and by sec. 103 may, if found committing the offence, be immediately apprehended without a warrant by any peace officer, or by the owner of the property, on or with respect to which the offence is committed, or by his servant, or any person authorized by him. This power only applies to hares or conies, and to the places specified. By the Game Act, 1 & 2 Will. 4, c. 32, s. 31, any person found on any land, &c., in search or pursuit of game, woodcocks, snipes, quails, land-rails, or conies, may be required by any person having the right of killing game upon such land, or by the occupier or gamekeeper, or servant of either of them, or by the warden, &c., of any forest, &c., forthwith to quit the land whereon he is found, and to tell his Christian and surname, and place of abode; and if such person, after being so required, refuse to tell his real name or place of abode, or give such a general description of his place of abode as shall be illusory for the purpose of discovery, or wilfully continue or return upon the land, he may be apprehended by the party so requiring, or by any person acting by his order and in his aid, and conveyed as soon as conveniently may be before a magistrate. In order to justify the apprehension of an offender under this section, he must have been required both to quit the land, and also to tell his name; and the return must be upon the same land as the party was found upon, and for the same purpose, that is, in search or pursuit of game, &c.; for otherwise a man going along a public path over the same land would come within the section: *Rex v. Long*, 7 C. & P. 314 (32 E. C. L. R.), Williams, J.; *Reg. v. Lawrence*, Gloucester Spr. A. 1843, MSS., C. S. G., s. p., by Wightman, J. But in *Reg. v. Prestney*, 3 Cox C. C. 505, Parke, B., held that the prosecutor was not bound both to require the prisoner to quit the land and also to tell his name and place of abode, but that he was at liberty to require either of those three matters of the prisoner, and that he was bound to comply with whichever the prosecutor demanded.

(m) See *post*, p. 813, *et seq.*

(n) It was my clause. C. S. G.

(o) I have made these remarks because the plain words of these sections have been very much misunderstood by counsel in *Reg. v. Sanderson*, *infra*, and elsewhere.

three poachers, who were out together in pursuit of game about eleven o'clock at night, there was no sufficient evidence of any authority in the keeper to apprehend under the 9 Geo. 4, c. 69, s. 2; Willes, J., held that they were liable to be apprehended by any one under the 14 & 15 Vict. c. 19, s. 11; for that section applied to all persons whatever found committing indictable offences in the night, and as more than three persons were found together armed in the field for the purpose of taking game in the night, they were guilty of an indictable offence, and liable to be apprehended for it under that section. (p)

An indictment for assaulting a gamekeeper must either state expressly that the defendant was "found committing" an offence within sec. 1, or after stating that the defendant entered by night for the purpose of taking game, so as to show that he had committed an offence within that section, must, in the subsequent part so referring to the previous part as to show that he was found committing such offence; and it is not sufficient to state that the defendant entered by night into land for the purpose of taking game, and that he was then and there by night as aforesaid found. A count alleged that the defendants by night did unlawfully enter certain land armed with guns for the purpose of taking game, and that they "were then and there in the said land by night as aforesaid by one W. R., the servant of Earl B., found, and that the defendants with the guns aforesaid did then and there assault, &c., the said W. R., the said W. R. being then and there authorized to apprehend the defendants;" it was objected that the count was bad, as it neither stated, in the words of the Act, that the defendants "were found committing the offence, or sufficiently referred to the previous averments to incorporate them in the latter part of it, and the judgment was arrested upon this objection. (q)

Where a count alleged that three entered a close by night with guns for the purpose of taking game, and were found by a servant of the owner of the said close, and that they assaulted him with the said guns; it was objected that this count intended to allege that the prisoners had committed an offence under sec. 9, and therefore the count was bad for not alleging that the prisoners were armed; Patteson, J., asked what answer there was to the objection, and the counsel for the prosecution admitted the force of the objection, and abandoned the count. (r)

Upon an indictment for wounding with intent to murder a gamekeeper of a nobleman, it appeared that a turnpike-road ran through his estate upon which the game was extensively preserved; but other proprietors preserved game upon lands which were not more than half a mile distant from the place where the wound was given. The keepers swore that they heard shots fired at night in the preserves in quick succession, as if two or more persons were shooting, and suspecting that the parties would shortly pass along the turnpike road, the keepers went and secreted themselves by the road-side. Shortly afterwards, six men came along the road; they had gun-barrels, which they took from their pockets; and an affray took place, in which the keeper was wounded. Several pheasants were found on the road after the affray was over. Wightman, J., told the jury that the keepers were not justified in endeavoring to apprehend the poachers; as they were not found upon any land committing any offence against the game laws, nor was any pursuit made. (s)

Where on an indictment for assaulting a gamekeeper, the prisoners were proved

(p) *Reg. v. Sanderson*, 1 F. & F. 598.

(q) *Reg. v. Curnock*, 9 C. & P. 730 (38 E. C. L. R.). Gurney, B., after taking time to consider, and, I believe, consulting Coleridge, J. Two other objections were intended to be made: first, that the assault was not alleged to have been upon the land where the defendants were found; secondly, that there was no averment to show that the keeper was in the execution of his duty when the assault was committed, and unless that were the case the assault was not within this Act. See *Rex v. Cheere*, 4 B. & C. 902 (10 E. C. L. R.), *ante*, p. 638. C S. G.

(r) *Reg. v. May*, 5 Cox C. C. 176, yet it is perfectly clear that there was nothing in the objection. The indictment was on the second section, and that only requires the offenders to be found on the close "committing any such offence," as is mentioned in the first section, *i. e.* entering "with any gun," &c. It is clear that the count would have been bad if it had alleged the offence in the terms of the ninth section, unless those terms were equivalent to those creating the offence in the first section; and as the count alleged the offence in the terms of the first section, it was clearly good.

(s) *Reg. v. Meadham*, 2 C. & K. 633 (61 E. C. L. R.).

to have been on land in pursuit of game in the night, and on seeing the keepers made off into a highway, and sat down under a tree, and the keepers went up to them, and were violently assaulted, but the keepers said that they had not followed them with intent to apprehend them; it was held that the assault must be committed at the time when the keepers are attempting to apprehend the poachers, and therefore the prisoners must be acquitted (*t*)

Upon an indictment for wounding with intent to prevent their lawful apprehension, it appeared that the two prisoners were *seized while poaching in the night on a preserve which had belonged to the Earl of Lichfield, and was then in the possession of his trustees, and the head-keeper had been appointed by Lord Lichfield twenty years before, and regularly paid by Lord Lichfield's agent to the time in question, but had never had any direct communication with the trustees, and a watcher, appointed by the head-keeper, had been wounded by the prisoners whilst apprehending them, and it was held that the evidence of authority was sufficient. (*u*)

So where a covert was the property of Sir John Acton, an infant, and Lord Granville had married Sir John's mother, and had exercised the right of killing and preserving game on Sir John Acton's property for seven years, and had appointed a gamekeeper; it was held that this was sufficient *prima facie* evidence of his right under the 1 & 2 Will. 4, c. 32, s. 36, to demand and take game from a person found in the covert. (*v*)

The ninth section creates two distinct offences, namely, first *entering* on land, on of the party being armed; and secondly, *being* on the land armed. (*w*)

By the express words of sec. 9, if several are together, and any one of them is armed, all of them are liable to be convicted; and it was held on the 57 Geo. 3, c. 90, the words of which were "if any person or persons," &c., "shall be found," &c., "armed with any gun," &c. O'Flannagan and two others were in a park at night, and two of them had guns: O'Flannagan had one, but which of the other two persons had the other gun could not be ascertained; the point was therefore saved, whether either of these two could be found guilty; but, upon a case reserved, the judges were clear that, if any one of the party was armed, every one of the party was within the Act. (*x*) But it was held, on the same repealed statute, that if several were out together, and one had arms without the knowledge of the others, the others were not liable to be convicted. Johnson and Southern went into a close in the night to kill game; Johnson had a loaded pistol, but Southern did not know it: and, upon a case reserved, the judges thought Southern not liable to be convicted under the Act. (*y*)

A constructive arming was held not to be sufficient within the new statute; therefore an indictment allege that two defendants, together with another person, entered a close, the two defendants being armed, and it appear that the two defendants were unarmed, they must be acquitted. An indictment stated that Davis and Griffiths, together with another person, entered certain land, "the said Davis and Griffiths then and there being armed:" it was proved that the third person had a gun, but Davis and Griffiths were unarmed; it was held that Davis and Griffiths must be acquitted; for under the 9 Geo. 4, c. 69, s. 9, a constructive arming is not sufficient, and as the indictment stated that these two men were *armed, and the proof was that neither of them was so, the allegation was not proved, and the case therefore failed. (*z*)

But where an indictment for night-poaching charged eight prisoners with "being

(*t*) Reg. v. Doddridge, 8 Cox C. C. 335, Channell, B.

(*u*) Reg. v. Fielding, 2 C. & K. 621 (61 E. C. L. R.), Cresswell and Patteson, JJ.

(*v*) Reg. v. Wall, 2 Cox C. C. 288, Coleridge, J.

(*w*) Per Coleridge, J., Rex v. Kendrick, 7 C. & P. 184 (32 E. C. L. R.), and MSS. C. G. See also Davies v. Reg., 10 B. & C. 89 (21 E. C. L. R.), *post*, p. 665. In Rex v. Mello, 2 D. P. C. 173, Taunton, J., held that the words "entering and being," in the 1 & 2 Will. 4, c. 32, s. 30, only constituted one offence; *sed qu.* for persons may enter land with innocent intent, and afterwards begin poaching.

(*x*) Rex v. Smith, MSS., Bayley, J., and R. & R. 368.

(*y*) Rex v. Southern, MS., Bayley, J., and R. & R. 444.

(*z*) Reg. v. Davis, 8 C. & P. 759 (34 E. C. L. R.), Patteson, J.

pectively armed with guns and other offensive weapons," and the jury found that of the prisoners were armed with guns and the rest with bludgeons; it was objected, that a merely constructive arming was not sufficient under the 9 Geo. 4, c. 9, and that every prisoner not armed with a gun was entitled to be acquitted, that no reliance could be placed on the words, "and other offensive weapons," that the statute enumerating by name gun, crossbow, firearms, and bludgeons, adding "or any other offensive weapons," the indictment ought to have specified an offensive weapon in any case, and particularly where the weapon was one of the named in the statute; Coleridge, J., overruled the objection, and upon a case served, the judges were of opinion that the conviction was right, and overruled *q. v. Davis*.(a)

Large stones are offensive weapons, if they are of a description capable of occasioning serious injury, and if they are brought and used for that purpose. The defendants had brought with them from a distance some large heavy smooth stones, and had thrown them at a gamekeeper and his assistants, whereby they had been sick and knocked down; it was left to the jury to say, whether the stones had been brought by the defendants to the place or found upon the spot; whether they were of such a description as to be capable of occasioning serious injury to the person if used offensively; and whether they were brought and used for that purpose; for that, if they were satisfied of the affirmative of all those questions, these stones were offensive weapons within the statute.(b) Where a stick or other instrument, ordinarily used for the purpose of walking, is found in the possession of persons, it is a question for the jury, whether such stick or other instrument was taken out for the purpose of being used as an offensive weapon, for if it was taken for such a purpose it is an offensive weapon within the statute. The prisoner taken with him when poaching a thick stick, large enough to be called a bludgeon, but which, being lame, he was in the habit of using as a crutch; it was held to be a question for the jury, whether he took it out with intent to use it as an offensive weapon, or merely for the purpose to which he usually applied it.(c) So where the only weapons proved to have been used by the prisoners were sticks, and, with which a gamekeeper had been knocked down, when produced, proved to be a very small one, fairly answering the description of a common walking-stick; upon its being objected that this stick could not be considered an offensive weapon, it was answered that the use made of it by the prisoner showed his intention, and the nature of the stick; Gurney, B., said, that if a man went out with a common walking-stick, and there were circumstances to show that he intended to use it for purposes of offence, it might perhaps be called an offensive weapon within the statute; but if he had it in the ordinary way, and upon some expected attack or collision he was provoked to use it in his own defence, it would be carrying the statute somewhat too far to say it was an offensive weapon within the meaning of the Act.(d) Where the prisoners were found in a field with hares, and dogs, and putting the hares on sticks walked off, and the sticks were about four feet and a half long, and about one and a half inch in diameter, one of them being weighted with an iron ferule, and another had a large knot at the thick end; Rolfe, B., directed the jury that if the prisoners brought the sticks merely and exclusively for the purpose of carrying hares, then they were not taken within the Act, though it was possible that the sticks might have been very actively used as offensive weapons in any affray with the keepers. But if the jury thought that the prisoners took the sticks for the double purpose of staking hares or carrying away the game, and also of attacking the keepers, if occasion should arise for such a purpose, then they would be armed within the Act.(e) So where an indictment on the 9 Geo. 4, c. 69, s. 9, alleged that the prisoners were

(a) *Reg. v. Goodfellow*, 1 Den. C. C. 81; 1 C. & K. 724 (47 E. C. L. R.); *Reg. v. Andrews*, 1 Cox C. C. 144, s. p.

(b) *Rex v. Grice*, 7 C. & P. 803 (32 E. C. L. R.), Ludlow, Serjt., after consulting Parke and Bolland, BB.

(c) *Rex v. Palmer*, 1 M. & Rob. 70, Taunton, J. See the cases collected, *ante*, p. 179, *et seq.*

(d) *Rex v. Fry*, 2 M. & Rob. 42.

(e) *Reg. v. Turner*, 3 Cox C. C. 304.

armed with bludgeons and other offensive weapons; and it was proved that all of them had sticks, and that one of them used his stick against a keeper, *Rex v. Johnson*(*f*) was cited to show that a stick used for offensive purposes was an offensive weapon; and Maule, J., observed that in that case the stick was capable of being an offensive weapon; but here there was no evidence as to the size or length; and left it to the jury to determine whether this stick was an "offensive weapon."(*g*)

Under the repealed statute it was held that perceiving a person fire was finding him armed, though his person was not seen at the time: and it was no answer to a charge under that Act that the parties put down their arms, and left them before they were seen, if it was perceived that some one was there armed before they were seen. A keeper heard a gun fired in a wood, and called to his man to watch: the persons in the wood immediately abandoned their guns, and had crept away two hundred yards from them, when the keeper and his man discovered and seized them. A case was reserved upon the question, whether they could be considered as found armed when they had got to so great a distance from their guns before they were discovered: and the judges (eleven) held that they were, and that they were rightly convicted.(*h*)

So it was sufficient under the repealed statute, if the evidence satisfied the jury that the prisoner had been in the place named in the indictment for the purpose of destroying game. Upon an indictment, which charged the prisoner in every count *654] with having entered a wood, called Kingshoe Spinney, it was proved that a gamekeeper heard nine reports, and saw three flashes in the wood: the prisoner was not seen in the wood, but was soon afterwards seen in a close which adjoined the wood: upon this evidence it was left to the jury to say, whether the prisoner was one of the party in the wood; and they having found that he was, the judges, upon a case reserved, held that, as there was evidence to satisfy the jury that he had been in the wood armed, or was one of a party who had been so, it was sufficient.(*i*)

So it is not necessary under the new Act that the defendants should be actually seen in the close laid in the indictment to satisfy the jury that they were in fact in the close for the purpose alleged. Thus where the prisoners had been seen in a close which lay between two woods, going in a direction from one of the woods, in which shots had been previously heard, towards the other wood, it was left to the jury to say whether they had not been in the wood in which the shot had been heard.(*k*)

A difference of opinion exists as to whether all the three defendants must be proved to have been in the close laid in the indictment, or whether it is sufficient to prove that all were out for the common purpose of taking game, and that one entered the close, two more being near enough to the close to aid and assist. Where it appeared that Dowsell alone was seen in Rodborough Hill Brake, the place laid in the indictment, between which and Rodborough Wood a turnpike road ran, and at that time no one was in company with Dowsell, and he escaped out of the brake into the road, where he was seized by the keeper, and whistled loudly, upon which four more men came out of Rodborough Wood, and rescued Dowsell: shots had been heard in the direction of the brake and the wood, but the witnesses were unable to speak as to which place the shots were fired in: it was objected, that there was no evidence to show that any one except Dowsell was in the brake; and unless it appeared that three were *together* in the place specified, no offence was proved: and Patteson, J., held that in order to support this indictment under the 9 Geo. 4, c. 69, s. 9, it must be proved that the prisoners were all together in the place laid in the indictment, and as that was not shown, that the prisoners must be

(*f*) R. & R. 492, *ante*, p. 181.

(*g*) Reg. v. Merry, MSS. C. S. G.; 2 Cox C. C. 240.

(*h*) Rex v. Nash, MS., Bayley, J., and R. & R. 386.

(*i*) Rex v. Worker, R. & M. C. C. R. 165. The second and third counts stated the prisoner to have been found in Kingshoe Close, which adjoined the wood, and a question was raised upon these counts, but not decided, viz., whether it was necessary that the prisoner should be found armed in the same close, into which he entered for the purpose of killing game?

(*k*) Rex v. Capewell, 5 O. & P. 549 (24 E. C. L. R.), MSS. O. S. G. Parke, B.

d.(l) But where an accomplice proved that all the four defendants went to the place called Norton Hill Wood for the purpose of killing pheasants, and that all of them, except himself and Meadows, went into the wood, they remaining there until the approach of the gamekeepers the witness and Meadows went into the wood, and informed the others of it, when they all ran away together; Alderson, B., said, "the entering on the land by one is to be considered as the entering of all, if the others are at the place and assisting—exactly in the same way that would fix them in a case of burglary; there all are guilty, as well those who actually enter the house as those who are close at hand on the outside of it, waiting to watch or to carry off the property; it is enough if all these persons were at the place, each of them acting his part, and concurring to one common intent, although some only of the party were bodily in the wood." (m) And in another case, where one or two of the four poachers were not actually in the wood named in the indictment, but were waiting outside to watch, the same very learned judge said, "if two persons were in the wood, and the other two outside were of the same party, and there for the same purpose, it would be an offence within the Act. Suppose that some of the party were to go down one side of the hedge, and some down the other, beating the same fence, that would be no offence within the statute, according to *Rex v. Dowsell*; (n) and the same consequence would follow if two went into the wood, and a number of others surrounded the outside: surely the statute meant to include such cases: I have a strong opinion on the point; but out of respect for my brother Patteson's opinion, if the question arises, I will reserve the point." (o)

(t) *Rex v. Dowsell and Bridgewater*, MSS., C. S. G., s. c., 6 C. & P. 398 (25 E. C. L. R.). There was no doubt in this case that all the party went for the common purpose of killing game both in the brake and in the wood. C. S. G.

(m) *Rex v. Passey*, 7 C. & P. 282 (32 E. C. L. R.).

(n) *Supra*, note (l).

(o) *Rex v. Lockett*, 7 C. & P. 300 (32 E. C. L. R.). Alderson, B. The jury having found that all the defendants had entered the wood, the question was not reserved. In *Rex v. Andrews*, 2 M. & Rob. 37, Gurney, B., is reported to have expressed a similar opinion, though it was not necessary for the decision of the case; but as the learned Baron, in a case at Stafford Spring Assizes, 1841, in which the same point arose, expressed great doubts on it, and would have reserved the point if the jury had convicted, the opinion expressed in *Rex v. Andrews* cannot be considered as being the deliberate opinion of the learned Baron. This question may be considered under two states of facts: first, where less than three enter the land, the others being near enough to aid and assist; secondly, where three enter and others are near enough to aid and assist. First, as to the case where less than three enter, this is quite as much a question of whether an offence within sec. 9 has been committed, as whether those who have not entered the field are guilty of such offence; and it is submitted that, whether we look at the object or the words of the clause, there must be an actual bodily entry by three persons into the close to bring the case within sec. 9. The object of the clause was to protect keepers from violence; now it is obvious that if less than three be in the close there is less danger of violence than if three be in it; if three be in the close they are ready to assist each other in committing violence; if some be out of the close, they must get into the close before they are in a position to commit it, and in some cases this might be impracticable; thus in the case put by the very learned Baron of part going down one side of a hedge, and part down the other, the hedge might be so strong that the one part could not get through it to assist the other in an attack upon keepers: and many similar cases might be put. As to the words, they seem strongly to indicate that there must be an entry by all three, and all three "together;" the word "together" is very important: if three poachers went to a wood of very large size, and each entered it separately at far distant points, they would have been within the clause if the word "together" had been omitted. Again, the words are, "any of such persons being armed." Suppose that the one that entered was not armed, but that one of the others was, then if it were held that the offence was complete, it would be so holding, although no person armed had entered the land; if it were held necessary that the one who entered should be armed, it would be limiting the arming to one particular individual, instead of leaving it indefinite which was armed. Difficulties would also arise from holding the entry of one to be the entry of all. Suppose three poachers went out with the common design of taking game in a narrow plantation, and the fields on each side of it, and that one went up the plantation, and one up each adjacent field, all being near enough to assist in killing game; according to such a construction each would be guilty of three distinct offences; in other words, all three would be together in three different closes *uno eodemque tempore*. The instance of burglary is not analogous, because that offence does not consist in an entry by "three or more together,"

*Where three poachers go out with a common purpose, but afterwards separate
 *656] in pursuit of game in different fields, they are not guilty of an offence within sec. 9. The three defendants went out for the purpose of night-poaching: Powell and Owen were seen setting nets in the hedge-row of the yew tree piece, they being on the other side of the turnpike road, and Nickless went into another field; Powell and Owen set a dog into the yew tree piece, which drove a hare into one of the nets; it was
 *657] *held that the case was not within the statute, as Nickless was independently engaged in poaching in the field, he having left the other poaching in the road. (p)
 Upon an indictment against six prisoners for night-poaching in Ratcliff's field, it

but by one person; as soon, therefore, as an entry by one is shown, the crime is proved, and then the question is, whether others engaged in the same transaction were principals in the second degree or accessories. Here the question is whether the crime has been committed. In burglary, and indeed in most, if not all, common law offences, where several persons are present at the commission of a crime, the indictment may either state the facts according to their legal effect, i. e. that all committed the act; or as they occurred, i. e. that one did the act, and that the others were present aiding and assisting. If, therefore, the case of burglary were analogous, an indictment alleging that one entered the field, and that the others were present aiding and assisting, ought to be good, and yet it is conceived no such indictment could be so framed as to give effect either to the word "together," or to the indefiniteness of the words "any of such persons being armed." It is to be observed, also, that sec. 2 only authorizes the apprehension of those who are "found upon any land;" so that the persons not in the field could not be apprehended under that section. The Game Act, 1 & 2 Will. 4, c. 32, s. 32, which applies to "any persons to the number of five or more together, found upon any land," may also be referred to as showing that there must be an entry by all; for how could it be said that finding one person in a field, with four in the adjoining field, was finding five together in the field where the one was found? On the whole it is submitted, that unless there has been a bodily entry by three together the offence is not complete.

Secondly, where three have bodily entered into the close, and others are near aiding and assisting, here the crime is assumed to be complete, and the question is, whether those near are guilty of it within sec. 9. If the common law rule, by which all are principals in misdemeanors (see note (b) *ante*, p. 128) prevailed, not only those near enough to assist, but all who were parties to the transaction, although absent, would be guilty; but it seems admitted on all hands that the common law rule does not apply; indeed Alderson, B., could only have referred to the analogy of burglary in *Rex v. Passey*, because he thought the common law rule did not apply. Some limit, then, must be put upon the clause, and it is submitted that the correct limit is to confine it to the persons who actually enter the close. The intent with which the parties enter being the same (with the slight difference pointed out in note (i) *ante*, p. 641) in both sec. 1 and sec. 9; sec. 9 rather authorizes a heavier punishment than introduces a new offence, and the two sections may well be read together thus: if any persons, whether one or more, enter, &c., they shall be liable to the punishment in sec. 1; but if three or more enter together armed, they shall be liable to the punishment in sec. 9, and the heavier punishment of that section may well be confined to those who actually enter the close. The clause requires both an entry and an arming, and as an entry by any number, however large, if unarmed, will not be sufficient; so it is but reasonable that a presence without an entry should not be sufficient; and as the statute has made an arming by one sufficient, if it had been intended that an entry by part should enure as an entry by all, probably it would have been made so by express words.

With regard to the entry, it is submitted that the statute intended an actual bodily entry into the close, and not such an entry as would amount to a trespass at common law. The doctrine in burglary that if any part of the person be introduced into the house, it is a sufficient entry, has long been considered as going a great length, and it would be carrying it much further to apply it to this offence. Sec. 2 also seems to show that an entry of the whole person was intended: it provides that "where any person shall be found upon any land, he may be apprehended upon such land," or in case of escape "therefrom;" now, how can it be said that a person who merely introduces his hand into one field while standing in another comes within this clause? The Game Act, 1 & 2 Will. 4, c. 32, ss. 31, 32, affords a similar argument. Suppose three poachers went, with intent to take game, to a park wall, too high for them to get over, and one, in the presence of the others, introduced his hand through a hole left for hares at the bottom of the wall, and set a snare within the park, could it be fairly contended that this was an entry by all armed into the park within sec. 9?

On the whole it is submitted that Mr. J. Patteson's construction of the statute is correct, and that there must be an entry of the whole person by three persons into the close to bring the case within sec. 9, and that none are within that section except those who actually enter the close. C. S. G.

(p) *Reg. v. Nickless*, 8 C. & P. 757 (34 E. C. L. R.), Patteson, J.

appeared that the prisoners were in company in a lane adjoining the field in question setting nets between the ditch and the hedge of the field to take game. One of them remained with the nets, and the rest divided into two parties, and went round the field. Three or four of the prisoners armed with bludgeons were seen at one time beating in the field, with two dogs, for game. A witness stated that he saw all the prisoners come out of the field, and go together to the nets and take them up. The prisoners were all associated and engaged in the common purpose of taking game in the field in question. The prisoners were pursued and apprehended, and four of them had sticks or bludgeons, and two of them drew knives from their pockets, and threatened to stab the takers. It was objected that the evidence did not sufficiently prove that all the prisoners had been in the field, and that none could be properly convicted, who had not been in the field, and as those who had been in the field could not be identified, all must be acquitted. Wilde, C. J., did not think the evidence sufficiently certain that all had been in the field, and directed the jury to consider whether all the prisoners were at the time associated and engaged in the common purpose of taking game by some of them going armed into the field, and were beating for game, while others rendered their aid by remaining outside the edge; and directed the jury if they were satisfied that all the prisoners were so engaged, they were all liable to be found guilty, although the witness could not identify which of the prisoners entered the field. The case was left to the jury on the assumption that some of the prisoners never entered the field. The jury found the prisoners guilty, and upon a case reserved the conviction was held right. The judges in this case did not think it necessary to decide, whether it would be an offence within the statute if a party of three or more together, one being armed, entered and were in land consisting of two or more enclosures in the same or different occupations, because here the indictment made it essential to prove that the offence was committed in the field occupied by Ratcliffe. Five of the judges (q) were of opinion that to constitute the statutable misdemeanor the party must enter into and be bodily in the close, and that if three were in the close and three out the latter were not guilty: and as the three who entered in this case could not be ascertained, they were entitled to be acquitted. Seven of the judges (r) thought that if three were in the close, one being armed, they were guilty, and that all others who were together with them aiding and assisting were guilty of the same misdemeanor, though they were not in the field (s).

*This decision was anything but satisfactory, and where an indictment charged the prisoners with night-poaching in Oakley Coppice, and it appeared that the gamekeeper saw three men coming along a field within a few yards of the coppice, and as though coming from it, after he had heard a shot in the direction of the coppice; and a struggle ensued, and pheasants recently killed were found near the shot; it was objected that there was no proof that all the three men entered the coppice; and Patteson, J., said he was entirely of opinion that three men must have actually entered the coppice in order to constitute this offence. He entirely concurred in the views expressed in the note to "Russell on Crimes." (t) Indeed if the constructive presence were alone sufficient, it would follow that if three men went out to poach, and each entered on a separate piece of land, each of the three would be in three different places at the same time; a conclusion which was utterly absurd. (u)

(q) Parke, B., Patteson, J., Cresswell, J., Platt, B., and Williams, J.

(r) Denman, C. J., Wilde, C. J., Pollock, C. B., Rolfe, B., Coltman, J., Wightman, J., and Erie, J.

(s) Reg. v. Whittaker, 1 Den. C. C. 310; 2 C. & K. 636 (61 E. C. L. R.). Notwithstanding this decision the editor adheres to the opinion expressed in his note to the last edition. The fallacy, on which the opinion of the majority of the judges proceeded in this case, lies in applying the principle applicable to a common law felony to this particular misdemeanor. In misdemeanor all who take part are principals, or only those who fall within the special terms of an enactment. Either, therefore, all who take any part in night-poaching, though a 100 miles off, are guilty, or only those who bodily enter the field. See *Rex v. Fletcher*, 2 Str. 1166, cited 1 Den. C. C. 384. The marginal note in 1 O. C. R. is incorrect—"some" should be "three."

(t) Note (o), *supra*, p. 655.

(u) Reg. v. May, 5 Cox C. C. 176. The prisoners were acquitted, otherwise the point could have been reserved for reconsideration.

On an indictment on sec. 9, it appeared that three persons went out together armed with guns in the night to destroy game, and were together in one of the closes mentioned in the indictment, called Thirteen Acres, but not for the purpose of killing game in that close (for there was none there), nor in one adjoining close by shooting from it. They were passing along it to another place. One at least of the three was in a close mentioned in the indictment, called The Spring, which had pheasants in it, for the purpose of destroying game in that close, but the whole three were not; they were all, however, at that time of the same company, and with that common purpose. The fourth count stated that the prisoners were in enclosed land occupied by C. White. The Spring and the Thirteen Acres were both enclosed and contiguous, being only separated by a fence, and both in the occupation of C. White. There was a question whether this could make any difference, Parke, B., therefore respited the judgment, and reserved the case for the opinion of the judges, and the following judgments were given: Lord Campbell, C. J., "The fourth count of the indictment alleges that the prisoners were in enclosed land occupied by C. White; and on that count at all events I think the conviction was right and ought to be affirmed. Some confusion seems to have arisen on this matter from not attending sufficiently to the provisions of the Act. It has been treated as though the word, close, occurred in the Act, whereas it only specifies *any land open or enclosed*; a practice has consequently prevailed of naming a certain close in the indictment, which is quite needless. It would certainly be requisite to designate *some land*, and give it some description; but if that land comprehended fifty closes, and the offence was committed on any part of such land, it would be within the statute. If therefore A., B., and C. all belonged to one party with one common intent, A. might be *659] in Blackacre, *B. in Whiteacre, and C. in Greenacre, and all guilty under this statute." Parke, B.: "I am of the same opinion; though at one time, I felt some doubt whether there could be a conviction on any count, I now think there may on the fourth. If the three are all of one party, one or more being armed with an offensive weapon, and with the common object of destroying game in the night, it is immaterial whether they are in the same or different closes or enclosures. It is necessary to describe the land correctly in the indictment, for the purpose of identifying it; but if the three are on the land so described together under the circumstances I have mentioned, it is sufficient to bring them within the statute, whether the land be open or enclosed, or in one or more enclosures, or in one or several occupations. In Mr. Greaves' very able note (a) the reasoning appears to me to be founded on the assumption that the statute provided only for the case of three being together in *one and the same* piece of enclosed land, if the land was enclosed, or *one and the same* piece of open land, if it was open, whereas the statute contains no such provision." Alderson, B.: "The indictment charges the prisoners with entering, &c., certain land, &c.; it is, therefore, necessary to describe the land, the entering which constitutes the offence charged. The land may consist of different closes, and be in different occupations; but whatever be the number of closes, or of occupations, the land in question must be rightly described in the indictment." (v)

(a) Note (o), *ante*, p. 655.

(v) Reg. v. Uzzell, 2 Den. C. C. 274, Talfourd, J., and Platt, B., concurred. This case was not argued, and therefore is entitled to much less weight than it otherwise would have been. The first remark on it is that Reg. v. Whittaker was clearly abandoned as wholly untenable. Then is this case rightly decided? and, with all deference, it is confidently submitted that the decision is erroneous. Sec. 1 enacts that if "any person" shall "enter or be in any land whether open or enclosed." Now, as it cannot be supposed that the Legislature contemplated the case of a person being in two closes or pieces of land at one and the same time, it is clear that "land here means one close or piece of land, and the same term in sec. 9 ought to be construed in the same sense also; and that is the true sense of the word; for though land be *nomen generalissimum* as including all mines, &c., it is quite unusual to speak of several closes even in the occupation of the same person as "land;" the general, if not invariable, custom being to use "lands;" and an instance of any number of different fields being spoken of as "land" when they were in the occupation of different persons would indeed be extraordinary. The repealed Act, 57 Geo. 3, c. 90, had the words "forest, chase, park, wood, plantation, close, or other open or enclosed ground," and there can be no doubt that the offence under it was confined to a single close or ground; and it is obvious that the change to "land" is the

*A difference of opinion also exists as to what constitutes an entry within the meaning of this statute. It has been held that if persons standing in a road hang nets on the twigs of a hedge within a close, it is an entry within sec. 9. Some poachers standing in a lane spread their nets upon the twigs of a hedge, which separated the lane from the close; Alderson, B. said, "I shall tell the jury if they are satisfied that, in effecting a common purpose by all the defendants, the nets were hung upon the twigs of the hedge so as to be within the field, it was an entry. Lord Ellenborough, C. J., in *Pickering v. Rudd*,^(w) stated that he once held that

Geo. 4, c. 69, was merely for the purpose of using one term applicable to every kind of land included in the profuse verbiage of the old Act, and not for the purpose of altering the locality of the offence; and as "open or enclosed ground" in the Act plainly meant either one or the other, but not both, so it does in the new Act also; and therefore the words "land whether open or enclosed," are precisely the same as "open or enclosed land," and the offence is created as to either, but not as to both. Again, this decision wholly overlooks the word "together." How three or more persons, who enter three or more different closes separated by hedges, even if they adjoin each other (and the judgment in this case does not limit the decision to such a case), can be said to satisfy the words "if any persons to the number of three or more together shall by night unlawfully enter or be in any land," it is impossible to conceive. To say that three persons are together, who are in different places, is a plain contradiction in terms. It might just as well be said that three persons, who entered into three different houses at the same time, were together when they were in those houses. The clause was framed to prevent and punish violence by numbers of persons being together—not merely forming one party—but being so near to each other that they could aid and assist each other in committing violence. And if the clause had contained no reference to land at all, still it must have been confined to those who were in such close proximity to each other as to be capable of assisting in the violence; and *a fortiori* must the clause be so limited in order to give effect both to the word "together" and "land." See *Reg. v. Jones*, *post*, p. 661.

It is quite obvious too that though the primary object of this section be the prevention of violence, both the old and new Acts were really passed for the benefit of the owner of the particular land by the protection of the game. Sec. 1 is exclusively devoted to that object, and sec. 2 is exclusively devoted to that object and the protection of the owner, &c., in carrying that object into effect. And under sec. 2 this decision would lead to so many inconveniences that it is plain the Legislature never could have intended anything of the kind. In this case it is clear that under sec. 2, the poacher who was in "The Spring" might have been apprehended; but it is equally clear that if the others had been on another person's land without any intent to take game there, they could not have been apprehended at all. It would be easy to multiply cases to show the strange results to which this decision would lead. But it will suffice to refer to the Day Game Act, 1 & 2 Will. 4, c. 32, some sections of which are plainly framed on this Act, and show beyond a doubt the meaning of it. Sec. 32 is introduced in terms for the purpose of protecting game from trespassers by a more summary means, and its terms are, 1st, "if any person commit any trespass by entering or being, in the day-time, upon any land in search or pursuit of game," &c.; 2d, "if any persons, to the number of five or more together, shall commit any trespass by entering or being in the day-time upon any land in search or pursuit of game," &c.; and any person charged with "any such trespass" may prove any matter which would be "a defence to an action at law for such trespass." Now, it is perfectly clear that "land" here means one land; for "trespass" means one trespass, and all the words of the clause with reference to land are in the singular number, "leave," "licenae," "occupier," &c. Besides the clause is only a summary action of trespass, and who ever dreamt of several occupiers or owners of different lands joining in an action of trespass? This clause is the counterpart of 9 Geo. 4, c. 69, s. 1, and sec. 31 of sec. 2 of that Act. Now by sec. 31, where any person is found on "any land or upon any of his Majesty's forests, parks, chases, or warrens," &c., "any person having the right of killing the game upon such land," &c., may require him to quit the land: now here as "any of his Majesty's forests," &c., means one forest; so "any land" means one land, and "such land," applying both to "any land" and "any forest," &c., must mean one land also. The same terms are in sec. 32, which corresponds to 9 Geo. 4, c. 69, s. 9, and afford similar observations. And see sec. 36. It would be difficult to find a clearer legislative exposition by one Act of the terms in another than the 1 & 2 Will. 4, c. 32, affords of the 9 Geo. 4, c. 69. It is to be observed also that in general the question will not be whether the prisoners are liable to no punishment at all, but whether they are liable to penal servitude for fourteen years under sec. 9, or penal servitude for seven years under sec. 2, or to be summarily dealt with under sec. 1. Patteson, Cresswell, and Williams, JJ., and Platt, B., who in *Reg. v. Whittaker* dissented from the decision were not present when *Reg. v. Uzzell* was decided.

(w) 1 Stark. N. P. C. 56 (2 E. C. L. R.); 4 Camp. 219. Lord Ellenborough, C. J., held, that sending dogs into a plantation to beat for game was a trespass in the plantation.

firing a gun loaded with shot into a field was a breaking of the close, and I am of opinion that if these defendants so placed the nets within the field it was an entry by them all." (x) But in a similar case it was held that if persons standing in a road set nets in a hedge-row of an adjoining field, and sent a dog into the field to drive game into the nets, this is not an entering of land within sec. 9. Poacher *661] were seen setting nets in the hedge-row of a field, they being on the other side of the hedge in a turnpike-road; they also sent a dog into the field which drove a hare into one of the nets; it was contended that the sending of the dog into the field to drive the hares into the nets was, in point of law, an entering into the field; but it was held that it would be straining the words too much in a criminal case to hold that this was within the statute. (y) In one case (z) the Court declined to express an opinion whether it was necessary to a conviction of a defendant under the 9 Geo. 4, c. 69, or under the 1 & 2 Will. 4, c. 32, s. 30, that he should personally have gone into the close, or whether it might be sufficient that he, standing without, sent others in. But in a later case (a) strong opinions were uttered at the Legislature in the 1 & 2 Will. 4, c. 32, s. 30, contemplated that the offender must personally be or enter on the land. Had the words been only "commit any trespass on land in pursuit of game," sending a dog upon the land would have been within the meaning of the words; but the words being "commit any trespass by entering or being upon any land" the construction must be that there must be a personal entering or being on the land.

Where on an indictment on sec. 9 against three for entering Mount Coppice, it appeared that two of them were seen together running out of the coppice, and the third was almost immediately afterwards seen coming out of it alone, having a gun and a pheasant, and one of the others had a gun; Maule, J., said, "the three prisoners must be shown to have acted together and in concert. It is not sufficient to show that all were in the close at the same time; there must be some proof of an association together. This is often done by showing that the parties were seen together previously, the day or evening before. There is no evidence of the kind here. It is, however, a question for the jury;" and the case was left to the jury accordingly. (b)

If the indictment state that the defendants entered into a certain close with intent, then and there, to kill game, it must be proved that the defendants had the intent to kill game in the particular close named. Thus, where upon an indictment under the repealed statute so laying the intent, the jury found that the defendant was still in pursuit of game, but they could not say whether in the close specified or elsewhere; the judges held that as the entry, with intent to kill game, was confined by the indictment to the close specified, it was necessary to prove the intent as to that close (c) And upon a similar indictment under the new Act, where it appeared that the prisoners were seen in the field laid in the two first counts, but it was not shown that they were doing any act tending to the destruction of game in it; and it rather seemed that they were merely crossing it in their way from one wood to another; Parke, B., held that the two first counts made it necessary to show that the prisoners *662] were in the field laid for the purpose of killing game there. (d) So where on a similar indictment for entering Breadstone Plantation, it appeared that a gun was heard about a quarter of a mile from the plantation, and the prisoners were seen in the plantation with a gun, and there were many pheasants roosting in the plantation, which the prisoners must have seen, but they did not fire at any of them.

Lord Berkeley v. Wathen, *ex relatione* Mr. Bloxsome, who was attorney in the cause. And see Reg. v. Pratt, 4 E. & B. 860, where Lord Campbell, C. J., and Crompton, J., expressed similar opinions.

(x) *Athea's case*, 2 Lewin 191.

(y) Reg. v. Nickless, 8 C. & P. 757 (34 E. C. L. R.), Patteson, J. See note (a), *ante*, p. 655.

(z) Reg. v. Scotton, 5 Q. B. 493 (48 E. C. L. R.).

(a) Reg. v. Pratt, 4 E. & B. 860 (75 E. C. L. R.), per Lord Campbell, C. J., and Crompton, J.

(b) Reg. v. Jones, 2 Cox C. C. 185.

(c) *Rex v. Barham*, R. & M. C. C. R. 151.

(d) *Rex v. Capewell*, 5 C. & P. 549 (24 E. C. L. R.).

idge, J., said, in summing up, "You must say whether these persons were in particular covert with an intent to kill game there. If you can suppose that had gone out on that night poaching in every other covert in the county, that not be sufficient to support the charge contained in this indictment, if they were in this particular covert with intent to destroy the game there. It lies on the tutor to make out to your satisfaction that the prisoners had an intent to kill in this particular covert; the intent can in this case only be inferred from the act of the parties, and it is here shown that there was game which the defendant must have seen, but did not make the slightest attempt to destroy."^(e) On an indictment which charged that the prisoners were in the Great Ground with intent and there to take game, it was proved that they were all in that close at 4 o'clock, A. M., when they were all taking up nets, which were spread against a gate in a gap in the fence; they had dogs with them, and when they had put the nets bag, they took up five hares which were lying dead on the ground about seven feet from the nets; it was contended that there was not sufficient evidence to prove they were in the Great Ground with intent to take game there; and the previous cases were cited. Rolfe, B., "The cases have certainly gone to that length under the statute, and as the indictment charges an intent then and there to take game, I in deference to those cases, direct the jury that they must be satisfied the prisoners were in the Great Ground with intent then—that is at that hour—and that is in that spot—to take game. For my own part, however, I must say, I should have been inclined to hold that the offence was complete if a man were to enter a close and were to take game in the next." "It was no matter here where the hares were taken; though they were taken in another close, the nets were spread in the Great Ground, and the offence was complete, though no game was taken there, if they were there with intent to do so."^(f)

No doubt is stated in the marginal note of *Rex v. Barham*,^(g) whether it is necessary that the defendant should have such an intent in the place in which he is found, unless it be so stated in the indictment, and *Rex v. Worker*,^(h) is referred to in that case, although the indictment was general, no such question arose; it should seem that whether the words "then and there" be in the indictment or the entry into the close must be proved to be with intent to kill game in such place, for unless such be the case the entry was made into that close, not with intent to kill game, but with some different intent, as, for instance, to pass over it. And it appeared that the prisoners were in Shutt Leasowe, a place named in the indictment, and which adjoined Short Wood, and were apparently going to Short Wood, Patteson, J., said, "the intent was evidently to kill game in the close, into which none of the parties ever got for that purpose; it is true that they were charged with being in Shutt Leasowe, but they had no intention of killing game there; they must be acquitted."⁽ⁱ⁾

The indictment must in some way or other particularize the place; for the defendant has a right to know to what specific place the evidence is to be directed: and stating in the indictment that the party entered into a certain close there, was held not sufficient under the repealed statute. The first count of an indictment stated, that the defendant, at the parish of Whitford, in the county of Northumberland, having entered into a certain close there situate, with intent there illegally to kill game, was found at night armed with a certain gun; and the second count charged him in the same manner with having entered into a certain enclosed ground; but neither the name of the close nor the enclosed ground were described by name, ownership, occupation, or value. And upon a case reserved, Abbott, C. J., Holroyd, J., and Park, J. A. J., thought any such description unnecessary: but Burrough, J., Garrow, B., Best, J., Peck, B., and Bayley, J., thought otherwise, because this was substantially a local

Rex v. Gainer, 7 C. & P. 231 (32 E. C. L. R.).

Reg. v. Turner, 3 Cox C. C. 304.

R. & M. C. C. R. 151.

Ibid. 165.

Reg. v. Davis, 8 C. & P. 759 (34 E. C. L. R.). It does not appear whether the indictment had the words "then and there" in it; but, whether it had or not, the observation of the very learned judge appears to have been made generally, and without any reference to the form of the indictment.

offence, and the defendant was entitled to know to what specific place the evidence was to be directed; and the judgment was arrested.^(k) So, it has been held under the new statute that an indictment for entering "a covert in a patch of A." is too general.^(l) But it has been held sufficient to allege that the defendants entered *664] certain land *in the occupation of a person named, without stating whether the land was enclosed or not.^(m)

If the name of the close be stated in the indictment, and the name be misstated, it is fatal. An indictment alleged that the defendants entered a certain wood called "The Old Walk," in the occupation of the Earl of Waldegrave: it appeared that the wood had always been called "The Long Walk," and upon a case reserved, the judges held the variance was fatal.⁽ⁿ⁾ Where an indictment described the land as "Digmore Plantation, of and belonging to Sarah Harriett Williams," and she was a widow generally known as Mrs. Hosier Williams, and Sarah Harriett Hosier Williams, Hosier having been the name of a former husband, but she would be quite as well known by the name of Sarah Harriett Williams, and could not be mistaken for any other person; it was held that the description in the indictment was sufficient.^(o)

Where an indictment for night-poaching described the land as land "of and belonging to J. W. Dod," Patteson, J., held that it was sufficient, as that meant that the land was in his occupation.^(p)

An indictment alleged that the prisoners, "late of the parish of Foffants, otherwise called Fofants, otherwise called Fovant," entered "certain land called Foffants, otherwise called Fofants, otherwise called Fovant;" and it was objected that the indictment was uncertain as to the parish and the wood, as they were both described under these several names; Coleridge, J., held that there was nothing in the objection, "as all the names were *idem sonans*."^(q)

The indictment must allege not only an entry by night, but an arming by night. An indictment alleged that the defendants did by night unlawfully enter divers closes and enclosed lands, and were then and there in the said closes and lands, armed with

(k) *Rex v. Ridley*, T. T. 1823, R. & R. 515.

(l) *Rex v. Crick*, 5 C. & P. 508 (24 E. C. L. R.), Vaughan, B. It is very usual to describe the close simply as belonging to A. B., especially after describing it by name and occupation in previous counts. In some cases this may lead to inconvenience to the prisoner, and as it applies equally to every close belonging to A. B. who may be the owner of a large number of closes, it admits of doubt whether such a description be not insufficient, and the more so, as it is very possible that the grand jury may have found the bill, because they considered the offence proved as to one close, and the petit jury may convict, because they think the offence proved as to a different close. The first count charged the entry into the Nineteen Acres, the second into the same close in the occupation of a person named, the third into enclosed land belonging to Sir R. Peel. The prisoners were seen crossing the Nineteen Acres in the direction from a wood, in which shots had been previously heard, towards a wood on the other side of the Nineteen Acres. The whole belonged to Sir R. Peel. There was no evidence that the prisoners were in pursuit of game in the Nineteen Acres; and as the case had been conducted on the part of the prosecution, as if the charge related to the Nineteen Acres only, in addressing the jury I only adverted to the evidence applicable to that close, and contended, that the prisoners were entitled to be acquitted, as they were not proved to have entered *that* close for the purpose of poaching; and Parke, B., held that was so as to the two first counts, but that the third was applicable to the wood, from which the prisoners were coming, and on this count the prisoners were convicted: *Rex v. Capewell*, 5 C. & P. 549 (24 E. C. L. R.). Now there can be little doubt that the third count was inserted to prevent an acquittal, on the ground of variance in the description in the two first counts, and was intended to apply to the Nineteen Acres, and equally little doubt that the grand jury found the bill with reference to the Nineteen Acres only. In all cases where the close is described in general terms, it would be prudent to apply for a particular of the close in which the offence is intended to be proved, which I apprehend the Court would order to be delivered, as it is the usual course in all cases, where an indictment is so general as not to afford the defendant sufficient information. See *ante*, p. 456. C. S. G.

(m) *Rex v. Andrews*, 2 M. & Rob. 37, Gurney, B.; s. p., *Reg. v. Morris*, 5 Cox C. C. 205.

(n) *Rex v. Owen*, R. & M. C. C. R. 118, decided upon the 57 Geo. 3, c. 90. The marginal note adds that, "it is not necessary where the name of the owner or occupier of the close is stated to state the name of the close also." The case itself, however, contains no such point. C. S. G.

(o) *Reg. v. Morris*, 5 Cox C. C. 205, Talfourd, J.

(p) *Reg. v. Riley*, 3 C. & K. 116.

(q) *Reg. v. Andrews*, 1 Cox C. C. 144.

ans for the purpose of then and there taking and destroying game; it was objected that the words "then and there" did not mean that the defendants were there by night, but only on the day, and at the place aforesaid; and it was held that the indictment was bad. If the words "by night" had occurred at the beginning of the sentence, they might have governed the whole, or if they had been at the end of the sentence they might have referred to the whole; but here they are in the middle of the sentence, and are applied to a particular branch of it, and cannot be extended to that which follows. The two members of the sentence are distinct; the first states the entry into the closes by night, but does not state that the defendants were armed with the intent with which they entered; the second branch states, that they were in the closes armed for the purpose of destroying game, but does not state that they were there by night. Neither of those branches of the sentence contains all that is requisite to constitute an offence within the statute, and the two being distinct the indictment is bad. (r) [*665]

In an indictment for night-poaching it is sufficient to allege that the prisoners unlawfully entered, and it is not necessary to allege the facts which made the entry unlawful. (s) And in such an indictment it is sufficient to allege an intent to take game without specifying the particular kind of game (t)

The indictment need not contain any specific allegation that the defendants entered the close between the expiration of the first hour after sunset and the beginning of the last hour before sunrise, the period which by the twelfth section of the statute it is provided shall be considered night. (u)

The indictment may contain counts not only on the ninth section, but also on the second for assaulting a gamekeeper authorized to apprehend, for assaulting a gamekeeper in the execution of his duty, and for a common assault, (v) and if there be any doubt as to the number of persons not amounting to three, or the proof of their being out in pursuit of game, it certainly would be prudent to add such counts in all cases where an assault has been committed. Where an indictment, after stating the entry into the land by night, proceeded thus, the defendants "being then and there by night as aforesaid armed with a gun:" and it was objected that this averment was not sufficient, because "then" meant only the day and year aforesaid, and not the time of the entry; Parke, B., said, he would leave the defendants to their writ of error, but advised the insertion of the words, "at the time when they so entered," in such indictments in future. (w) Where an indictment alleged, that the defendants did enter, and were in certain lands, they "being then and there by night as aforesaid armed with guns, and other offensive weapons," and it was objected that the indictment did not contain any sufficient allegation that the defendants were armed when they entered the land; it was held that the indictment was sufficient, as all the requisites of the statutes had been complied with. (x) Where there was one indictment for shooting at a gamekeeper with intent to murder him, and another indictment for night-poaching, both founded on the same transaction, it was held that the prosecutor was not bound to elect which he would proceed upon, as the offences were quite distinct, and one of them could not possibly merge in the other. (y)

Upon an indictment for night-poaching the case was proved, except that it was shown that the land was the freehold of *Spode, and in the occupation of a tenant, and it was contended that in order to show that the prisoner was "un- [*666]

(r) *Davies v. Reg.*, 10 B. & C. 89 (21 E. C. L. R.). The following objections were also taken, but not adverted to by the Court: 1st, that the hour of the night ought to have been stated; 2dly, that it was not stated that the defendants unlawfully were in the close for the purpose of destroying game; 3dly, that it was not stated that the defendants were there together for the purpose of destroying game; and 4thly, that the indictment stated that they entered "divers closes" without specifying any in particular.

(s) *Reg. v. May*, 5 Cox C. C. 176, Patteson, J.

(t) *Ibid.*

(u) *Riley's case*, 1 Lewin 149, Parke, B.; *Pearson's case*, *Ibid.* 154, Gurney, B.

(v) *Rex v. Finucane*, 5 C. & P. 551 (24 E. C. L. R.), and MS. C. S. G. Parke, B.; *Rex v. Simpson*, *Stafford Spr. Ass.* 1830, Bolland, B., MS. C. S. G.

(w) *Rex v. Wilks*, 7 C. & P. 811 (32 E. C. L. R.). See *Stead v. Poyer*, 1 C. B. 782 (50 C. L. R.).

(x) *Rex v. Kendrick*, 7 C. & P. 484 (32 E. C. L. R.), and MS. C. S. G. Coleridge, J.

(y) *Rex v. Handley*, 5 C. & P. 565 (24 E. C. L. R.), Parke, B.

lawfully" there, it must be shown by direct evidence that he had not the permission either of the tenant or landlord; the jury found the prisoner guilty, and unless the particular proof suggested was necessary, there was abundant evidence, not merely that the prisoner and those with him were on the land, but also in their conduct that they were unlawfully there; and upon a case reserved, it was held that the conviction was right. If persons are found at night armed and using violence to keepers, it cannot be necessary to call the tenant of the land or the owner to prove they were not there by permission.(z)

(z) Reg. v. Wood, D. & B. C. C. 1.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

CHAPTER THE FIRST.

OF MURDER.

MURDER is the killing any person under the King's peace, with malice prepense aforethought, either express or implied by law.(a) Of this description the malice prepense, *malitia præcogitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide;(b) and it will therefore be necessary to inquire concerning the cases in which such malice has been found to exist. It should, however, be observed, that when the law makes use of the word malice aforethought as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief.(c) And in general any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed; but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be universally wicked, is adjudged to be of *malice prepense*, and consequently murder.(d)¹ Malice may be either *express* or *implied* by law. Express malice is, when one person kills another with a sedate deliberate mind and formed design: such formed design being evidenced by external circumstances, discovering the inward intention; as

(a) 3 Inst. 47, 51; 1 Hale 424, 448, 449; 1 Hawk. P. C. c. 31, s. 3.; Kel. 127; Post. 5; 2 Lord Raym. 1487; 4 Blac. Com. 198; 1 East P. C. c. 5, s. 2, p. 214.

(b) 4 Blac. Com. 198; Gastineaux's case, 1 Leach 417.

(c) Post. 256, 262.

(d) 1 Hawk. P. C. c. 31, s. 18; Post 257; 1 Hale 451 to 454.

¹ In many of the United States, murder has been divided by statute into two degrees. The first alone is punished with death. Murder in the first degree in general is that which is accompanied with a deliberate intent to take life. All other kinds of murder or malicious homicide are murder in the second degree. The cases upon this subject are very numerous, and need not be here cited. It will be sufficient to refer to those cases in which the character of the deliberation is considered. In general no time is necessary—deliberation for a moment is held sufficient. But the state of the actor's mind is always to be taken into consideration, and so drunkenness may be an important element. The character of the weapon, whether deadly in itself or not, is also an important element: *Comm. v. Drum*, P. F. Smith 9; *State v. Hoyt*, 13 Minn. 132; *Lanergass v. People*, 50 Barb. 266; *Lewis v. State*, 3 Head. 127; *McAdams v. State*, 25 Ark. 405; *McKenzie v. State*, 26 Ibid. 334; *Errin v. State*, 33 Tex. 638; *Donnelly v. State*, 2 Dutch. 463, 601; *State v. Shoults*, 24 N. H. 128; *Jordan v. State*, 10 Tex. 479; *Sullivan v. People*, 1 Parker C. R. 347; *Kilpatrick v. Comm.*, 7 Casey 198; *People v. Moon*, 8 Cal. 90; *Fahnestock v. State*, 23 Ind. 231; *Senan v. Comm.*, 8 Wright 55; *Fouts v. State*, 4 Greene 500; *Atkinson v. State*, 20 Tex. 2; *State v. McDonnell*, 32 Verm. 491; *Sanchez v. People*, 22 N. Y. 147; *Warren v. Comm.*, 1 Wright 45; *Resp v. Mulatto Bob*, 4 Dall. 146; *Comm. v. Green*, 1 Ashm. 289; *People v. Clark*, 3 Seld. 385.

The Act of the Legislature dividing the offence of murder into two classes does not change the common law offence of murder so as to require a different structure of the charging part of the indictment as to the malicious intent: *Gehrke v. State*, 13 Texas 3.

lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm.(e) And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden : (f) thus where a man kills another suddenly without any, or without a considerable provocation, the law *668] implies malice; for no person, unless of an *abandoned heart, would be guilty of such an act upon a slight or no apparent cause.(g) So if a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved.(h) And where one is killed in consequence of such a wilful act as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief.(i) And it should be observed as a general rule, that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse, or justification : (k) and that it is incumbent upon the

(e) 1 Hale 451; 4 Blac. Com. 199.

(f) 1 East P. C. c. 5, s. 2, p. 215.

(g) 4 Blac. Com. 200.

(h) 1 Hale 455; 4 Blac. Com. 200.

(i) 1 Hale 474; 1 Hawk. P. C. c. 29, s. 12; 4 Blac. Com. 200; 1 East P. C. c. 5, s. 18.

Malitia, in its proper or legal sense, is different from that sense which it bears in common speech. In common acceptation it signifies a desire of revenge, or a settled anger against a particular person: but this is not the legal sense; and Lord Holt, C. J., says: "Some have been led into mistakes by not well considering what the passion of malice is: they have construed it to be a rancour of mind lodged in the person killing for some considerable time before the commission of the fact, which is a mistake, arising from the not well distinguishing between *hatred* and *malice*. *Envy*, *hatred*, and *malice* are three distinct passions of the mind:" Kel. 127. Amongst the Romans, and in the civil law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it (*De Nat. Deor. Lib. 3, s. 30*) as "*versuta et fallax nocendi ratio*;" and in another work (*De Offic. Lib. 3, s. 18*) he says, "*mihî quidem etiam teræ hereditates non honestæ videntur si sint malitiosas* (i. e. according to Pearce, a *malo animo profectis*) *blanditiis officiorum: non veritate, sed simulatione quæsitæ*." And see Dig. Lib. 2, Tit. 13, Lex 8, where, in speaking of a banker or cashier giving his accounts, it is said, "*Ubi exigitur argentarius rationes edere, tunc punitur cum dolo malo non exhibet. * * * Dolo malo autem non edit, et qui malitiose edidit, et qui in totum non edit*." Amongst us malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Thus Lord Coke, in his comment on the words *per malitiam*, says, "if one be appealed of murder, and it is found by verdict that he killed the party *se defendendo*, this shall not be said to be *per malitiam*, because he had a just cause:" 2 Inst. 384. And where the statutes speak of a prisoner on his arraignment standing *mute of malice*, the word clearly cannot be understood in its common acceptation of anger or desire of revenge against another. Thus where the 25 Hen. 8, c. 3, says, that persons arraigned of petit treason, &c., standing "mute of malice or froward mind," or challenging, &c., shall be excluded from clergy, the word *malice*, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice, in opposition to cases where some just cause may be assigned for the silence, as that it proceeds from madness, or some other disability or distemper. And in the statute 21 Edw. 1, *De malefactoribus in parciis*, trespassers are mentioned who shall not yield themselves to the foresters, &c., but "*immo malitiam suam prosequendum et continuando*," shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been (as will be seen in the course of the present and subsequent chapters) whether the act were done with or without just cause or excuse; so that it has been suggested (Chapple, J., MS., Sum.) that what is usually called malice implied by the law would perhaps be expressed more intelligibly and familiarly to the understanding if it were called *malice in a legal sense*. Malice, "in its legal sense, denotes a wrongful act done intentionally without just cause or excuse:" per Littledale, J., *M'Pherson v. Daniels*, 10 B. & C. 272 (21 E. C. L. R.), and approved by Cresswell, J., as the more intelligible expression in *Reg. v. Noon*, 6 Cox C. C. 137. "We must settle what is meant by the term malice. The legal import of this term differs from its acceptation in common conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is neither necessary in support of such indictment to show that the prisoner had any enmity to the deceased, nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional, and done without any justifiable cause:" per Best, J., *Rex v. Harvey*, 2 B. & C. 268 (9 E. C. L. R.).

(k) 4 Blac. Com. 201. In *Rex v. Greenacre*, 8 C. & P. 35 (34 E. C. L. R.), Tindal, C. J., said, "where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence, or by inference from the circum-

*prisoner to make out such circumstances to the satisfaction of the Court and jury, unless they arise out of the evidence produced against him.(l)¹ It [*669 should also be remarked that, where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected. And provocation will be no answer to proof of *express* malice; so that if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring *that he will have his blood*, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion.(m) But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A. and B., and they are reconciled again, and then, upon a new and sudden falling out, A. kills B., this is not murder.(n) It is not to be presumed that the parties fought upon the old grudge, unless it appear from the whole circumstances of the fact:(o) but if upon the circumstances it should appear that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing will be murder.(p)

On an indictment for murder it appeared that the deceased died of a wound inflicted in her chest with a knife; there was no evidence of any dispute; the prisoner asserted that she had killed herself, and this was his defence. The jury found the prisoner guilty, "but we believe it was done without premeditation." Byles J., re-

stances of the case, that the offence is of a mitigated character, or does not amount to the crime of murder." Coleridge and Coltman, J.J., *presentibus*.

(l) Fost. 255; 4 Blac. Com. 201; 1 East P. C. c. 5, s. 12, p. 224.

(m) 1 East P. C. c. 5, s. 12, p. 224.

(n) 1 Hale 451.

(o) 1 Hawk. P. C. c. 31, s. 30.

(p) 1 Hale 451.

¹ Every homicide is presumed to be malicious until the contrary appears: Comm. c. York, 9 Metc. 93; State v. Johnson, 3 Jones (Law) 266; Green v. State, 28 Miss. 687; Atkins v. State, 16 Ark. 568; People v. March, 6 Cal. 543; State v. Knight, 43 Maine 11. But see Coffee v. State, 3 Yerg. 283. It is sufficient to constitute murder, that it appear that malice existed at the time of the killing, without regard to the time which it had before existed: Green v. State, 13 Mo. 382. But ill-will towards the deceased personally is not necessary: Revel v. State, 26 Geo. 275. The rule of law is: that a man shall be taken to intend that which he does; or which is the immediate or necessary consequence of his act. A mortal wound given with a deadly weapon, in the previous possession of the slayer, without any or upon very slight provocation, is, *prima facie*, wilful, deliberate, and premeditated killing; and throws upon the prisoner the necessity of proving extenuating circumstances: Hill's case, 2 Gratt. 594. If the act of a person which produces the death of another be attended with such circumstances as are the ordinary symptoms of a wicked, depraved and malignant spirit, the law from these circumstances will imply malice, without reference to what was passing in the person's mind at the time he committed the act: State v. Smith, 2 Strobb. 77. Where the prisoner fired a loaded pistol at a person on horseback, and declared that he did so only with the intention to cause the horse to throw him, and the ball took effect on another person and produced his death, it was held that the crime was murder: Ibid. A blow with a dangerous weapon calculated to produce, and actually producing death, if struck without such provocation as reduces the crime to manslaughter, is deemed by the law malicious, and the killing is murder: United States v. M'Glue, 1 Curt's C. C. 1.

For other cases upon the subject of evidence of malice see Comm. v. Vaughan, 9 Cush. 594; Jones v. State, 29 Geo. 594; Lingo v. State, Ibid. 470; State v. Schoenwald, 31 Mo. 147; Bristow's case, 15 Gratt. 634; State v. Hogue, 6 Jones (Law) 381; Dazier v. State, 26 Geo. 156; Maher v. People, 10 Mich. 212; Ex parte Wray, 30 Miss. 673; M'Coy v. State, 25 Texas 33; People v. Barry, 31 Cal. 557; Murphy v. People, 37 Ill. 447; State v. Bonds, 1 Nev. 265; Ake v. State, 30 Tex. 466; Moore v. State, 31 Ibid. 392; M'Millan v. State, 35 Geo. 54; Clarke v. State, Ibid. 75; Warren v. State, 4 Cold. 130; State v. Brown, 12 Minn. 538; Comm. v. Drum, 8 P. F. Smith 9; State v. Willis, 63 N. C. 26; Holland v. State, 13 Fla. 117; U. S. v. Mingo, 2 Curt. C. C. 1; U. S. v. Armstrong, Ibid. 446; Comm. v. Hawkins, 3 Gray 463; Comm. v. Fox, 7 Ibid. 585; State v. Harrison, 5 Jones (Law) 115; State v. Johnson, 2 Ibid. 247; State v. Gentry, Ibid. 406; People v. Kirby, 2 Parker C. R. 28; Murphy v. State, 1 Ala. (S. C.) 48; Comm. v. Macloon, 101 Mass. 1.

fused to receive this verdict, and told the jury that "to reduce the crime to manslaughter, it must be shown that there was provocation at the time, and provocation of a serious nature. The prosecutor is not bound to prove that the homicide was committed from malice prepense. If the homicide be proved, the law presumes malice; and although that may be rebutted by evidence, no such attempt has been made here. The defence is that the woman took her own life. The question for you is, did the prisoner take his wife's life or not? If he did it was murder." (*p*)

Where knowledge of some fact is necessary to make a killing murder, those of the party who have the knowledge will be guilty of murder, and those who have it only of manslaughter only. If A. assault B. of malice, and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A.'s malice, is guilty of manslaughter only. (*q*)

The person committing the crime must be a free agent, and not subject to actual force at the time the act is done: thus if A. by force take the arm of B. in which is a weapon, and therewith kill C., A. is guilty of murder, but not B. But if it be only a moral force put upon B., as by threatening him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. (*r*) If, however, A. procures B., an idiot, or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument. (*s*) So if A. lay a trap or pitfall for B., whereby B. is killed, A. is guilty of the murder as a principal in the first degree, the trap or pitfall being only the instrument of death. (*t*) If one persuade another to kill himself, the adviser is guilty of murder; (*u*) and if *670] the party takes poison himself by the persuasion of another, in the absence of the persuader, yet it is a killing by the persuader; and he is principal in it, though absent at the taking of the poison. (*v*) And he who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. (*w*)¹

A girl of thirteen years of age was indicted for the murder of an infant ten weeks old. She had bought a threepenny packet of "Battle's Vermin Killer," saying that her mistress had sent her for it, which was false. "Battle's Vermin Killer" is a powder containing about three-quarters of a grain of strychnine in the threepenny packet. When she was told that a coroner's inquest would be held, she asked, "Will they know whether it's poisoned or not?" and being answered "They will," she said, "How can they know? they are only men like master." She afterwards asked whether they would commit her to prison? and thereon a person said, "Surely you have not poisoned anything?" The prisoner said, "I have given it poison, but I did not think it would kill it so soon." Being asked whether she gave the poison in liquid or powder, she said, "In powder;" and being asked why, she said, "Because I was tired of lugging the child about." It was urged that it was not proved that the prisoner had capacity to commit the crime, or had acted with deliberate malice. Pollock, C. B., "The crimes of murder and manslaughter are, in some instances,

(*pp*) Reg. v. Maloney, 9 Cox C. C. 6.

(*q*) 1 Hale 446; Plowd. 100, *post*, p. 706.

(*r*) 1 Hale 433; Dalt. c. 145, p. 473; 1 East P. C. c. 5, s. 12, p. 225.

(*s*) 1 East P. C. c. 5, s. 14, p. 228; 1 Hawk. P. C. c. 31, s. 7.

(*t*) 4 Blac. Com. 35.

(*u*) If present when he kills himself; but if absent, he is an accessory before the fact. See Rex v. Russell, R. & M. C. C. R. 356, *ante*, p. 71. C. S. G.

(*v*) 1 Hale 431; Vaux's case, 4 Rep. 44 b. Provided the party taking knew not that it was poison. C. S. G.

(*w*) 1 Hawk. P. C. c. 27, s. 6; Sawyer's case, Old Bailey, May, 1815, MS., s. r. And see Rex v. Dyson, *post*, p. 705.

¹ If one counsel another to commit suicide, and the other by reason of the advice kills himself, the adviser is guilty of murder as a principal: Comm. v. Bowen, 13 Mass. 356. Where a judge charged that if one person inflicts a mortal wound, and while the wounded person is languishing, another person kills him by an independent act, the former is guilty of murder, it was held to be error: State v. Scates, 5 Jones (Law) 420; Comm. v. Fox, 7 Gray 585. All are alike guilty of homicide, who conspire to do an unlawful act where death follows the prosecution of the common object, although some are not present: Brennan v. People, 15 Ill. 511.

very difficult of distinction. The distinction which seems most reasonable consists in the consciousness that the act done was one which would be likely to cause death. No one could commit murder without that consciousness. The jury must be satisfied before they could find the prisoner guilty [of murder] that she was conscious, and that her act was deliberate. They must be satisfied that she had arrived at that maturity of intellect which was a necessary condition of the crime charged." (x)

Murder may be committed upon any person within the King's peace. Therefore, to kill an alien enemy within the kingdom, unless it be in the heat and actual exercise of war, (y) or to kill a Jew, an outlaw, one attainted of felony, or one in a *præmunire*, (z) is as much murder as to kill the most regular born Englishman. (a)¹

An infant in its mother's womb, not being in *rerum naturâ*, is not considered as a person who can be killed within the description of murder: and therefore if a woman being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not murder or manslaughter. (b) But by a recent statute any person unlawfully *administering poison, or other noxious thing, to procure the miscarriage of any woman, or unlawfully using any instrument or other means [*671 whatsoever with the like intent, is guilty of felony. (c)

Where a child, having been born alive, afterwards died by reason of any potions or poisons it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them. (d) Giving a child, whilst in the act of being born, a mortal wound in the head, as soon as the head appears, and before the child has breathed, will, if the child is afterwards born alive, and dies hereof, and there is malice, be murder; but if there is not malice, manslaughter. The prisoner was indicted for the manslaughter of an infant child; the prisoner, who practiced midwifery, was called in to attend a woman who was taken in labor, and when the head of the child became visible, the prisoner, being grossly ignorant of the art which he professed, and unable to deliver the woman with safety to herself and the child, as might have been done by a person of ordinary skill, broke and compressed the skull of the infant, and thereby occasioned its death immediately after it was born: it was submitted that the indictment was misconceived, though the facts could warrant an indictment in another form; and that the child being *en ventre sa mère* at the time the wound was given, the prisoner could not be guilty of manslaughter; but, the prisoner having been found guilty, the judges, upon a case reserved, were unanimously of opinion, that the conviction was right. (e)

Upon an indictment against *Ann West* for murder it appeared that S. Henson, being with child, went to the prisoner and underwent an operation for the purpose of procuring abortion. This operation was repeated on several days, and Henson was shortly after delivered of a male child, she being then about six months advanced in her pregnancy: the child was born alive, but died about five hours afterwards. A medical witness stated that there were no unusual appearances on the child, and that it was a healthy child; but that, being born at that period of gestation, it was impossible that it could live any considerable length of time separated from the womb of its mother. The witness added, "Judging from the healthy appearance of the child, I cannot suppose that the premature delivery was spontaneous. The operations described by

(x) Reg. v. Vamplew, 3 F. & F. 520. Verdict, manslaughter.

(y) 1 Hale 433.

(z) Id. Ibid. Formerly to kill one attainted in a *præmunire* was held not homicide; 24 Hen. 8, B. Coron. 197; but the 5 Eliz. c. 1, declared it to be unlawful.

(a) 4 Blac. Com. 198.

(b) 1 Hale 433.

(c) 24 & 25 Vict. c. 100, s. 58.

(d) 3 Inst. 50; 1 Hawk. P. C. c. 31, s. 16; 4 Blac. Com. 198; 1 East P. C. c. 5, s. 14, p. 18; *contra*, 1 Hale 432, and Staund. 21; but the reason on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be supposed that such fact never can be clearly established. See Exod. c. 21, v. 22, 23.

(e) Rex v. Senior, R. & M. C. C. R. 346.

¹ So to kill an Indian in time of war: State v. Gest, 13 Minn. 341; Jim v. Territory, 1 Wash. Terr. 76.

Henson would naturally and probably produce that premature delivery. It might be produced by a fall, or any sudden shock received by the mother: but in this case I have no doubt it was produced by the acts of the prisoner."(*f*) Maule, J., told the jury that if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living, and afterwards dies in consequence of its exposure to the external world, the person who by her misconduct so brings the child into the world, and puts it thereby into a situation in which it cannot live, is guilty of murder. The evidence seems to show clearly that the death of the child was caused by its premature birth; and if that premature delivery was brought on by the felonious act of the prisoner, then the offence is complete. If the child, by the felonious act of the prisoner, was brought into the world in a state in which it was more likely to die than it would have been if born in due time, and did die in consequence, the offence is murder, and the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder. (*g*)

The murder of *bastard children* by the mother was considered as a crime so difficult to be proved, that a special legislative provision was made for its detection by the 21 Jac. 1, c. 27, which required that any such mother endeavoring to conceal the death of the child, should prove, by one witness at least, that the child was actually born dead. But this law, which made the concealment of the death almost conclusive evidence of the child's being murdered by the mother, was accounted to savor strongly of severity, and always construed most favorably for the unfortunate object of accusation; and at length it was repealed, together with an Irish Act upon the same subject, by the 43 Geo. 3, c. 58.

Questions of considerable nicety sometimes arise on trials for infanticide, as to whether the death took place after the child was actually born, or whilst it was in progress of being born; and although the law be clear that a child must be actually born to be the subject of murder, perhaps it is not clearly settled what constitutes actual birth for this purpose. Where, on an indictment alleging that the prisoner was delivered of a child, and that she afterwards strangled it, it appeared that the child, which was found concealed, had breathed, but the medical men could not say whether it had breathed during the birth or afterwards; Littledale, J., told the jury, "the being born must mean that the whole body is brought into the world, and it is not sufficient that the child respires in the progress of the birth." (*h*)

So where, upon an indictment containing a count for murder by stabbing, and a count charging that before the child was completely born the prisoner stabbed it with a fork, and that it was born, and then died of the stab, it was proved that a puncture was found on the child's skull, but when that injury was inflicted did not appear, and some questions were asked as to whether the child had breathed; Parke, J., said, "The child might breathe before it was born; but its having breathed is not sufficiently life to make the killing of the child murder; there must have been an independent circulation in the child, or the child cannot be considered as alive for this purpose." (*i*)

*So where the first count of an indictment charged that the prisoner, being big with a female child, did bring forth the said child alive, and did afterwards strangle it, and other counts varied the statement of the mode of death, but all of them stated the birth of the child as above mentioned; and it appeared that the dead body of the child was found concealed under the prisoner's bed, with a ribbon tied tightly round the neck, and the evidence of the medical witnesses left it in doubt whether the ribbon was tied round the neck, and the child strangled by it, during the progress of birth, or after the child was fully born, but before the umbilical cord was severed: and it was submitted that a child could not be the subject of murder till it

(*f*) The indictment alleged that the prisoner forced his right hand and a pin into the womb of Henson, and the report states that the operation was "of the nature described in the indictment."

(*g*) Reg. v. West, 2 C. & K. 784 (61 E. C. L. R.).

(*h*) Rex v. Poulton, 5 C. & P. 329 (24 E. C. L. R.).

(*i*) Rex v. Enock, 5 C. & P. 539 (24 E. C. L. R.); Reg. v. Wright, 9 C. & P. 754 (38 E. C. L. R.), Gurney, B, s. p.

had a completely independent circulation, and had been wholly detached from the mother; that the term "born alive" meant the being completely separated from the mother, and having a completely independent circulation; and a child would not have an independent circulation for some time after it was completely brought forth, unless the umbilical cord was divided. Parke, B., said, "it has been frequently so said in cases where the death has been caused by suffocation, or other injuries, which might have occurred in the course of unassisted delivery; but I should like to know whether there is any case where it has been so held where a wilful wound had been inflicted during the birth of a child. (*k*) At all events, this indictment will not be supported, unless it be shown that the child was completely born, as it is distinctly averred that the child was brought forth before it was strangled." And in summing up the very learned Baron said, "Whether there might be any question on a count differently framed, it is not necessary to say; perhaps there might not; but in order to convict on the first count you must be satisfied that the whole body of the child had come forth from the body of the mother when the ligature was applied. If you think that the child was not killed after it came forth, you will acquit. I think it is essential that it should have been wholly produced. But supposing you should be of opinion that the child was strangled intentionally, while it was connected by the umbilical cord to the mother, and after it was wholly produced, in that case I should put the matter into a course of further inquiry, directing you to convict the prisoner, and reserving the point for a higher tribunal; my present impression being, that it would be murder, if those were the facts of the case." (*l*) And in a subsequent case, where this case was mentioned, and the prisoner's counsel admitted, that it did not go to the length of deciding that the child must have a separate independent existence from that of the mother, in order to make the killing of it murder; Vaughan, J., said, "I should have been very much surprised if it had, because, if that were the law, the child and the after-birth might be completely delivered, and yet, because the umbilical cord was not separated, the child might be knocked on the head and killed, without the party who did it being guilty of murder." (*m*) And where one count charged *that the prisoner, being big with a female child, "*did bring forth the same* [**674 alive*," and then in the usual manner alleged the murder of the child by choking it with a handkerchief; and another count charged the murder in the same way of a certain illegitimate child, "then lately before born of the body" of M. T.; and there was strong evidence to prove that the child had been wholly produced alive from the prisoner's body, and that she had strangled it; but it was also clearly proved by the surgeon, who examined the body of the child, that it must have been strangled before it had been separated from the mother by the severance of the umbilical cord, and the surgeon further stated that a child has, after breathing fully, an independent circulation of its own, even while still attached to the mother by the umbilical cord, and that in his judgment the child in question had breathed fully after it had been wholly produced, and had therefore an independent circulation of its own before and at the time it was strangled, and was then in a state to carry on a separate existence. Erskine, J., directed the jury, that if they were satisfied that the child had been wholly produced from the body of the prisoner alive, and that the prisoner wilfully strangled the child after it had been so produced and while it was alive, and while it had, according to the evidence of the surgeon, an independent circulation of its own, he was of opinion that the charge in the said counts was made out, although the child, at the time it was so strangled, still remained attached to the mother by the navel-string. The jury found the prisoner guilty; and, upon a case reserved, the judges held the conviction right. (*n*) Where the prisoner was indicted for the murder of her child by cutting off its head, and a surgeon stated that he was enabled to say decidedly that the child had breathed, but he could not swear that the whole body of the child was born when the act of breathing took place; Coltman, J., said, "In order to justify a conviction for murder, you must be satisfied that the entire child

(*k*) See *Rex v. Sellis*, *post*, note (*o*).

(*l*) *Rex v. Crutchley*, 7 C. & P. 814 (32 E. C. L. R.). The prisoner was acquitted of murder.

(*m*) *Reg. v. Reeves*, 9 C. & P. 25 (38 E. C. L. R.).

(*n*) *Reg. v. Trilloe*, 2 M. C. C. R. 260; C. & Mars. 650.

was actually born into the world in a living state. The fact of its having breathed is not a decisive proof that it was born alive: it may have breathed, and yet died before birth."^(o) But if a child be actually wholly produced alive, it is not necessary that it should have breathed to make it the subject of murder. Upon an indictment for the murder of a child, where it appeared that the dead body of the child was found in a river, and it was proved by two surgeons that it had never breathed; Park, J. A. J., said, "A child must be actually wholly in the world in a living state to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive, and yet do not breathe for some time after their birth."^(p)

The killing may be effected by poisoning, striking, starving, drowning, and a thousand other forms of death, by which human nature may be overcome.^(q) But there must be some external violence, or *corporal* damage, to the party; and therefore where a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such passion of grief or *fear that he dies suddenly, or *675] contracts some disease which causes his death, the killing is not such as the law can notice.^(r) If a man however does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no stroke be struck by himself, and no killing may have been primarily intended:^(s) as where a person carried his sick father, against his will, in a severe season, from one town to another, by reason whereof he died;^(t) or where a harlot being delivered of a child, left it in an orchard covered only with leaves, in which condition it was killed by a kite;^(u) or where a child was placed in a hogstye, where it was devoured.^(v) In these cases, and also where a child was shifted by parish officers from parish to parish, till it died for want of care and sustenance,^(w) it was considered that the acts so done, wilfully and deliberately, were of malice prepense.¹

Where the prisoner had delivered herself by night upon a turnpike road, and, after carrying her child more than a mile along the road, had left it on the side of the road without any clothing or covering to protect it from the inclemency of the weather, where it died from the cold, and she had wholly concealed the birth of the child till she was apprehended; Coltman, J., in summing up, said, "If a party so conduct himself with regard to a human being, which is helpless and unable to provide for itself, as must necessarily lead to its death, the crime amounts to murder. But if the circumstances are not such that he must have been aware that the result would be death, the crime would be manslaughter, provided the death were caused by an unlawful act, but not such as to imply a malicious mind. There have been cases where it has been held that persons leaving a child exposed, and without any assistance, and under circumstances where no assistance was likely to be rendered, were guilty of murder. It will be for you to consider whether the prisoner left the child in such a situation that to all reasonable apprehension she must have been aware that the child must die, or whether there were circumstances that would raise a reasonable expectation that the child would be found by some one else, and preserved; because then it would only be the crime of manslaughter. If a person were to leave a child at a door of a gentleman, the probability would be so great that it would be found, that it would be too much to say that it was murder, if it died: if, on the other hand, a child were left in an unfrequented place, what inference could be drawn but that the party left it there in order that it might die? This is a sort of intermediate case, and therefore it is for you to say whether the prisoner had reasonable ground for believing that the child would be found and preserved."^(x)

(o) Reg. v. Sellis, 7 C. & P. 850 (32 E. C. L. R.).

(p) Rex v. Brain, 6 C. & P. 349 (25 E. C. L. R.).

(q) 4 Blac. Com. 196, *moriendi mille figuræ*; 1 Hale 431; 1 Hawk. P. C. c. 32, s. 4.

(r) 1 Hale 427, 429; 1 East P. C. c. 5, s. 13, p. 225; Reg. v. Murton, 3 F. & F. 492, Byles, J.

(s) 4 Blac. Com. 197,

(t) 1 Hawk. P. C. c. 31, s. 5; 1 Hale 431, 432.

(u) 1 Hale 431; 1 Hawk. P. C. c. 31, s. 6. (v) 1 East P. C. c. 5, s. 13, p. 226.

(w) Palm. 545.

(x) Reg. v. Walters, C. & M. 164, and MSS. C. S. G. See Stockdale's case, 2 Lewin 224.

¹ Nixon v. People, 2 Scamm. 269.

a recent case a prisoner was convicted of manslaughter for assaulting her infant child, and throwing it upon a *heap of dust and ashes, and leaving it exposed to the cold air, by means of which exposure the child became [*676 and died. (y)

Doing a person to do an act which is likely to produce his death, and which does so it, is murder; and threats may constitute such force. The indictment stated first that the prisoner killed his wife by beating; secondly, by throwing her out of the window; and, thirdly and fourthly, that he beat her and threatened to throw her out of the window and to murder her; and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and the bruises received by the fall died. It was strong evidence that the death of the wife was occasioned by the blows received before her fall; but Heath, J., Gibbs, J., and Bayley, J., were of opinion that if her death was occasioned partly by the blows and partly by the fall, she was constrained by her husband's threats of further violence, and from a reasonable apprehension of his doing such further violence as would endanger life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner however was acquitted; the judge being of opinion that the deceased threw herself out of the window from her intemperance, and not under the influence of the threats. (z)

There was an indictment for manslaughter alleged that the deceased was riding on a pack, and that the prisoner assaulted and struck him with a stick, and that the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, spurred his horse, whereby it became frightened, and threw the pack, &c., and it was proved that the prisoner struck the deceased with a small stick that he rode away, the prisoner riding after him, and on the deceased spurring the horse, it winced and threw him; it was held on the authority of the preceding cases that the case was proved. (a)

That the act done by the deceased which occasions his death must be done in order to produce the violence of the prisoner. Upon a trial for manslaughter it appeared that the prisoner and the deceased had some dispute about paying for some spirits, and the prisoner swore that the deceased's boat being alongside the schooner in which the prisoner was, the prisoner pushed it with his foot, and the deceased stretched out the bow of the boat, to lay hold of a barge, to prevent the boat drifting away, and his balance fell overboard and was drowned. Park, J. A. J., after consulting Patteson, J., said, that they were of opinion that, if the case had rested on the evidence of the first witness it would not have amounted to a case of manslaughter. (b) So where upon an indictment for murder by drowning, by the deceased slipping into the water in endeavoring to escape from an assault made with intent to murder or rob, it appeared that the body was found in a river, and it bore no signs of violence, but not sufficient to occasion death, which appeared to have been caused by drowning, and there were marks of a struggle on the bank of the river; Ers-
J., told the jury that a man might throw himself into a river under such circumstances as rendered it not a voluntary act, by reason of force applied either to the body or the mind; and it then became the guilty act of him who compelled the deceased to take the step. But the apprehension must be of immediate violence,

Reg. v. Waters, 1 Den. C. C. 356; 2 C. & K. 864 (61 E. C. L. R.). The point in this case, that it was consistent with all that was stated in the count that the child might be capable of taking care of itself; but it was held that if she had been sufficiently old, or old enough so to do, the death could not have arisen from the act of the prisoner, and the defect was cured by the verdict. It is a novel doctrine in criminal cases that a defective indictment is cured by verdict. Lord Hale says, "None of the statutes fails extends to indictments, and therefore a defective indictment is not aided by verdict;" 2 Hale P. C. 193; and no authority is known for such a doctrine in other cases. The indictment was right; for it alleged the acts of the prisoner which caused the death, and it is all that it ever was necessary to do in such an indictment.

Rex v. Evans, O. B. Sept. 1812, MS., Bayley, J.

Rex v. Hickman, 5 C. & P. 151 (24 E. C. L. R.), Park, J. A. J.

Rex v. Waters, 6 C. & P. 328 (25 E. C. L. R.), Park, J. A. J., and Patteson, J. It was held that the prisoner was not the man who pushed the boat away.

and well grounded from the circumstances by which the deceased was surrounded; not that the jury must be satisfied that there was no other way of escape, but that it was such a step as a reasonable man might take.(c)

Upon the same principles, where there is found to be actual malice, or a wilful disposition to injure another, or an obstinate perseverance in doing an act necessarily attended with danger, without regard to the consequences, as if a master by premeditated negligence, or harsh usage, cause the death of his apprentice, it will be murder. Thus, where the prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehavior, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; not having suffered him to lie in a bed on account of the vermin, but having made him lie on the boards for some time without covering, and without common medical care; and the death of the apprentice, in the opinion of the medical witnesses, was most probably occasioned by his ill-treatment in Bridewell, and the want of care when he went home; and they inclined to think that, if he had been properly treated when he came home, he might have recovered; the Court, under these circumstances, and others in favor of the prisoner, left it to the jury to consider, whether the death of the apprentice was occasioned by the ill-treatment he received from his master after returning from Bridewell, and whether that ill-treatment amounted to evidence of malice; in which case they were to find him guilty of murder.(d) The prisoner Charles Squire, and his wife, were indicted for the murder of a boy who was bound as a parish apprentice to the prisoner Charles; and it appeared that both the prisoners had used the apprentice in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment: but the surgeon who opened the body deposed that in his judgment the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received. Lawrence, J., was of opinion that the case was defective as to the *678] wife, as it was not her duty to provide the apprentice with *sufficient food and nourishment, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty and executed.(e)¹

The law is undisputed that if a person, having the care and custody of another who is helpless, neglects to supply him with the necessaries of life, and thereby causes or accelerates his death, it is a criminal offence. But the law is also clear that if a person, having the exercise of freewill, chooses to stay in a service where bad food and lodging are provided, and death is thereby caused, the master is not criminally liable. Per Erle, C. J. Where, therefore, a servant maid of very weak intellect was kept on very insufficient food, and slept in a damp room, and died in

(c) Reg. v. Pitts, C. & Mars. 284 (41 E. C. L. R.).

(d) Self's case, 1 East P. C. c. 5, s. 13, p. 226, 7; 1 Leach 137; and see the case more fully stated in the chapter on *Manslaughter*.

(e) Rex v. Squire and his wife, Stafford Lent Assizes, 1799, MS.; and as to the principles upon which the wife was acquitted, see the case more fully stated, *ante*, p. 38. After the surgeon had deposed that the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c., which he had received, the learned judge was proceeding to inquire of him whether, in his judgment, the series of cruel usage the boy had received, and in which the wife had been as active as her husband, might not have so far broken his constitution as to promote the debility, and co-operate along with the want of proper food and nourishment to bring on his death, when the surgeon was seized with a fainting fit, and, being taken out of court, did not recover sufficiently to attend again upon the trial. The judge, after observing that, upon the evidence, as it then stood, he could not leave it to the jury to consider, whether the wounds, &c., inflicted on the boy, had contributed to cause his death, said, that if any physician or surgeon were present who had heard the trial, he might be examined as to the point intended to be inquired into; but no such person being present, he delivered his opinion to the jury, as stated in the text.

¹ If a seaman is in a state of great debility and exhaustion, so that he cannot go aloft without danger of death or enormous bodily injury, and the facts are known to the master, who, notwithstanding, compels him, by moral or physical force, to go aloft, and the seaman falls from the mast and is drowned thereby, and his death is caused by such misconduct of the master; it is murder in the master if he was malicious—if he had no malice, it is manslaughter: United States v. Freeman, 4 Mason 505.

consequence thereof; but it appeared that she was not confined to the house, and might have left it if she chose; it was held that the mistress was not guilty of manslaughter.^(ee) The facts of this case are voluminous, and would clearly have supported an indictment on the 24 & 25 Vict. c. 100, s. 26, p. 1015 of Vol. I. But that clause was not adverted to in the case; and yet it seems very well worthy of consideration whether, where death results from the commission of an offence within that section, the case is not one of manslaughter. See Vol. I. p. 851. It is difficult also to see how the servant's remaining can affect the legal quality of the prisoner's acts, and render those acts which are an indictable offence innocent as regards the death. The utmost effect that can reasonably be given to the servant's remaining is to make her a partaker in causing her own death; but that is clearly no defence to the mistress. Suppose the death had been from beating, the case would clearly have been manslaughter, and yet the servant might have gone away and avoided the beating.

A master is not bound by the common law to find medical advice for a servant, but a master is bound during the illness of an apprentice to provide him with proper medicines; if he neglect so to do he is criminally responsible. The prisoner was indicted for the manslaughter of his apprentice by neglecting to provide him sufficient meat and drink, &c. The deceased was bound to the prisoner by indenture, by which he covenanted to find him clothes and victuals; his death was produced, according to the evidence of some medical men, by uncleanness and want of food; Patteson, J., told the jury that "by the general law the master was not bound to provide medical advice for his servant;^(f) yet that the case was different with respect to an apprentice, and that a master is bound during the illness of his apprentice to provide him with proper medicines; and that if they thought that the death of the deceased was occasioned, not by the want of food, &c., but by want of medicines, then, in the absence of any charge to that effect in the indictment, the prisoner would be entitled to be acquitted."^(g) Where a master has treated a person, bound to him by an invalid indenture of apprenticeship, as his servant, and such person dies through the neglect of the master to provide him with food, the master cannot defend himself against an indictment for manslaughter on the ground that he was not legally bound to provide such person with food. An indictment for manslaughter in one count alleged that the deceased was the apprentice of the prisoner, and that it was his duty to provide sufficient food for her as such apprentice, and that he neglected to do so, &c., by means of which she died; in another count it alleged that the deceased was the servant of the prisoner, and that it was his duty to provide her with food, &c. An invalid indenture of apprenticeship was put in, and it appeared that the deceased had always been treated as an apprentice by the prisoner, and had performed such duties as an apprentice would have performed, but the prisoner being a farmer these duties were the same as those performed by ordinary farmers' servants: it was objected that the first count was not proved, as the indenture was invalid; and that the relation of master and servant never existed, for an invalid contract of apprenticeship could not be converted into a hiring and service: *that the foundation of this indictment was that the prisoner [*679 was legally bound to provide maintenance for the deceased, and here it was clear he could neither have been compelled to support her as an apprentice or as a servant; but it was held, that the prisoner having treated the deceased as his servant, could not turn round and say she was not his servant at all.^(h) Where the first count

(ee) Reg. v. Smith, 12 Law T. 608.

(f) See Sellen v. Norman, 4 C. & P. 80 (19 E. C. L. R.).

(g) Reg. v. Smith, 8 C. & P. 135 (38 E. C. L. R.).

(h) Rex v. Davies, Hereford Sum. Ass. 1831, Patteson, J., MS. C. S. G. In support of this decision it may be observed, that although a son could not be punished for the murder of his father as for petit treason, under the 25 Edw. 3. st. 5, c. 2, unless by a reasonable construction he came under the word servant. Yet if he were bound apprentice to his father or mother, or was maintained by them, or did any necessary service for them, though he did not receive wages, he might have been indicted by the description of servant: 1 Hawk. P. C. c. 32, s. 2; 1 East P. C. c. 5, s. 99, p. 336; and a near relation, as a sister, might be a servant within the statute, if she acted as such: Rex v. Edwards, Stafford Ass. MS., coram Lawrence, J. C. S. G.

stated that the deceased was the apprentice of the prisoner, and it was his duty to provide the deceased with proper and necessary nourishment, medicine, medical care and attention, and charged the death to be from neglect, &c.; and the second count charged that the deceased "so being such apprentice as aforesaid," was killed by the prisoner by over-work and beating; and the only evidence given to show that the deceased was an apprentice was, that the prisoner had stated that he was his apprentice; Patteson, J., held, that there was sufficient evidence to support the second count, but not the first. (i)

Where the mother of a bastard child marries after the passing of the 4 & 5 Will. 4. c. 76, the new Poor Law Act, and such child afterwards dies (after it has been weaned) (k) through neglect to provide it with sufficient food, the omission to provide food is the omission of the husband, and in order to render the wife criminally responsible it must be shown that the husband supplied her with food to give to the child, and that she wilfully neglected to give it. The prisoner, who was the wife of J. S., was charged with the murder of her illegitimate child, aged three years, by omitting to give it proper food. The prisoner had in December, 1834, married J. S.; the deceased was her illegitimate child, and was born before her marriage; in the judgment of medical witnesses the death had proceeded from the want of proper food. For the prosecution *Rex v. Squire*, (l) and the 4 & 5 Will. 4, c. 76, s. 71, were referred to; and it was submitted that the mother of an illegitimate child was bound to take care of her child, and might be guilty of murder if its death arose from neglect. Alderson, B.: "The prisoner is indicted as a married woman: if her husband supplied her with food for this child, and she wilfully neglected to give it to the child, and thereby caused its death, it might be murder in her. (m) In these cases the wife is in the nature of the servant of the husband: it does not at all turn upon the natural relation of the mother: to charge her you must show that the husband supplied her with food to give to the child, and that she wilfully neglected to give it. There is no distinction between the case of an apprentice and that of a *680] bastard child, and the wife *is only the servant of the husband, and, according to the case before Mr. Justice Lawrence, (n) can only be made criminally responsible by omitting to deliver the food to the child, with which she had been supplied by her husband. The omission to provide food is the omission of the husband, and the crime of the wife can only be the omitting to deliver the food to the child after the husband has provided it." (o)

(i) *Reg. v. Crumpton*, Car. & Mars. 597 (41 E. C. L. R.).

(k) See *Reg. v. Edwards*, *post*, p. 684.

(l) *Supra*, note (e).

(m) This position was thought too wide in *Reg. v. Bubb*, *infra*, by Williams, J., and the Editor, as it is not limited to cases where death or serious bodily injury is contemplated.

(n) *Supra*, note (e).

(o) *Rex v. Saunders*, 7 C. & P. 277 (32 E. C. L. R.). This case was decided on the opening of counsel, and it did not appear whether the wife was living with her husband, or whether he was capable of maintaining the child. By the 4 & 5 Will. 4, c. 76, s. 71, the mother of every child born a bastard after the passing of the Act, "so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family, until such child shall attain the age of sixteen." By sec. 57, every man who, after the passing of the Act, marries a woman having a child or children, either legitimate or illegitimate, "shall be liable to maintain such child or children as a part of his family" until sixteen, or until the death of the mother. In *Laing v. Spicer*, Tyrw. & Gr. 358, 1 M. & W. 129, it was held that the putative father of a bastard, on whom an order of maintenance had been made, under the 18 Eliz. c. 2, s. 2, and 49 Geo. 3, c. 68, before the passing of the 4 & 5 Will. 4, was no longer liable under such order, where the mother since the passing of that Act had married a person capable of supporting the child; and the Court seemed to think that the putative father would not be liable, even if the husband were incapable of supporting the child. It seems to follow, from this decision, and from the words of sec. 71, that the liability of the mother of a bastard under that Act wholly ceases upon her marriage; and it is presumed that it was upon this ground that *Reg. v. Saunders* was decided. No notice was taken in that case of any common-law liability to support a bastard. In 1 Blac. Com. 457, it is said, "the duty of parents to their bastard children by our law is principally that of maintenance; for though bastards are not looked upon to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved; and they hold, indeed, as to many other intentions; as

An indictment for murder alleged that M. Hook, an infant of tender age, was a daughter of R. Hook, and was living with R. *Hook and Elizabeth Bubb, and under their care and control, and unable to provide for or take care of herself, and that it was the duty of the prisoners to provide for and administer to M. Hook sufficient food for the support of her body, and that the prisoners feloniously, &c., did refuse and neglect to give and administer to M. Hook sufficient food for the support of her body; whereby she became mortally sick and died. (p) The case against Bubb was, that she was the sister of Hook's deceased wife, and on her death had gone to live with Hook, and became the manager of his household. He was absent from home except from Saturday night until Monday morning, but always provided ample food for the whole family. Hook's children were healthy till Bubb undertook their management, but she systematically neglected them, especially the deceased, and, notwithstanding the remonstrances of the neighbors, persisted in withholding sufficient food, for want of which the child gradually wasted away, and died of actual starvation. Williams, J., told the jury that "the indictment alleges, first, a duty on the part of the prisoner to supply the necessities of life to the child; it alleges, secondly, a malicious neglect or omission to perform that duty; and it alleges, thirdly, that the omission or neglect caused the death of the child. Now, first, with respect to the proposition that it was the duty of the prisoner to provide food necessary to sustain the life of the child. It is quite clear that the circumstance of the prisoner being aunt of the child, or being resident in the same house with the child, was not sufficient to cast upon her the duty of pro-

particularly that a man shall not marry his bastard sister or daughter" (citing *Hains v. Jeffell*, 1 Lord Raym. 68; Comb. 356). And this is in accordance with Puffendorf, book 1, c. 11, s. 6, who says, "maintenance is due not to legitimate children alone, but to natural and even to incestuous issue." In *Nichole v. Allen*, 3 C. & P. 36 (14 E. C. L. R.), Lord Tenterden, C. J., held that there was not only a moral but a legal obligation on a putative father to maintain his bastard child; and though this case seems to be overruled by *Mortimore v. Wright*, 6 M. & W. 482, as to there being no necessity for a promise on the part of the father to pay for the maintenance of the child; this point seems not to have been questioned. It seems, therefore, that there is this distinction between an apprentice and the bastard of the wife, that there is neither a moral nor a legal obligation on the wife to maintain an apprentice, but there certainly is a moral, and it should seem a legal obligation to support a bastard. In a note to *Rex v. Saunders*, the reporters observe, "an Act of Parliament (18 Eliz. c. 3, s. 2) would hardly have been required to fix the mother with the payment of a weekly sum, if at common law she is liable for the entire maintenance of the child." This observation might have been entitled to weight, if there had not been similar provisions to compel the maintenance of legitimate children. These statutes were probably introduced for the purpose of giving a ready means of enforcing a legal obligation by compelling the payment of a sufficient sum to indemnify the parish while the children were supported by it. With regard to legitimate children, it is the duty of their parents, by the common law, to provide for their maintenance: 1 Blac. Com. 46; see Puff. L. of N., book 4, c. 11, s. 4. This duty may be enforced, in the case of poor children, by the 43 Eliz. c. 2, s. 6, as well on the father as on the mother, being of sufficient ability. By the 5 Geo. 1, c. 8, if either father or mother leave their children a charge upon a parish, the goods of the father or mother may be seized and sold, and the rents of their lands received in discharge of the parish. And by the 5 Geo. 4, c. 83, s. 3, every person able, wholly or in part, to maintain himself, herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, whereby any of his or her family becomes chargeable, is to be deemed an idle and disorderly person, and punished accordingly. It should seem that there may be cases where a wife may be liable to maintain her children during her husband's lifetime, as where the husband has deserted her, or she has a separate maintenance (see Christian's note to 1 Blac. Com. 448), and it may be worthy of consideration whether where the husband is incapable of work, but she is capable of maintaining her children, she is not legally bound so to do; and as the overseers of every parish are bound by law to provide necessary support in cases of emergency, it may well be doubted whether cases may not occur where the wife would be legally bound to apply for relief to the parish officers. Suppose a husband were ill in bed, but the wife well, and the children starving for want of food, could it be fairly contended that she was under no legal obligation to apply for relief for them, and that if one of them died for want of food, she was not criminally responsible? See *Umston v. Newcomen*, 4 L. & E. 899 (31 E. C. L. R.), and *Reg. v. Mabbett*, *infra*, p. 683. C. S. G.

(p) The grand jury returned a bill for murder against E. Bubb, and for manslaughter against R. Hook, and a bill for manslaughter in the same form, *mutatis mutandis*, as the bill for murder was then preferred against the latter, and Bubb tried first.

viding food for it. But if the prisoner undertook the charge of attending to the child, and of taking that care of it which its tender age required, a duty then arose to perform those duties properly; and if the prisoner, being in the capacity, as it were, of a servant or nurse, and having the charge of attending and taking care of the child, was furnished with the means of doing so properly, then the duty arose, which is charged in this indictment, of giving it sufficient food, and if the prisoner neglected to perform that duty, beyond all question she is criminally responsible. It remains for me to explain to what extent she is responsible. If the omission or neglect to perform the duty was malicious, then the indictment would be supported, and the crime of murder would be made out against the prisoner; but if the omission or neglect were simply culpable, but not arising from a malicious motive on the part of the prisoner, then it would be your duty to find her guilty of manslaughter only. And here it becomes necessary to explain what is meant by the expression malicious, which is thus used. If the omission to supply necessary food was accompanied with an intention *to cause the death of the child, or to cause some serious bodily harm to it, then it would be malicious in the sense imputed to it by this indictment, and in a case of this kind it is difficult, if not impossible, to understand how a person who contemplated doing serious bodily injury to the child by the deprivation of food, could have meditated anything else than causing its death. You will, therefore, probably consider that the question resolves itself into this: did the prisoner contemplate, by the course she pursued, the death of the child? If she did, and death was caused by the course she pursued, then she is guilty of murder. But if you are not satisfied that she contemplated the death of the child, then, although guilty of a culpable neglect of duty, it would amount only to the crime of manslaughter. If, on the other hand, you should think either that she did not undertake the duty of supplying the child with proper food, or that she did not culpably neglect that duty, then you will acquit her." (g)

On the trial of Hook for the manslaughter of the same child, in addition to the facts proved on the trial of Bubb, it was proved that when he was at home she treated the children better than on other occasions; and that he had uniformly behaved kindly to them, and especially to the deceased. Williams, J., told the jury that "this case differs from the last in this very essential particular, that here there is a duty directly cast upon the prisoner to provide sufficient food for the child if he has sufficient means for doing so, and inasmuch as it is proved that the prisoner had such means, there can be no doubt but that the law threw upon him the duty of preserving the child's life by providing it with proper food. But the peculiarity of the case is this, that inasmuch as we must take it that Bubb was guilty, she could not have been so, unless the prisoner had provided her with sufficient means for feeding the child, and it must be taken as an admitted fact in this case that the prisoner did take such steps as, but for Bubb's misconduct, would have preserved the child's life. Then the question is, how is the charge shaped against the prisoner? If Bubb neglected her duty by depriving the child of food for any purpose, and the prisoner was conscious of it, and nevertheless chose to let her persevere in that course, he thus became himself an instrument, as it were, of depriving the child of sufficient food, and he would be guilty upon this indictment. If, therefore, you think he was conscious that Bubb deprived the child of food to such an extent as to render it dangerous to the child's life, and, being so conscious, instead of preventing her from continuing in this course, he allowed her to do so, and was culpably negligent of the obvious duty cast upon him, then he is guilty of manslaughter, because then substantially he would have neglected to provide the child with proper food." (r)

Where parent, child, and servant reside in the same house, the duty of the parent is to provide food for the child, and the duty of the servant is to supply the food

(g) Reg. v. Bubb, 4 Cox C. C. 455. The indictment also alleged the duty to provide clothing and the neglect thereof; but as the child is alleged to have died of "actual starvation," all relating to the clothing has been omitted. This and the next case underwent the most careful consideration, and the law on the subject was fully discussed between Williams, J., Lord Campbell, C. J., and the Editor, on a review of the previous cases.

(r) Reg. v. Hook, 4 Cox C. C. 455.

when so provided by the *parent to the child, an indictment therefore charging both with the same duty cannot be supported; but there ought to be [*683 separate indictments charging each in respect of the duty incumbent on each.(s)

Upon an indictment against husband and wife for the murder of their infant child, it appeared that the child's death was produced by English cholera, and that insufficient food had a tendency to produce that complaint; the husband was in work, but he spent the money he obtained on himself; and the wife did not appear to have any money or food to give to the child; Martin, B., consulted Erle, J., and they were of opinion that it was the bounden duty of all persons having children, when they themselves cannot support them, to endeavor to obtain the means of getting them support, and if they wilfully abstain from going to the union, where by law they have a right to support, and their children die in consequence, they are criminally responsible for it; but there ought to be a distinct abstaining to go for several days; and if a married woman neglects for four or five days to go to the union for the purpose of getting support for a child, she knowing that such neglect would be likely to produce the death of the child, it is manslaughter.(t)

The prisoner was tried for the murder of her daughter: the case for the prosecution was that the prisoner, having great ill-will against the deceased, had purposely neglected to procure a midwife, or other proper person to attend her daughter when she was taken in labor, and that by reason thereof she died in childbirth; she was about eighteen years of age and unmarried. The prisoner had married a second husband, and after the marriage the daughter had lived with them for some time, and then went out to service, occasionally returning to live with them when she was out of place; at last she returned to her step-father's house on a Tuesday, and continued there till the Saturday following, when she died. It was objected that the prisoner was under no legal obligation to procure or try to procure the attendance of a midwife. Williams, J., directed the jury to consider whether it was established by the evidence that the death was attributable to the prisoner's neglect to use ordinary diligence in procuring the assistance of a midwife, or other proper attendant, and, if it was so established, then to consider whether by so neglecting she intended to bring about the death of her daughter; and if so the jury were to convict her of murder; but if not, of manslaughter: the jury convicted her of manslaughter; and it was held that there was not an omission of any duty rendering the prisoner liable to be convicted. Assuming that if she had used ordinary care she would have procured the attendance of a midwife; that she knew where a midwife could be found; and that if the midwife had been summoned she would have attended; her skill must have been paid for, and there was no evidence that the prisoner had the means at her command of paying for that skill. The midwife would probably have attended without being paid. Yet the prisoner could not be criminally *responsible [*684 for not asking for that aid, which, perhaps, might have been given without compensation. Aid of this kind was not always required in childbirth, and sometimes no ill consequences resulted from its absence.(u)

Where on an indictment for murder of an infant it appeared that the infant was found dead in a bag without any preparation having been made for it by the prisoner, it was held that she was not guilty of manslaughter, if she knew she was about to be delivered, and wilfully abstained from taking the necessary precautions to preserve the life of the child after its birth, and the child died in consequence of that neglect.(v)

The prisoner was indicted for the manslaughter of her child, and it appeared that she had been delivered of the child whilst on the seat of a privy, and that the child had breathed. The prisoner was seventeen years old, subject to epileptic fits, and this was her first child. Erle, J., told the jury that "our law casts upon certain persons the duty of affording protection and sustenance to others who may be sub-

(s) This was agreed between Williams, J., and the Editor in *Reg. v. Bubb*, *supra*, on an indictment before the 14 & 15 Vict. c. 100. But *qu.*, whether one indictment in the present form would not suffice.

(t) *Reg. v. Mabbett*, 5 Cox C. C. 339. See the latter part of note (o), *ante*, p. 681.

(u) *Reg. v. Shepherd*, 1 L. & C. 147.

(v) *Reg. v. Knights*, 2 F. & F. 46, Cockburn, C. J., and Williams, J.

jected to their control. Masters are bound to provide for their apprentices; parents are bound to take care of and sustain their children; and if in consequence of their failing to perform their duties death ensues, it is murder or manslaughter in the master or parent, according to circumstances. The question in this case is, whether there was any negligence on the part of the mother in not providing for the safety of her offspring. It is but reasonable to presume that the child dropped from her whilst she was in the privy. Now, if you think that she had the means and the power of procuring such assistance as might have saved the life of the child, by neglecting to do so she would be clearly guilty of manslaughter. But it is proper that you should take into your consideration that the prisoner is very young; that this was her first child; that she was subject to epileptic fits, and that the probability is that the child could have survived but a very few moments after its immersion in the soil."^(w)

Where a child is very young and not weaned, the mother is criminally responsible if the death arose from her not suckling the child when she was capable of doing so. The prisoner, who was indicted for manslaughter, was a married woman, and was the mother of the deceased, who, at the time of its death, was little more than three months old and not weaned. Patteson, J., said, "In the case of an older child, it would be the duty of the husband to supply food; but in a case like the present, the mother would be liable, if the death arose from her not suckling the child when she was capable of doing so."^(x)

If, a person, who stands in the place of a parent, inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours, and beyond its strength, and the child dies of a disease hastened by such ill-treatment, it will be murder if the treatment was of such a nature as to indicate malice; but if such person believed that the child was shamming illness, and was *really able to do the work required, it will only be manslaughter although the punishment were violent and excessive.^(y)

Where a party undertakes to provide necessaries for a person, who is so aged and infirm that he is incapable of doing so for himself, and through his neglect to perform his undertaking death ensues, he is criminally responsible; so also if a party confines another, he is bound to provide him with necessaries, and if he neglects so to do, and in consequence thereof the party dies, he is criminally responsible. Upon an indictment for murder, which stated that the deceased was of great age, and was residing in the house and under the care and control of the prisoner, and that it was his duty to take care of and find her sufficient meat, &c., and then alleged her death to have been caused by confining her against her will, and not providing her with meat and other necessaries; it appeared that she was seventy-four years of age, and that upon the death of her sister, with whom she had lived, the prisoner, who attended the funeral, took the deceased home with him, saying she was going home to live along with him till affairs were settled, and he would make her happy and comfortable; and on another occasion the prisoner had said that in consideration of a transaction, which he mentioned, he had undertaken to keep the deceased comfortable as long as she lived. When the deceased first went to the prisoner's a servant was kept, and the deceased lodged in the back parlor; afterwards she was removed into the kitchen. After some time no servant was kept, and the deceased was waited on by the prisoner and his wife, and she remained locked in the kitchen alone, sometimes by the prisoner and sometimes by his wife, for hours together; and on several occasions had complained of being confined; in the cold weather no fire was discernible in the kitchen, and for some time before her death the deceased was continually locked in the kitchen, and not out of it at all. An undertaker's man stated that, from the appearance of the body, he thought she had died from want and starvation. A surgeon proved that the immediate cause of death was water on the brain; that the appearance of all parts of the body betokened the want of proper food and nourishment, that there was great emaciation of the

^(w) Reg. v. Middleship, 5 Cox C. C. 275.

^(x) Reg. v. Edwards, 8 C. & P. 611 (34 E. C. L. R.), Patteson, J.

^(y) Rex v. Cheeseman, 7 C. & P. 455 (32 E. C. L. R.), Vaughan, J. See this case, *post*, 863.

body, and that the water on the brain might have been produced by exhaustion. Patteson, J., "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of the deceased, then he will be guilty of murder;(z) if, however, you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which have happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether from the way in which the prisoner treated her, he had not by way of contract, in some way or other, taken upon him the performance of that duty, which, she from age and infirmity, was incapable of doing." (After reading the evidence *as to the contract, the very learned Judge added), "This is the evidence on which you [*686 are called on to infer that the prisoner undertook to provide the deceased with necessities; and though, if he broke that contract, he might not be liable to be indicted during her life,(a) yet if by his negligence her death was occasioned, then he becomes criminally responsible."(b)

Upon an indictment for manslaughter it appeared that the prisoner four years previously had separated from his wife, by mutual consent, the prisoner allowing her 2s. 6d. a-week, which had been in general regularly paid, and the last payment was on the Sunday preceding her death. On the Tuesday she was turned out of her lodgings, being at that time suffering from diarrhœa. On the Wednesday she was in a house in a state of great illness, when the prisoner passed by, and was told he must take his wife away, as she could not shelter there. The prisoner replied, "Turn her out; I won't be pestered with her," and then walked away. The same evening, which was wet and dark, she was seen by a constable wandering about seeking shelter. He took her to the house where the prisoner lodged, and told him the state of his wife, who was ill and without lodging, and explained to him that it was incumbent on him to provide her with lodging and relief. He replied that he had no lodging for her; that she was a nasty beast, and he could not live with her. He shut the window and went away. On the Thursday the prisoner offered to pay for a bed for her at a public house, and she went to bed. On the Friday she died. The deceased was laboring under a complication of diseases, which must have speedily resulted in death. The surgeon stated that he considered the period of her existence had been abridged in consequence of her not having had shelter on the Wednesday night. Gurney, B., told the jury that there was no ground for any charge against the prisoner, as having caused her death from want of food, as he had regularly paid her allowance to her, and he might have been compelled to pay her a larger sum if that had not been sufficient. Under ordinary circumstances he might have refused to have anything to do with her, but when she was ill and without shelter on a cold and wet night, the question assumed a different aspect, and it was whether they could certainly conclude that his refusal to give her shelter at that time had the effect of causing her death to occur sooner than that event would have happened in the ordinary course of nature.(c)

In a former part of this work many cases have been mentioned where children of tender years and lunatics have been neglected, abandoned, or ill-treated; but it is sufficient to refer to those decisions in this place.(d)

By the ancient common law, a species of killing was held to be murder, concerning which much doubt has been entertained in *more modern times, namely, [*687 the bearing false witness against another with an express premeditated design

(z) This position is too narrow. If the prisoner intends either death, or grievous injury to the health, or body of the party, it is murder; as Williams, J., and the Editor agreed in *Reg. v. Bubb*, *ante*, p. 682. See *post*, p. 739, *et seq.*

(a) In *Reg. v. Pelham*, 8 Q. B. 959 (55 E. C. L. R.), Patteson, J., said, as to this dictum, "I was speaking of the particular facts before me; certainly I did not mean to lay down that there could be no indictment at all if there was no death."

(b) *Reg. v. Marriott*, 8 C. & P. 425 (55 E. C. L. R.), Patteson, J.

(c) *Reg. v. Plummer*, 1 C. & K. 600 (47 E. C. L. R.). The prisoner was acquitted, otherwise the question whether he was bound to provide shelter for his wife would have been reserved.

(d) See *ante*, p. 80, *et seq.*, 90, *et seq.*

to take away his life, so as the innocent person be condemned and executed.(e) But a very long period has elapsed since this offence has been holden to be murder; and in the last instance of a prosecution for it, the prisoners having been convicted, judgment was respited, in order that the point of law might be more fully considered upon a motion in arrest of judgment.(f) Then the attorney-general, however, declaiming to argue the point, the prisoners were discharged of that indictment; but it should seem that there are good grounds for supposing that the attorney-general declined to argue this point from prudential reasons, and principally lest witnesses might be deterred from giving evidence upon capital prosecutions if it must be at the peril of their own lives, but not from any apprehension that the point of law was not maintainable.(g) *In foro conscientie* this offence is, beyond doubt, of the deepest malignity.(h)

If a man has a *beast* that is used to do mischief, and he knowing it, suffers it to go abroad, and it kills a man, this has been considered by some as manslaughter in the owner;(i) and it is agreed by all that such a person is guilty of a very gross misdemeanor:(k) and if a man purposely turn such an animal loose, knowing its nature, it is with us (as in the Jewish law)(l) as much murder, as if he had incited a bear or a dog to worry people; and this, though he did it merely to frighten them, and make what is called sport.(m)

On an indictment for manslaughter it appeared that the deceased, a child about eight years old, was killed by a kick from the prisoner's horse, which had been in his possession about four years, and was a very vicious and dangerous animal, and had kicked and injured several persons, and some of these instances had been brought to the prisoner's knowledge, and he otherwise knew of the propensities of the horse. There is a large common at C. where the ratepayers are accustomed to pasture their horses, and through it there are defined public paths a yard wide or more. Two of them converge near a bridge over the river, and from the point where they meet form a broad path to the river, but the boundaries of this path are ill-defined. The paths are open to the rest of the common. The public have a right to use these paths, but it was not proved that they had a right to traverse the other parts of the common, although they often did traverse it. The prisoner claimed a right as a ratepayer to turn out his horses to pasture on this common, and this right was not disputed. The deceased with some other children was on the common, and when on or very near the broad path, the vicious horse of the prisoner, which had been turned on loose by him, kicked at the deceased, struck her on the head, and killed her. It was a question whether the deceased was on the path at the time she was kicked. The question was left to the jury whether the death of the child was caused by the culpable negligence of the prisoner, and they were told that they might find culpable negligence if the evidence satisfied them that the horse was so vicious and accustomed to kick mankind as to be dangerous, and that the prisoner knew that it was so, and with that knowledge turned it out loose on the common, through which there were to his knowledge open paths on which the public had a right to pass. The jury found the prisoner guilty of having caused the death by his culpable negligence, but that the evidence did not satisfy them one way or the other whether the child at the time she was kicked was

(e) *Mirror*, c. 1, s. 9; *Brit. c.* 52; *Bract. lib.* 3, c. 4; 1 *Hawk. P. C.* c. 31, s. 7; 3 *Inst.* 91; 4 *Blac. Com.* 196.

(f) *Rex v. Macdaniel*, *Bery and Jones*, *Fost.* 131; 1 *Leach* 44. This trial took place in 1756. The prisoners were indicted for murder upon a conspiracy of the kind mentioned in the text against one Kidden, who had been convicted and executed for a robbery upon the highway, upon the evidence of *Berry and Jones*.

(g) 4 *Blac. Com.* 196, note (g), where *Blackstone, J.*, says, that he had good grounds for such an opinion, and that nothing should be concluded from the waving of that prosecution; and in 1 *East P. C.* 5, s. 94, p. 333, note (a), the author states that he had heard *Lord Mansfield, C. J.*, make the same observation, and say, that the opinions of several of the judges at that time, and his own, were strongly in support of the indictment.

(h) See *Deut. c.* 19, v. 16, *et seq.*

(i) 4 *Blac. Com.* 197.

(k) 1 *Hawk. P. C.* c. 31, s. 8.

(l) *Exod. c.* xxi. v. 29.

(m) 4 *Blac. Com.* 197, and see 1 *Hale* 430, where the author says, that he had heard that it had been ruled to be murder, at the assizes held at *St. Albans'* for *Hertfordshire*, and the owner hanged for it; but that it was but an hearsay.

on the path or beyond it. Upon a case reserved, after argument for the prisoner, Erle, C., J., said, "I am of opinion that this conviction should be affirmed. The prisoner turned upon a common where there was a public footway a very dangerous animal, knowing what its propensities were, and it is found by the jury that the prisoner was guilty of culpable negligence in so doing, and that the death of the child was caused by the culpable negligence of the prisoner. That under ordinary circumstances would be sufficient to sustain a conviction for manslaughter; but the point contended for the prisoner is, that the child was not on the path at the time when she was kicked, and her death caused thereby; and the jury were unable to say whether she was on the footway or beyond at the time. For the purpose of the judgment I assume that the child was not on the footway, but very near it. In point of reason I think that the prisoner ought to be held responsible in this case, and that it is not a ground of acquittal that the child had strayed off the pathway.(mm) The principle of that case extends to a case like this, where a child walking on a public highway accidentally deviated into the neighboring land, and met with her death from the kick of a vicious horse close to the public way." "The public take a highway on the terms on which it is granted to them by the grantor, and, as between them and the grantor, must use the way subject to its risks; but the public are entitled to use the way without being subject to dangers like that in the present case. It was injurious to persons using the pathway in question to turn on the common a vicious animal of this kind. The judgment is confined to the fact of the child being near to the path at the time, and that, having accidentally strayed from the pathway, but being very near to it, her death was caused by the culpable negligence of the prisoner. I do not wish to sanction the notion that, because a person may not be civilly liable for an act of negligence, he is therefore not criminally liable. It is not necessary to discuss that proposition now; however, I do not accede to it."(nn)

If a physician or surgeon gives his patient a potion or plaster, intending to do him good, and, contrary to the expectation of such physician or surgeon, it kills him, this is neither murder nor manslaughter, but misadventure.(n)¹ It has however been holden, that if the medicine were administered, or the operation performed, by a person not being a *regular* physician or surgeon, the killing would be manslaughter at the least:(o) but the law of this *determination has [*688

(mm) After citing *Barnes v. Ward*, 9 C. B. 414 (67 E. C. L. R.).

(nn) *Reg. v. Dant*, 10 Cox C. C. 102; L. & C. 567. (n) 4 Blac. Com. 197; 1 Hale 429.

(o) Brit. c. 5; 4 Inst. 251. In *Rex v. Simpson*, Lancaster, 1829; Wilcock's L. Med. Prof. Append. 227; 1 Lew. 172; 4 C. & P. 407 (19 E. C. L. R.), note (a), the prisoner was indicted for manslaughter; the deceased had been discharged from the Liverpool Infirmary as cured, after undergoing salivation, and was recommended to go for an emetic to get the mercury out of his bones, to the prisoner, an old woman, who occasionally dealt in medicines; she gave him a solution of white vitriol, or corrosive sublimate, one dose of which caused his death. She said she had received the mixture from a person who came from Ireland. Bayley, J., said, "I take it to be quite clear that if a person, not of medical education, in a case where professional aid might be obtained, undertakes to administer medicine which may have a dangerous effect, and thereby occasions death, such person

¹ An act apparently lawful in itself, when done with a felonious intent, becomes thereby unlawful: thus when a physician was indicted for the murder of a person who had died of the small pox, communicated to him by his patients, whom he had inoculated, and was convicted of manslaughter, it was held, on a motion for a new trial, that it did not amount to that crime, as there was no unlawful design: *Fairlee v. People*, 11 Ill. 1.

If a person assume to act as a physician, whether he be regularly bred to the profession, or a quack, however ignorant of medical science, and prescribe for a person, with an honest intention and expectation of curing the patient, but through his ignorance of the properties of the medicine prescribed, or of the nature of the disease, or both, the patient die in consequence of the treatment, contrary to the expectation of the party prescribing, he is not guilty of murder or manslaughter: *Comm. v. Thompson*, 6 Mass. Rep. 134. But if one give another medicine which kills him, and the party prescribing have so much knowledge or information of the probable fatal tendency of the prescription, that it may be reasonably presumed by the jury, that he administered the medicine from wilful rashness and fool-hardy presumption, and not with the honest intention and expectation of effecting a cure, he will be guilty of manslaughter at least, though he may not have intended any bodily harm to the patient: *Ibid.*

been questioned by very high authority, upon the ground that physic and salves were in use before licensed physicians and surgeons existed. (p)

And it seems now to be settled that it makes no difference whether the party be a regular physician or surgeon or not. Thus it has been held that if a person *bonâ fide* and honestly exercising his best skill to cure a patient, perform an operation, which causes the death of the patient, it makes no difference whether such person be a regular surgeon or not, nor whether he has had a regular education or not. Upon an indictment for manslaughter by causing the death by thrusting a round piece of ivory against the rectum, and thereby making a wound through the rectum, it appeared that upon examination of the body after death, a small hole was discovered perforated through the rectum. The prisoner had attended the deceased, but there was no evidence to show how the wound had been caused, and questions were put in order to show that it might have been the result of natural causes, and it was proposed to show that the prisoner had had a regular medical education, and that a great number of cases had been successfully treated by him. Hullock, B. (stopping the case), "This is an indictment for manslaughter, and I am really afraid to let the case go on, lest an idea should be entertained that a man's practice may be questioned whenever an operation fails. In this case there is no evidence of the mode in which this operation was performed; and even assuming for the moment that it caused the death of the deceased, I am not aware of any law which says that this party can be found guilty of manslaughter. It is my opinion that it makes no difference whether the party be a regular or irregular surgeon; indeed, in remote parts of the country, many persons would be left to die, if irregular surgeons were not allowed to practice. There is no doubt that there may be cases where both regular and irregular surgeons might be liable to an indictment, as there might be cases where, from the manner of the operation, even malice might be inferred. All that the law-books (q) have said has been read to you, but they do not state any decisions, and their silence in this respect goes to show what the uniform opinion of lawyers has been upon this subject. As to what is said by Lord Coke, he merely details an authority, a very old one, without expressing either approbation or disapprobation; however, we find that Lord Hale has laid down what is the law on this subject. That is copied by Mr. J. Blackstone, and no book in the law goes any further. It may be that a person legally qualified to practice as a surgeon may be liable to penalties, but surely he cannot be liable to an indictment for felony. It is quite clear you may recover damages against a medical man for want of skill; but as my Lord Hale (r) says, "God forbid that any mischance *689] of this kind should make a person guilty of murder or *manslaughter." Such is the opinion of one of the greatest judges that ever adorned the bench of this country; and his proposition amounts to this, that if a person, *bonâ fide* and honestly exercising his best skill to cure a patient, performs an operation, which causes the patient's death, he is not guilty of manslaughter. In the present case no evidence has been given respecting the operation itself. It might have been performed with the most proper instrument and in the most proper manner, and yet might have failed. Mr. L. has himself told us that he performed an operation, the propriety of which seems to have been a sort of *vexata quæstio* among the medical profession; but still it would be most dangerous for it to get abroad, that if an operation performed either by a licensed or unlicensed surgeon should fail, that surgeon would be liable to be prosecuted for manslaughter." (s)

Where a person, who had been in the habit of acting as a man-midwife, tore away part of the prolapsed uterus, supposing it to be a part of the *placenta*, it was held

is guilty of manslaughter. He may have no evil intention, and may have a good one; but he has no right to hazard the consequence in a case where medical assistance may be obtained; if he does so, it is at his peril. It is immaterial whether the person administering the medicine prepares it or gets it from another." This case was doubted by Mr. Alley, in *Rex v. St. John Long*, 4 C. & P. 434 (19 E. C. L. R.), and it seems inconsistent with the subsequent cases. C. S. G.

(p) 1 Hale 429.

(q) 4 Bl. Com. 197; 1 Hale P. C. 429; 4 Inst. 251.

(r) 1 Hale P. C. 429.

(s) *Rex v. Van Butchell*, 3 C. & P. 629 (14 E. C. L. R.), coram Hullock, B., and Little-dale, J. Verdict, not guilty.

that he was not indictable for manslaughter by thus causing the death, unless he was guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. The prisoner, who was indicted for the murder of Mrs. D., was not a regularly educated accoucheur, but was a person who had been in the habit of acting as a man-midwife among the lower classes of people. Mrs. D. had been delivered by the prisoner on a Friday, and on the Sunday following an unusual appearance took place, which the medical witnesses stated to be a *prolapsus uteri*; this the prisoner mistook for a remaining part of the *placenta*, which had not been brought away at the time of the delivery: he attempted to bring away the proapsed uterus by force, and in so doing he lacerated the uterus, and tore asunder the mesenteric artery; this caused the death of the patient; and it appeared, from the testimony of a number of medical witnesses, that there must have been great want of anatomical knowledge in the prisoner. It was proved that the prisoner had falsely delivered many other women. Lord Ellenborough, C. J.: "There has not been a particle of evidence adduced which goes to convict the prisoner of the crime of murder, but still it is for you to consider whether the evidence goes as far as to make out a case of manslaughter. To substantiate that charge, the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance, or the most criminal inattention. One or other of these is necessary to make him guilty of that criminal negligence and misconduct, which is essential to make out a case of manslaughter. It does not appear that in this case there was any want of attention on his part; and from the evidence of the witnesses on his behalf, it appears that he had delivered many women at different times, and from this he must have had some degree of skill." (t)

*Upon an indictment for manslaughter by feloniously rubbing Miss C. with a dangerous liquid, it appeared that two of the family had died of consumption, but that Miss C. had enjoyed good health. Mrs. C. having heard that the prisoner had said that unless Miss C. put herself under his care she would die of consumption in two or three months, placed her under his course of treatment. The prisoner rubbed a mixture on different parts of the bodies of his patients, and this had been applied to Miss C. on the 3d of August by the prisoner's servant, and by his direction. On Friday, the 13th of August, a witness went with Miss C. to the prisoner's, respecting a wound on her back, and Miss C. then inhaled; on the next day the prisoner examined her back, and said it was in a beautiful state, and that he would give one hundred guineas if he could produce a similar wound on the persons of some of his patients. The prisoner's attention being directed to a part of the wound which was of a darker appearance, he stated that this proceeded from his inhaling, and that unless those appearances were produced he could expect no beneficial result. The wound at this time was about five or six inches square. Miss C. was suffering much from sickness, and the prisoner said that it was of no consequence, but, on the contrary, a benefit; and that those symptoms, combined with the wound, were a proof that his system was taking due effect. On Sunday, the 15th, Miss C. having got worse, the prisoner said that in two or three days she would be better in health than she had ever been in her life, and spoke very confidently that the result of his system would prolong her life, and that no person could be doing better than she was. At this interview the wound, which had extended, was shown to the prisoner. At the same time he was desired to do something to stop the sickness, but he said he had a remedy in his pocket, which he could not apply, as he knew the sickness had been beneficial: and he also stated on that day, and on Monday, the 16th, that Miss C. was doing uncommonly well. On Tuesday, the 17th, she died. An eminent surgeon proved that on the Monday her back was extensively inflamed as large as a plate, and in the centre was a spot, as large as the palm of the hand, black, and dead, and in a mortified state, and he thought that some very powerfully stimulating liniment had been applied to her back; that applying a lotion of a strength capable of causing the appearance he saw, to a

(t) *Rex v. Williamson*, 3 C. & P. 635 (14 E. C. L. R.). In addition to the facts above stated, it was proved that the prisoner had attended the deceased in seven previous confinements with perfect success, and that the deceased wished him to attend her in her confinement. See 4 C. & P. 407 (19 E. C. L. R.), note (a).

person of the age and constitution of the deceased, if in perfect health, was likely to damage the constitution and produce disease and danger. The appearances on the back were quite sufficient to account for her death. On the most careful examination of the body, after death, no latent disease or seeds of disease were discovered. It was submitted, for the defence, that, in point of law this was nothing like a case of manslaughter, and 1 Hale P. C. 429, 4 Bl. C. b. 4. c. 14. and *Rez v. Van Butchell*,^(u) were cited and relied on. Park, J. A. J., "I am in this difficulty; I have an opinion, and my learned Brother differs from me; I must, therefore, let the case go to the jury." Garrow, B., "In *Rez v. Van Butchell* the learned judge had very good ground to stop the case, as there was no evidence as to what had *691] been done. I *make no distinction between the case of a person, who consults the most eminent physician, and the cases of those whose necessities or whose folly may carry them into any other quarter. It matters not whether the individual consulted be the president of the College of Physicians, the president of the College of Surgeons, or the humblest bone-setter of the village; but be it one or the other, he ought to bring into the case ordinary care, skill, and diligence. Why is it that we convict in cases of death by driving carriages? Because the parties are bound to have skill, care, and caution. I am of opinion that, if a person, who has ever so much or so little skill, sets my leg, and does it as well as he can, and does it badly, he is excused; but suppose the person comes drunk, and gives me a tumbler full of laudanum, and sends me into the other world, is it not manslaughter? And why is that? Because I have a right to have reasonable care and caution." Park, J., in summing up, "The learned counsel truly stated in the outset, that whether the party be licensed or unlicensed is of no consequence, except in this respect that he may be subject to pecuniary penalties for acting contrary to charters or Acts of Parliament; but it cannot affect him here." (After citing 1 Hale 429, as an authority in point, the learned judge proceeded), "I agree with my learned Brother, that what is called *mala praxis* in a medical person is a misdemeanor; but that depends upon whether the practice he has used is so bad that everybody will see that it is *mala praxis*. The case at Lancaster^(v) differs from this case. I have communicated with Tindal, C. J., who tried that case, and he informed me that the man was a blacksmith, and was drunk, and so completely ignorant of the proper steps, that he totally neglected what was absolutely necessary after the birth of the child. That certainly was one of the most outrageous cases that ever came into a court of justice. I would rather use the words of Lord Ellenborough in *Rez v. Williamson*."^(w) (His Lordship read them.) "And this is important here, for though he be not licensed, yet experience may teach a man sufficient; and the question for you will be, whether the experience this individual acquired does not negative the supposition of any gross ignorance or criminal inattention?" (After setting the authority of Hale P. C. 429, against the dictum of Lord Coke, 4 Inst. 251, and citing the observations of Hullock, B., in *Rez v. Van Butchell*^(x) with approbation, his Lordship proceeded), "The refusal by the prisoner to apply the medicines in order to stop the sickness, although he had it with him, would, in my opinion, if wickedly done, amount to murder; but he mentioned a case in which sickness had been beneficial. Undoubtedly the result proves a very erroneous opinion on his part, and it seems singular that the restlessness and other circumstances did not awaken apprehension, and call for further measures, but the question again recurs, whether this was an erroneous judgment of a person, who was of general competency, though he unfortunately failed in the particular instance." "With respect to the application of the mixture, if he commanded the servant to *692] use it, it is the same as if he used it himself. Perhaps *from the evidence as to whether it was done either from gross ignorance or criminal inattention. No one doubts Mr. B.'s skill, but that is not quite the question; it is not whether the act done is the thing that a person of Mr. B.'s great skill would do, but whether it shows such total and gross ignorance in the person who did it, as must necessarily produce such a result. On the one hand, we must be careful and most anxious to

(u) *Supra*, p. 689.

(w) *Supra*, p. 689.

(v) Probably Ferguson's case, *post*, p. 696.

(x) *Ibid*.

prevent people from tampering in physic, so as to trifle with the life of man; and, on the other, we must take care not to charge criminally a person who is of general skill, because he has been unfortunate in a particular case." "If you think there was gross ignorance or scandalous inattention in the conduct of the prisoner, then you will find him guilty; if you do not think so, then your verdict will be otherwise." (y)

The important consideration in these cases is, whether in reference to the remedy the party has used, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. Upon a similar indictment against the same person for causing the death of Mrs. L. it appeared that she put herself under his care on the 6th of October, at which time she was in very good health, to be cured of a complaint she had in her throat. On the 3d she had applied a small blister to her throat, but the wound occasioned by it was nearly well on the 6th. On the 7th, 8th, 9th, and 10th she went to the prisoner's, and on the evening of the 10th complained to her husband of a violent burning across her chest, in consequence of which he looked at it, and found a great redness across her bosom, darker in the centre than at the other parts; she also complained of great chilliness, and shivered with cold, and passed a very restless and uncomfortable night. On the 11th she was very unwell all the day, the redness was more vivid, and the spot in the centre darker, round the edges white and puffed up, and there was a dirty white discharge from the centre. Cabbage leaves had been applied. On the 12th the redness on the breast and chest was, if anything, greater. In consequence of the symptoms, the husband went to the prisoner, who asked why Mrs. L. had not come to inhale, and go on with the rubbing; the husband replied it was impossible, she was so ill; she had been constantly unwell since the night of the 10th, and was suffering a great deal of pain and sickness: the prisoner said it would soon go off, it was generally the case. He was told of the shivering and chilliness, and that some hot wine and water had been given to relieve her; he said hot brandy and water would have been better, and to put her head under the bed clothes. He was told that her chest and breast looked very red and very bad; he said that was generally the case in the first instance, but it would go off as she got better, and that the husband need not be uneasy about it, as there was no fear or danger. In the course of the day the cabbage leaves had been removed, and a dressing of spermaceti ointment put on the chest instead. In the evening the prisoner came and *saw Mrs. L. and looked at her breast, and observing the dressing said those greasy plasters had no business there, and she ought to have continued the [693 cabbage leaves. She said she could not bear the pain of keeping them on. He then took off his great coat and said that he would rub it out, and turned up the cuff of his coat as if for the purpose of doing so. She exclaimed very much with fright, and expressed her wonder that he should think of rubbing in the state her breast was in. She asked if there was no way of keeping the leaf on without touching the breast; and he asked her what she wished; she replied to be healed. He said it would never heal with those greasy plasters; that was not the way in which he healed sores. He then asked for a towel, and began dabbing it on the breast, particularly in the centre, where the discharge came from. He said that old linen was the best thing to heal a wound of that kind. She said her skin and flesh were very healthy, and always healed immediately with the simple dressing she had used. He said old linen was better, but she might use the dressing if she liked it, he saw no objection, and, when it skinned over he would rub it again. He never saw her afterwards; she died on the 8th of November. A surgeon proved that on the 12th of October he found a very extensive wound covering the whole anterior part of the chest, which, in his opinion, might be produced by any strong acid: the skin was destroyed; the centre of the wound was darker, and in a higher state of inflammation than the other parts; he considered the wound very dangerous to life when he first saw it; the centre spot and the upper part became gangrenous in about a week; and in his opinion Mrs. L. died of the wound, and

(y) *Rex v. St. John Long*, 4 C. & P. 398 (19 E. C. L. R.). Verdict, guilty. For the defence twenty-nine witnesses were called, who had been patients of the prisoner, and were satisfied with his skill and diligence.

according to his judgment it was not necessary or proper to produce such a wound to prevent any difficulty in swallowing, and he did not know of any disease, in which the production of such a wound would be necessary or proper. The body was internally and externally in perfect health, except a little narrowness at the entrance of the *œsophagus*. Another surgeon stated that he thought that a man of common prudence or skill would not have applied a liquid which in two days would produce such extensive inflammation; though all irritating external applications sometimes exceeded the expectations of the medical attendant; but he should say that such conduct was a proof of rashness and of ignorance. It was submitted that this was not manslaughter, but homicide *per infortunium*; that where the mind is pure and the intention benevolent, and there are no personal motives, such as a desire of gain, if an operation be performed, which fails, the party is not responsible; and that the indictment which in substance charged that the death was occasioned by the external application, was not supported. There was no count imputing ignorance or want of skill, or hastiness, or roughness of practice. Bayley, B. "I agree with Lord Hale,^(z) and do not think that there is any difference between a licensed and unlicensed surgeon. It does not follow that in the case of either, an act done may not amount to manslaughter. There may be cases in which a regular medical man may be guilty; and that is all that Lord Hale lays down. And that may be *694] laid out of the question in this case. *But the manner in which the act is done, and the use of due caution, seems to me to be material. Mr. J. Foster, p. 263, speaking of a person who happens to kill another by driving a cart or other carriage, says. "If he might have seen the danger, and did not look before him, it will be manslaughter *for want of due circumspection*." And there is also a passage in Bracton to the like effect. But all that I mean to say now is, that there being conflicting authorities, and the impression on our minds not being in your favor, I propose to reserve the point. As to the indictment not being supported by the evidence, one of the allegations is that the prisoner *feloniously* applied a noxious and injurious matter. And there is no doubt, if the jury should be of opinion against the prisoner, that the facts proved will be sufficient to warrant their finding that the prisoner *feloniously* did the act; for if a man, either with gross ignorance or gross rashness, administers medicine and death ensues, it will be clearly felony." It was then objected that in this case, as in larceny, there must be a trespass proved. It was not proved that any fraud had been practiced by the prisoner to get the patient under his care; nor had there been any avaricious seeking after fees; if there had been it might have been evidence to show the existence of trespass. In *Rex v. Van Butchell*,^(a) the case was stopped, because there was no evidence of how the operation was performed, and here there was not any evidence to show the mode in which the application was made. Bayley, B. "In this case we may judge of the thing by the effect produced, and that may be evidence from which the jury may say, whether the thing which produced such an effect was not improperly applied." Bolland, B. "When you pass the line which the law allows, then you become a trespasser." Bayley, B. "If I had a clear opinion in your favor, or if my Brothers had, or if we had any reason to think that other judges were of a different opinion, it would become our duty to give our opinion here, and prevent the case from going to the jury: but feeling as I do, notwithstanding all I have heard to-day, and myself and my Brothers having had our attention directed to the law before we came here, I think it right that the case should go to the jury; I think that if the jury shall find a given fact in the way in which I shall submit it to them, it will constitute the crime of *feloniously* administering, so as to make it manslaughter. I do not charge it on ignorance merely, but there may have been rashness; and I consider that *rashness will be sufficient to make it manslaughter*. As for instance, if I have the toothache, and a person undertakes to cure it by administering laudanum, and says, 'I have no notion how much will be sufficient,' but gives me a cup full, which immediately kills me; or if a person prescribing James's powder says, 'I have no notion how much should be taken,' and yet give me a tablespoonful, which has the same effect; such persons acting

(z) 1 Hale P. C. 429.

(a) *Supra*, p. 689.

ish rashness will, in my opinion, be guilty of manslaughter. With respect to what has been said about a willing mind in the patient, it must be remembered that a prosecution is for the public benefit, and *the willingness of the patient cannot take away the offence against the public.*" In summing up, Bayley, B., said "the points for your consideration *are first, whether Mrs. L. came to her death by the application of the liquid; secondly, whether the prisoner, in applying it, [*695] has acted feloniously or not. To my mind it matters not whether a man has received a medical education or not; the thing to look at is, *whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution.* I have no hesitation in saying for your guidance, that *if a man can be guilty of gross negligence in attending to his patient after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter.*" "If you shall be of opinion that the prisoner made the application with a gross and culpable degree of rashness, and it was the cause of Mrs. L.'s death, then, heavy as the charge against him, he will be answerable on this indictment for the offence of manslaughter. There is a considerable interval between the application of the liquid and the death of the patient; yet if you think that the infliction of the wound on the 10th of October was the cause of the death, then it is no answer to say that a different course of treatment by Mr. C. might have prevented it. You will consider these two points: first, of what did Mrs. L. die? You must be satisfied that she died of the wound, which was the result of the application made on the 10th of October; and then, secondly, if you are satisfied of this, whether the application was a felonious application; this will depend upon whether you think it was gross and culpable rashness in the prisoner to apply a remedy which might produce such effects in such a manner that it did actually produce them. If you think so then he will be answerable to the full extent." (b)

Any person, whether he be a regularly licensed medical man or not, who professes to deal with the life or health of his Majesty's subjects, is bound to have competent skill to perform the task that he holds himself out to perform, and is bound to treat his patients with care, attention, and assiduity, and if the patient dies for want hereof, such medical man is guilty of manslaughter. Upon an indictment for manslaughter, by causing the death of a child by putting a plaster made of corrosive and dangerous ingredients upon its head, it appeared that the child for eighteen months had been afflicted with scald head, and was taken to the prisoner, who applied two plasters successively all over its head. Two surgeons proved that there was a general sloughing of the scalp, which caused the death, and in their opinion this might have been produced by the plasters; there was no evidence to show of what the plasters were composed. Bolland, B., "The law, as I am bound to lay it down and I believe I lay it down as it has been agreed upon by the judges; for cases of this kind have occurred of late more frequently than in former times) is this: if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his Majesty's subjects, he is bound to have competent skill to perform the task that he holds *himself out to perform, and he is [*696] bound to treat his patients with care, attention, and assiduity." (c)

The prisoner, a surgeon and man-midwife, was charged with manslaughter upon the indictment, which he alleged that he undertook the care and charge of B. K. as

(b) *Rex v. St. John Long*, 4 C. & P. 423 (19 E. C. L. R.), Bayley and Bolland, BB., and Bosanquet, J. The prisoner was acquitted. There was no negligence or inattention in the prisoner after the applications, as he did not know where Mrs. L. was until the 12th of October, and after that time she was attended by Mr. C.

(c) *Rex v. Spiller*, 5 C. & P. 333 (24 E. C. L. R.), coram, Bolland, B., and Bosanquet, J. See also *Lanphier v. Phipos*, 8 C. & P. 475 (34 E. C. L. R.), where Tindal, C. J., said, "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your cause; nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest possible degree of skill: there may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable, and competent degree of skill."

a man-midwife, and to do everything needful for her during and after the time of her delivery, and that after B. K. was delivered he neglected to take proper care of and to render her proper assistance, by means whereof she died. Tindal, C. J., said to the jury, "You are to say whether, in the execution of that duty which the prisoner had undertaken to perform, he is proved to have shown such a gross want of care, or such a gross and culpable want of skill, as any person undertaking such a charge ought not to be guilty of; and that the death of the person named in the indictment was caused thereby."^(d)

If a medical man, though lawfully qualified to act as such, cause the death of a person by the grossly unskillful or grossly incautious use of a dangerous instrument, he is guilty of manslaughter. Upon an indictment for manslaughter in causing the death of a woman by using a lever in delivering her of a child, it appeared that the prisoner had for nearly thirty years carried on the business of an apothecary and man-midwife, and that he was qualified by law to carry on that profession; his practice had been very considerable, and (amongst others) he had attended the deceased herself on the birth of all her children. On the occasion in question, he made use of a metal instrument, known in midwifery by the name of a vectis, or lever, inflicting thereby such grievous injuries on the person of the deceased, as to cause her death within three hours; and it was proved by the evidence of medical men, first, that the instrument used was a dangerous one, and that at that period of the labor it was very improper to use it at all; and secondly, that it must have been used in a very improper way, and in an entirely wrong direction. There was no evidence on either side as to whether the prisoner had or had not ever made use of such an instrument on former occasions. Coleridge, J., told the jury, that the questions for them to decide were, whether the instrument had in this instance caused the death of the deceased, and whether it had been used by the prisoner with due and proper skill and caution, or with gross want of skill, or gross want of attention. No man was justified in making use of an instrument, in itself a dangerous one, unless he did so with a proper degree of skill and caution. If the jury thought that in this *697] instance the prisoner had used the instrument with gross want of skill, or gross want of caution, and that the deceased had thereby lost her life, it would be their duty to find the prisoner guilty.^(e)

If a person brings a competent knowledge, and on a particular occasion makes an accidental mistake, he is not answerable; but if a person not acquainted with the medical art administers a dangerous remedy to a person laboring under a serious disease, proper medical assistance being at the time procurable, and death ensues from such administering, it is manslaughter. So if such person administers medicine, of the nature of which he is ignorant, and such medicine causes death. The prisoner was indicted for manslaughter in causing the death of R. R., by administering to him a large quantity of Morison's pills; the deceased, being ill of small-pox, had sent for the prisoner, who was a publican and agent for the sale of the pills, and under his advice had taken large quantities of them; his strength gradually wasted under their influence, and on the morning of his death, while in a state of collapse, the prisoner had, of his own accord, administered to him twenty pills. The prisoner had treated the deceased with great kindness during his illness, and on a former occasion the deceased had recovered from a dangerous illness while under the prisoner's treatment. Several medical men gave it as their opinion that medicine of the violent character, of which the pills were composed, could not be administered to a person in the state in which the deceased was, without accelerating his death. Lord Lyndhurst, C. B., "I agree that in these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without a license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which mistake death ensues, he is not thereby guilty of manslaughter; but if,

(d) Ferguson's case, 1 Lew. 181. *Quære*, whether this be not the same case as that mentioned in *Rex v. St. John Long*, 4 C. & P. 404, 405 (19 E. C. L. R.), *see ante*, p. 691. If so, the prisoner was a blacksmith, drunk, and wholly ignorant of the proper steps to be taken; no evidence is stated in Lewin.

(e) *Rex v. Spilling*, 2 M. & Rob. 107.

where proper medical assistance can be had, a person totally ignorant of the science of medicine takes on himself to administer a violent and dangerous remedy to one laboring under disease, and death ensues in consequence of that dangerous remedy having been so administered, then he is guilty of manslaughter."(*f*)

Where the prisoner, a herb doctor, gave a woman a bottle of lobelia inflata, and desired her to give two teaspoonfuls of the infusion three times a day to a child whom he examined, and she accordingly gave the child some doses of the infusion for several days, and then ceased, as she thought it got better; but the child died three weeks after it was seen by the prisoner, and more than a week after the last dose had been administered, and it was proved that the child had died of over-doses of lobelia, which is an acro-narcotic poison, and is occasionally used by regular practitioners; Pollock, C. B., told the jury that "it is no crime for any one to administer medicine, but it is a crime to administer it so rashly and carelessly as to produce death; and in this respect there is no difference between the most regular practitioner and the greatest quack. All that the prisoner ought to be held responsible for was, what took place in the first week after he saw the child. The prisoner had not seen the child for three weeks before its death. The charge against the prisoner is, not that he carelessly allowed the woman to be in possession of a dangerous medicine, but that he caused the death of the child by administering the medicine; but in the evidence it appeared that the child got better while the medicine was being given to it. If the prisoner had been a medical man, I should have recommended you to take the most favorable view of his conduct; for it would be most fatal to the efficiency of the medical profession if some could administer medicine without a halter round his neck; and although I cannot speak of a person in the prisoner's position in language as strong, still he ought not to be responsible unless it has been proved with reasonable certainty that he caused the death by the careless administration of the drug."(*g*)

Where the deceased had once been operated upon for cancer, and the disease again appeared in his face, and the prisoner, a blacksmith, told him he could cure him, and the deceased consented to place himself in his hands, and he put some kind of oil on his face, and then applied some kind of powder which caused the greatest agony, and death ensued in nine days; and after the prisoner had been employed there was a line of demarcation around the tumor, and all the tissues were destroyed, as if some powerful caustic had been applied, and the general symptoms showed poisoning by some irritant poison; and on a *post mortem* examination, marks were found of extensive inflammation in the bowels and numerous ulcerations, which were the effects of mercury applied to the tumor; and the deceased died from the effects of corrosive sublimate. Corrosive sublimate was sometimes applied to wounds, but not to cancer. The deceased must have died of the cancer, but his death was accelerated. Watson, B., directed the jury to find the prisoner guilty if they considered he took upon himself the responsibility of attending to a patient suffering under cancer, when he was not qualified for the purpose. If he used dangerous applications, he was bound to bring skill in their use; and he thought that the prisoner's education and employment made the use of these dangerous substances almost amount to want of skill. The jury must, however, say whether what the prisoner did produced or accelerated the death; or (and) whether the prisoner in their opinion had acted with neglect in using the remedies he had done.(*h*)

On an indictment for manslaughter it appeared that the prisoner, a medical man, lived with his mother, and she being ill, he got a drachm of prussic acid, which filled one fourth of an ounce bottle. After she came in from a walk he gave her some of the prussic acid; she went upstairs, and, whilst taking off her bonnet, died. The prisoner said he had given her four drops, but it appeared that the bottle had lost much more. The cork however was broken, and the bottle was loose in his pocket. Very obscure evidence was given as to the relative strengths of different

(*f*) *Rex v. Webb*, 1 M. & Rob. 405; 2 Lew. 196. The very learned Chief Baron added, "If I entertained the least doubt of this position, I might fortify it by referring to the opinion of Lord Ellenborough, in *Rex v. Williamson*." *Supra*, p. 689.

(*g*) *Reg. v. Crick*, 1 F. & F. 519.

(*h*) *Reg. v. Crook*, 1 F. & F. 521.

preparations of prussic acid, as to the mode of measuring drops, as to the quantities *699] contained in drops, and as to the quantity likely to kill; but the cork being held partly in would much affect the *quantity of a drop, and the state of a person's body might vary the effect of a few drops of the poison. Cockburn, C. J., told the jury that "if a person takes upon himself to administer a dangerous medicine, it is his duty to administer it with proper care; and if he does it with negligence he is guilty of manslaughter. But do the facts here show such culpable negligence on the part of the prisoner? If the prisoner had given the deceased all that was missed from the bottle, it would be so, for the quantity would be so large that it must have been the grossest negligence. But the cork was found broken and half out of the bottle, so that it is impossible to say how much of the poison might not have escaped; or again, the cork being half gone, the liquid might have dropped faster than the prisoner supposed, and if so it would not be such culpable negligence as would make him criminally responsible." (i)

The prisoner was indicted for manslaughter, and was an herb doctor, and had found the deceased ill of a cold from standing in a market, and volunteered to prescribe for her, and put into a small bottle of pale brandy about an ounce of meadow saffron seeds, known medically as colchicum seeds, first bruising them, and directing the deceased's daughter to place the bottle before the fire for two hours, and then shake it up and give her mother a tablespoonful. The daughter gave her mother a tablespoonful on Monday, and she became ill and sick shortly after, and continued at short intervals vomiting and retching till she died exhausted on Wednesday. She died from gastritis, or inflammation of the stomach, which the medical men attributed to the over-dose of colchicum seeds. Two grains of colchicum seeds, in the form of tincture, was a dose; a teaspoonful of the mixture would contain eighteen grains, and a tablespoonful contained eighty grains. This was a highly poisonous and fatal dose. The heart of the deceased showed slight symptoms of fatty degeneration, and the administering colchicum to a person so diseased was malpractice, as it tended to depress and weaken the heart's action, and render it less able to keep up the circulation. Willes, J., "Every person who dealt with the health of others was dealing with their lives, and every person who so dealt was bound to use reasonable care, and not to be grossly ignorant. Gross negligence might be of two kinds: in one sense, where a man, for instance, went hunting and neglected his patient, who died in consequence. Another sort of gross negligence consisted in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines, which should be carefully used, of the properties of which he was ignorant, or how to administer a proper dose. A person who with ignorant rashness, and without skill in his profession, used such a dangerous medicine, acted with gross negligence. It was not, however, every slip that a man might make that rendered him liable to a criminal investigation. It must be a substantial thing. If a man knew that he was using medicines beyond his knowledge, and was meddling with things above his reach, that was culpable rashness. Negligence might consist in using medicines in the use of which care was required, and of the properties of which the person using them was ignorant. A person who so took a leap in the dark in the administration of medicines was guilty of gross negligence. If a man was wounded, and another applied to his wound something which was of a dangerous nature and ought not to be applied, and which led to fatal results, then the person who applied this remedy would be answerable, and not the person who inflicted the wound, because a new cause had supervened. But if the person who dressed the wound applied a proper remedy, then, if a fatal result ensued, he who inflicted the wound remained liable. He left it to the jury to say whether the deceased had died from natural causes, or from the supervening cause of the medicine prescribed for her by the prisoner, he being an irregular and apparently unskilled practitioner. If from the latter cause, had the prisoner prescribed this medicine, which was the cause of death, rashly in the sense he had explained." (i)

Where a prisoner, who had formerly been a butcher by trade, had practised as a surgeon for many years without any legal qualification, was indicted for the man-

(i) Reg. v. Bull, 2 F. & F. 201.

(ii) Reg. v. Markuss, 4 F. & F. 356.

slaughter of a man on whom he had performed an operation for a disease in the bone, and the only question was whether the practice of the prisoner in the particular case amounted to gross and culpable negligence, and several medical men proved that the treatment pursued by the prisoner exhibited the grossest and most culpable ignorance, it was proposed for the defence to call witnesses to prove that the prisoner had treated them for similar complaints successfully, and *Rex v. Williamson*,^(k) was relied upon. Maule, J., refused to allow the witnesses to be examined, saying, "In *Rex v. Williamson* the witnesses were asked generally *causa scientia*. Neither on the one hand nor the other can other cases be gone into. The attention of the jury must be confined to the present case." And in summing up the very learned judge said, "If a medical or any other man caused the death of another *intentionally*, that would be murder; but where a person *not intending to kill a man*, by his gross negligence, unskillfulness, and ignorance caused the death of another, then he was guilty of culpable homicide; and the question for the jury was, whether the deceased had died from the effects of the operation performed on him by the prisoner, and whether the treatment pursued by the prisoner in the case of the deceased was marked by negligence, unskillfulness, and ignorance."^(l)

A question is put by Lord Hale, whether, if a person infected with the plague should go abroad with the intention of infecting another, and another should thereby be infected and die, this would not be murder; but it is admitted that, if no such intention should evidently appear, it would not be felony, though a great misdemeanor.^(m) It may be observed, that an offence of this sort in breach of quarantine is punishable by the provisions of a recent statute.⁽ⁿ⁾

A question has been raised, whether an indictment for murder could be maintained for killing a female infant by *ravishing* her; but the point was not decided.^(o) But there is no doubt that it *may*. The prisoner was indicted for the murder of a child under ten, and it appeared that he had had connection [*700 with her and given her the venereal disease; and Wightman, J., told the jury that if they were of opinion that the prisoner had had connection with her, and she died from its effects, then the act being, under the circumstances of the case, a felony in point of law, this would of itself be such malice as would justify them in finding him guilty of murder.^(p)

It is agreed that no person shall be adjudged by any act whatever to kill another, who does not die thereof within a year and a day after the stroke received, or cause of death administered, in the computation of which the whole day upon which the hurt was done is to be reckoned the first.^(q)

Questions may occasionally arise as to the *treatment* of the wound or hurt received by the party killed. Upon this subject it has been ruled, that if a man give another a stroke not in itself so mortal but that with good care he might be cured, yet if the party die of this wound within the year and a day, it is murder, or other species of homicide, as the case may be; though if the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound not in itself mortal, for want of proper applications, or from neglect, turns to a gangrene or a fever, and that gangrene or

(k) *Supra*, p. 689.

(l) *Reg. v. Whitehead*, 3 C. & K. 202.

(m) 1 Hale 432. See *Reg. v. Greenwood*, *infra*, p. 700.

(n) 6 Geo. 4, c. 78, s. 17. *Ante*, p. 165, *et seq.*

(o) *Rex v. Ladd*, 1 Leach 96; 1 East P. C. 226. The judges to whom the case was referred gave no opinion upon the point, as the indictment was holden to be defective.

(p) *Reg. v. Greenwood*, 7 Cox C. C. 404. The report proceeds, "The jury retired, and, after some time, returned into Court, saying that they were satisfied that he had had connection, and that her death resulted therefrom, but were not agreed as to finding him guilty of murder." Wightman, J., told them that, under these circumstances, it was open to them to find the prisoner guilty of manslaughter, and that they might ignore the doctrine of constructive malice if they thought fit. The jury found a verdict of manslaughter. *See quære.*

(q) 1 Hawk. P. C. c. 31, s. 9; 4 Bla. Com. 197; 1 East P. C. c. 5, s. 112, pp. 343, 344.

fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder, or manslaughter, according to the circumstances. For though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound being the cause of the gangrene or fever, is the immediate cause of the death, *causa causati*.^(r) Thus, it was resolved, that if one gives wounds to another, who neglects the cure of them, or is disorderly, and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according to the circumstances; because if the wounds had not been, the man had not died; and, therefore, neglect or disorder in the person who received the wounds shall not excuse the person who gave them.^(s)¹ So where on an indictment for murder it appeared that the deceased had been waylaid and assaulted by the prisoner and severely cut across one of his fingers by an iron instrument, and the surgeon urged him to submit to amputation, but he refused, though he was told that his life would be in great hazard; and it was dressed day by day for a fortnight; when lock-jaw came on induced by the wound in the finger, and the finger was then amputated, but too late; and the lock-jaw ultimately caused *701] death; and the surgeon thought it most probable that the life would have been saved if the finger had been amputated in the first instance; and it was contended that it was the obstinate refusal to submit to amputation that was the cause of the death; Maule, J., held that that was no defence; and told the jury that if the prisoner wilfully, and without any justifiable cause, inflicted the wound, which was ultimately the cause of the death, he was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question was whether in the end the wound was the cause of death.^(t)²

Where on an indictment against a principal in the second degree for murder by shooting in a duel, after the examination of the first medical witness, who stated his opinion that the operation (of which no account is given in the report) was the only chance of saving the life of the deceased; the counsel for the prisoner were proceeding to cross-examine him as to the nature and seat of the wound, to show that the opinions he had expressed of its danger and the necessity of the operation were not correct; Erle, J., said, "I presume you propose to call counter-evidence and impeach the propriety of the operation; but I am clearly of opinion that if a dangerous wound is given, and the best advice is taken, and an operation performed under that advice, which is the immediate cause of death, the party giving the wound is criminally responsible." It was proposed to show that the opinion formed by the medical men was grounded upon erroneous premises, and that no operation was necessary at all, or at least that an easier and much less dangerous operation ought to have been adopted; and it was submitted that a person is not criminally responsible where the death is caused by consequences which are not physically the

(r) 1 Hale 428.

(s) Rew's case, Kel. 26.

(t) Rex v. Holland, 2 M. & Rob. 351.

¹ Comm. v. Green, 1 Ashm. 289. When a surgical operation is performed in a proper manner, and under circumstances which render it necessary in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of death, the party inflicting the wound will nevertheless be responsible for the consequences: Comm. v. M'Pike, 3 Cush. 181.

² Where the wound is adequate and calculated to produce death, it is no excuse to show, that had proper caution and attention been given a recovery might have followed. Neglect or maltreatment will not excuse, except in cases where doubt exists as to the character of the wound: State v. Corbett, 1 Jones (Law) 267.

Where death is caused by a wound received, the person who inflicts it is responsible for its consequences, although the deceased might have recovered by the exercise of more care and prudence: M'Allister v. State, 17 Ala. 434.

If a wound is inflicted, not dangerous in itself, and the death which ensues was evidently occasioned by the grossly erroneous treatment of it, the original author will not be accountable: Parsons v. State, 21 Ala. 300. See also Comm. v. Hackett, 2 Allen 136; State v. Scott, 12 La. Ann. 274; Livingston's case, 14 Gratt. 592; State v. Scates, 5 Jones (Law) 420.

consequences of the wound, but can only be connected with the first wound by moral reasonings; as here that which occasioned death was the operation, which supervened upon the wound, because the medical men thought it necessary. Erle, J., "I am clearly of opinion, and so is my brother Rolfe, that where a wound is given, which, in the judgment of competent medical advisers, is dangerous, and the treatment which they *bonâ fide* adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible, and of course those who aided and abetted him in it. I so rule on the present occasion; but it may be taken, for the purpose of future consideration, that it having been proved that there was a gunshot wound, and a pulsating tumor arising therefrom, which, in the *bonâ fide* opinion of competent medical men, was dangerous to life, and that they considered a certain operation necessary, which was skilfully performed, and was the immediate and proximate cause of death; the counsel for the prisoner tendered evidence to show this opinion was wrong, and that the wound would not have inevitably caused death, and that by other treatment the operation might have been avoided, and was therefore unnecessary. I will reserve this point for the consideration of the Judges, although I have no doubt upon the subject. To admit this evidence would be to raise a collateral *issue in every case as to the degree of skill which the [*702 medical men possessed."(u)

Where the deceased had been severely kicked on the stomach, and brandy had been given her by a surgeon to restore her, and part of it had gone the wrong way into the lungs, and might, peradventure, have caused the death, the prisoner was convicted of manslaughter, and Coleridge, J., said the case was like that where a dangerous wound was given, and an operation was performed.(v)

If a man be sick of some disease, which, by the course of nature, might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death, by irritating and provoking the disease to operate more violently or speedily, this is murder or other homicide, according to the circumstances, in the party by whom such wound or hurt was given. For the person wounded does not die simply *ex visitatione Dei*, but his death is hastened by the hurt which he received; and it shall not be permitted to the offender to apportion his own wrong.(w)

Upon an indictment for manslaughter it appeared that the death was caused by a blow on the back of the neck, and that the deceased was not at the time in a good state of health, and that she was desired to remain in a hospital, where she could best be attended to, but would not. Parke, B., said, "It is said, that the deceased was in a bad state of health, but that is perfectly immaterial; as if the prisoner was so unfortunate as to accelerate her death, he must answer for it."(x) So upon an indictment for manslaughter by administering Morison's pills, it appeared that they were administered whilst the deceased was ill of small-pox, and the medical witnesses all gave it as their opinion that the administering of Morison's pills in such doses must have aggravated the disease under which the deceased labored, and have accelerated his death; and one of them said, that the deceased died of small-pox heightened by the treatment he had received. It was objected, that the indictment was not supported by the evidence, which only proved that the deceased died of a natural disorder, accelerated by improper treatment. It might be conceded, for the sake of argument, that if the indictment had so stated the case, it might have been

(u) Reg. v. Pym, 1 Cox C. C. 339. Acquittal.

(v) Reg. v. McIntyre, 2 Cox C. C. 379.

(w) 1 Hale 428. Lord Hale says, that thus he had heard that learned and wise judge, J. Rolfe, frequently direct. See Johnson's case, 1 Lewin 164, where on an indictment for manslaughter in causing a death by a blow on the stomach, on a surgeon stating that a blow on the stomach in this state of things, arising from passion and intoxication, was calculated to occasion death, but not so if the party was sober. Hullock, B., is said to have directed an acquittal, saying, "that where the death was occasioned partly by a blow, and partly by a predisposing circumstance, it was impossible so to apportion the operations of the several causes as to be able to say with certainty that the death was immediately occasioned by any one of them in particular." This ruling is questioned in Roscoe Cr. Evid. 647, and as it should seem with very good reason, as it is contrary to the other authorities upon this point. C. S. G.

(x) Rex v. Martin, 5 C. & P. 128 (24 E. C. L. R.), Parke, B.

sufficient; but the indictment made quite a different charge, *viz.*, that the party died wholly and solely of a mortal sickness caused by the medicine and the improper treatment. Lord Lyndhurst, C. B., "It is true the witnesses do not say whether the deceased would, in their opinion, have died of the small-pox if the pills had not *703] been administered; but they all *agree in this, that his death was accelerated by the pills. Now their evidence being translated, comes to this, that the party died on the day when he did die, *viz.*, on the 27th of June, by reason of taking the pills. At present, therefore, it appears to me that the indictment is good." And, in summing up, the very learned Chief Baron adhered to the opinion he had already expressed on the argument, and left it to the jury to say "whether the death of the deceased had been occasioned or accelerated by the medicines administered by the prisoner.(y)

So where a husband was indicted for the manslaughter of his wife by accelerating her death by blows, and it appeared that she was at the time in so bad a state of health that she could not possibly have lived more than a month or six weeks under any circumstances: Coleridge, J., told the jury that if a person inflicted an injury upon a person laboring under a mortal disease, which caused that person to die sooner than he otherwise would have done, he was liable to be found guilty of manslaughter, and the question for them was whether the death of the wife was caused by the disease under which she was laboring, or whether it was hastened by the ill usage of the prisoner.(z)

It will not be necessary to specify the particular instances of the more gross kinds of wilful murder in which the malignity of the heart, the malice prepense which has been already described, is apparent. It may, however, be remarked, that of all species of deaths, that by poison has been considered as the most detestable, because it can, of all others, be least prevented by manhood or forethought. It is a deliberate act, necessarily implying malice, however great the provocation may have been;(a) and on account of its singular enormity was made treason by the 22 Hen. 8, c. 9, and punishable by a lingering kind of death; but this statute was repealed by the 1 Edw. 6, c. 12, ss. 10 & 13.(b) By a late statute administering poison with *intent* to murder, though no death should ensue, is made highly penal, which will be more particularly mentioned in its proper place.(c)¹

Self-murder may be mentioned as a peculiar instance of malice directed to the destruction of a man's own life, by inducing him deliberately to put an end to his existence, or to commit some unlawful malicious act, the consequence of which is his own death.(d) It has been already stated, that a person killing another, upon *704] his desire or command, is guilty of murder,(e) but *in this case the person killed is not looked upon as a *felo de se*, inasmuch as his assent, being against the laws of God and man, was void.(f) But where two persons agree to

(y) *Rex v. Webb*, 1 M. & Rob. 405; 2 Lew. 196. Verdict, guilty.

(z) *Reg. v. Fletcher*, Gloucester Spr. Ass. 1841. MSS. C. S. G. See *Reg. v. Merton*, 3 F. & F. 492, s. p.

(a) 1 East P. C. c. 5, s. 12, p. 225, s. 30, p. 251; 4 Bla. Com. 200; 1 Hale 455.

(b) The true grounds of this statute of Edw. 6, which was repealed by the 9 Geo. 4, c. 81, have been much discussed, and different opinions have been expressed on the subject by many great lawyers. See the opinions of Lord Coke, 11 Co. 32, a.; Kelyng. C. J., Kel. 32; Lord Holt, Kel. 125; and Mr. Justice Foster 68, 69. Mr. Justice Foster considered the enactments of the statute to be not in affirmance of the common law, but by way of *revival* of it; to this solution of the difficulty Mr. Barrington has made some objections (Obs. on the Stat. 524), which have been observed upon by the editor of Mr. Just. Foster's work, in his Preface to the second edition.

(c) 24 & 25 Vict. c. 100, s. 11, *post*, Chap. x.

(d) 4 Bla. Com. 189. *Occider luy mesme, per quel act il occide per presumption sa alme auwy, est greinder offence que a tuer auter*, in *Hales v. Pettite*, Plowd. 261 (b). The 4 Geo. 4, c. 52, regulates the mode of interment of the remains of persons found *felo de se*.

(e) *Ante*, p. 670.

(f) 1 Hawk. P. C. c. 27, s. 6. An attempt to commit suicide is a misdemeanor at common law, and the question for the jury is whether the prisoner had a mind capable of

¹ *People v. Hartung*, 4 Parker C. R. 71; *Stephens v. People*, *Ibid.* 396. On an indictment for murder perpetrated by means of poison, the jury may find the prisoner guilty of murder in the second degree: *State v. Dowel*, 19 Conn. 388.

die together, and one of them, at the persuasion of the other, buys poison and mixes it in a potion, and both drink of it, and he who bought and made the potion survives by using proper remedies, and the other dies; it is said to be the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner. (g) Upon a principle which will presently be mentioned more fully, if a man, attempting to kill another, miss his blow and kill himself, (h) or intending to shoot at another, mortally wound himself by the bursting of the gun, (i) he is *felo de se*; his own death being the consequence of an unlawful malicious act towards another. It has also been said, that if A. strike B. to the ground, and B. draw a knife and hold it up for his own defence, and A. in haste falling upon B. to kill him, fall upon the knife and be thereby killed, A. is *felo de se*; (k) but this has been doubted. (l) A husband and wife being in extreme poverty and great distress of mind, the husband said "I am weary of life, and will destroy myself," upon which the wife replied, "If you do I will too." The man bought some poison mixed it with some drink, and they both partook of it. The husband died, but the wife, by drinking salad oil, which caused sickness, recovered, and was tried for the murder of her husband, and acquitted, but solely on the ground that, being the wife of the deceased, she was under his control; and inasmuch as the proposal to commit suicide had been first suggested by him, it was considered that she was not a free agent, and therefore the jury, under the direction of the judge who tried the case, pronounced a verdict of not guilty. (m)

The prisoner was indicted for the murder of a woman by drowning her. It appeared that the prisoner had cohabited with the deceased for several months previous to her death, and she was with child by him; they were in a state of extreme distress; and being unable to pay for their lodgings, they quitted them in the evening of the night on which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre, and afterwards went to Westminster Bridge to drown *themselves in the Thames; they got into a boat, and from that into another boat, the water where the first boat was moored [*705 not being of sufficient depth to drown them. They talked together for some time in the boat into which they had got, the prisoner standing with his foot on the edge of the boat, and the woman leaning upon him. The prisoner then found himself in the water; but whether by actual throwing of himself in, or by accident, did not appear. He struggled to get back into the boat again, and then found that the woman was gone; he then endeavored to save her, but could not get to her, and she was drowned. In his statement before the magistrate he said that he intended to drown himself, but dissuaded the woman from following his example. The learned judge told the jury, that if they believed that the prisoner only intended to drown himself, and not that the woman should die with him, they should acquit the prisoner; but that if both went to the water for the purpose of drowning themselves together, each encouraged the other in the commission of a felonious act, and the survivor was guilty of murder. He also told the jury, that although the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act

contemplating the act, and whether in fact he did intend to take away his life, and drunkenness in this, as in other cases, is no excuse; but it is a material fact in order to determine whether the prisoner really intended to kill himself: *Reg. v. Doody*, 6 Cox C. C. 463, *Wightman, J.*

(g) 1 Hawk. P. C. c. 27, s. 6; *Keilw.* 136; *Moor* 754.

(h) 1 Hale 412.

(i) 1 Hawk. P. C. c. 27, s. 4.

(k) 3 Inst. 54; *Dalt.* c. 144.

(l) See 1 Hale 412, who considers that in this case B. is not guilty at all of the death of A., not even *se defendendo*, as he did not strike, only held up the knife; and that A. is not a *felo de se*, but that it is homicide by misadventure. In *Hawk. P. C. c. 27, s. 5*, it seems to be considered that B. should be adjudged to kill A. *se defendendo*.

(m) Anonymous case, as stated by *Patteson, J.*, in *Reg. v. Allison*, 8 C. & P. 418 (34 E. C. L. R.). The case is reported in *Moor* 754. *Quære*, whether they were husband and wife; the report begins, "*home et sa feme ayant long temps vive incontinent ensemble.*" And it states that a special verdict was found, but does not state the decision. See my note, *ante*, p. 34, as to the decision of this case. C. S. G.

of throwing was to be considered as the act of both, and so the case was reached by the indictment. The jury stated that they were of the opinion that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. And, upon a case reserved, the Judges were clear that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of their previous agreement, he was a principal in the second degree, and was guilty of murder; but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either of them, and the prisoner was recommended for a pardon.⁽ⁿ⁾ So where upon an indictment for the murder of a woman, it appeared that the prisoner and the deceased, who passed as husband and wife, being in very great distress, both agreed to take poison, and each took a quantity of laudanum, in the presence of the other, and both lay down on the same bed together, wishing to die in each other's arms, and the woman died, but the prisoner recovered; Patteson, J., told the jury that, "supposing the parties in this case mutually agreed to commit suicide, and one only accomplished that object, the survivor will be guilty of murder in point of law. It may be said that they were both under the influence of what is called 'temporary insanity,' and a practice has of late years been pursued by coroners' juries of finding verdicts to that effect in cases which do not at all justify such a conclusion. As a lawyer, I am bound to say that such verdicts are wholly unwarranted by the law of this country."^(o)

A person could not formerly be tried, as an accessory before the fact, for *706] inciting another to commit suicide, if that person *committed suicide.^(p) But the 24 & 25 Vict. c. 94, s. 1, seems to remove this difficulty.^(q)

In order to make an abettor to a murder or manslaughter principal in the felony he must be present aiding and abetting the fact committed. The *presence*, however, need not always be an actual standing by within sight or hearing of the fact, for there may be a constructive presence, as when one commits a murder and another keeps watch or guard at some convenient distance.^(r) But a person may be present, and, if not aiding and abetting, be neither principal nor accessory: as, if A. happen to be present at a murder and take no part in it, nor endeavor to prevent it, or to apprehend the murderer, this strange behavior, though highly criminal, will not of itself render him either principal or accessory.^(s)

If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder and another of manslaughter; for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former.^(t) So if A. assault B. of malice and they fight, and A.'s servant come in aid of his master, and B. be killed, A. is guilty of murder; but the servant, if he knew not of A.'s malice, is guilty of manslaughter only.^(u) Several persons conspired to kill Dr. Ellis, and they set upon him accordingly, when Salisbury, who was a servant to one of them, seeing the affray and fighting on both sides, joined with his master, but knew nothing of his master's design. A servant of Dr. Ellis, who supported his master, was killed. The Court told the jury that malice against Dr. Ellis would make it murder in all those whom that malice affected, as the malice against Dr. Ellis would imply malice against all who opposed the design against Dr. Ellis: but, as to Salisbury, if he had no malice, but took part suddenly with those who had, without knowing of the design against Dr. Ellis, it was only manslaughter in him. The jury found Salisbury guilty of manslaughter and three others of murder, and the three were executed.^(v)

It has been decided that if the person charged as principal be acquitted, a conviction of another charged in the indictment as present aiding and abetting him in

(n) *Rex v. Dyson*, R. & R. 523.

(o) *Reg. v. Alison*, 8 C. & P. 418 (34 E. C. L. R.), Patteson, J.

(p) *Rex v. Russell*, R. & M. C. C. R. 356; *Reg. v. Leddington*, 9 C. & P. 79 (38 E. C. L. R.), Alderson, B., *ante*, p. 71.

(q) *Ante*, p. 67.

(r) 1 Hale 615; Fost. 350; 4 Bla. Com. 34. See *ante*, p. 50.

(s) Fost. 350; 1 Hale 439.

(u) 1 Hale 446; *ante*, p. 669.

(t) 1 East P. C. 5, s. 121, p. 350.

(v) *Rex v. Salisbury*, Plowd. 97.

murder, is good: for (by Holt, C. J.) "though the indictment be against the prisoner for aiding, assisting, and abetting A., who was acquitted, yet the indictment and trial of this prisoner is well enough, for all are principals, and it is not material who actually did the murder."^(w) And though anciently the person who gave the fatal stroke was considered as the principal, and those who were present aiding and assisting, only as accessories; yet it has long been settled that all who are present aiding and assisting are equally principals with him who gave the stroke whereof the party died, though they are called principals in the indictment in the second degree.^(x) So that if A. be indicted for murder, or manslaughter, [707] and C. and D. for being present and assisting A., and A. appears not, but C. and D. appear, they shall be arraigned; and if convicted shall receive judgment, though neither appear nor be outlawed.^(y) And if A. be indicted as having given the fatal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment shall be given against them; for it is only a circumstantial variance, and in law it is the stroke of all that are present aiding and abetting.^(z)

Where the first count charged *Downing* as principal in the first degree in the murder of W. Cooper by shooting him with a gun, and *Powys* as being present aiding and abetting *Downing*, and the second count charged *Powys* as principal in the first degree, alleging that he "afterwards" assaulted "the said W. Cooper," and *Downing* as being present aiding and abetting *Powys*; and the jury found them both guilty, but added they were not satisfied which of the prisoners fired the gun, but were satisfied that one of them fired the gun, and that the other was present aiding and abetting: it was thereupon submitted that, the prisoners being charged differently in the two counts, the jury must be instructed to find them guilty on one or the other of the counts only; but *Coltman, J.*, thought that, as the evidence equally supported either count, it was not necessary to give any such direction, and therefore told them that if they were satisfied that one of the two fired the gun, and that the other was present aiding and abetting, they were both liable to be found guilty, and the jury returned a general verdict of guilty; and, upon a case reserved, the conviction was held right, for both counts substantially related to the one person killed and to one killing.^(a)

Where a count charged *Thom* with murder, and *Tyler* and *Price* with being present aiding and abetting in the commission of the murder, and it appeared that *Thom* was insane at the time of committing the murder, it was held that *Tyler* and *Price* could not be convicted on this count.^(b) Where a count charged *Tyler* and *Price* as principals in the first degree with a murder, and it appeared that *Thom*, an insane person, collected a number of persons together, who armed themselves, with a common purpose of resisting the lawfully-constituted authorities, *Thom* declaring that he would cut down any constables who came against him, and a constable having come with his assistants, and a warrant to apprehend *Thom*, in the presence of *Tyler* and *Price*, who were two of his party, shot one of the assistants; it was held that the prisoners were guilty of murder as principals in the first degree, and that it was no ground of defence that *Thom* and his party had no distinct or particular object in view *when they assembled together and armed themselves; because, if their object was to resist all opposers in the commission of any breach of the peace, and for that purpose the parties assembled together and armed themselves with dangerous weapons, however blank the mind of *Thom* might be as to any ulterior purpose, and however the minds of the

(w) *Rex v. Wallis*, Salk. 334; *Rex v. Taylor*, 1 Leach 360; 1 East P. C. c. 5, s. 121, p. 351.

(x) 1 Hale 437; Plow. Com. 100, a.

(y) 1 Hale 437; Plow. Com. 97, 100, *Gythin's case*.

(z) 1 Hale 438; Plow. Com. 98, a; 9 Co. 67, b; *Rex v. Mackally*, 1 East P. C. c. 5, s. 121, p. 350; *Turner's case*, 1 Lew. 177, Parke, B.; *Reg. v. Phelps*, C. & M. 180 (41 E. C. L. R.).

(a) *Reg. v. Downing*, 1 Den. C. C. 52, Maule, J., *diss.* See 2 C. & K. 382 (61 E. C. L. R.), for the indictment. Now the proper course in such cases would be simply to allege that the prisoners murdered according to the 24 & 25 Vict. c. 100, s. 6. See the cases as to principals in the second degree, *ante*, p. 49, *et seq.*

(b) *Reg. v. Tyler*, 8 C. & P. 616 (34 E. C. L. R.), Lord Denman, C. J. See *quære*.

prisoners might be unconscious of any particular object, still, if they contemplated a resistance to the lawfully-constituted authorities of the country, in case any should come against them while they were so banded together, there would be a common purpose, and they would be answerable for anything which they did in the execution of it.(c)

He that counsels, commands, or directs the killing of any person, and is himself absent at the time of the fact being done, is an accessory to murder before the fact.(d) And though the crime be done by the intervention of a third person, he that procures it to be committed is an accessory before the fact; so that if A. bid his servant to hire somebody, no matter whom, to murder B. and furnish him with money for that purpose, and the servant procure C., a person whom A. never saw or heard of, to do it, A. is an accessory before the fact.(e)

If A. advise B. to kill another, and B. does it in the absence of A., in such case B. is principal, and A. is accessory in the murder. And this holds, even though the party killed be not *in rerum naturâ* at the time of the advice given; so that if a man advise a woman to kill her child as soon as it shall be born, and she kills it when born in pursuance of such advice, he is an accessory to the murder.(f)

It is a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act. Thus, if A. commands B. to beat C., and B. beat him so that he dies, A. being absent, B. is guilty of murder as principal, and A. as accessory; the crime having been committed in the execution of a command which naturally tended to endanger the life of another.(g) And *à fortiori*, therefore, if a man command another to rob any person, and he in robbing kill him, the person giving such command is as much an accessory to the murder, as to the robbery which was directly commanded: and it is also said, that if one command a man to rob another, and he kill him in the attempt but do not rob him, the person giving such command is guilty of the murder, because it was the direct and immediate effect of an act done in execution of a command to commit a felony.(h)

Where an indictment charged certain persons with the murder of N. Batty at Paris, and the prisoner as accessory before the fact, and it appeared that when the Emperor and Empress of the French arrived at the opera-house in the Rue Lapelletier, Paris, the street being full of people, as the carriage approached the entrance two grenades were first thrown and exploded, and a third about a minute afterwards,*709] and that Batty was one of the Gardes *de Paris on duty at the time, and that he died of wounds caused by the explosion; Lord Campbell, C. J., after citing 1 Russ. C. & M.,(i) told the grand jury, "as to the objection that the prisoner could have had no intention that those who were killed by the explosion of the grenades should be put to death, it may be observed that such a question can only arise where the principal does not act in strict conformity with the plans and instructions of the accessory. But here, if the prisoner was privy to the plot, the other persons in throwing the grenades as they did must be considered as having acted strictly in conformity with his plans and instructions, and he is answerable as accessory for the consequences." And after citing 1 Russ. C. & M.,(k) his Lordship added: "The approved text is, 'was the event alleged to be the crime to which the accused is charged to be accessory, a probable consequence of the act he committed?'"(l)

But if the crime committed be not the direct and immediate effect of the act done in pursuance of the command, or if the act done varies in substance from that which was commanded, the party giving the command cannot be deemed an accessory to the crime. Thus if A. persuade B. to poison C., and B. accordingly

(c) Reg. v. Tyler, Ibid.

(d) 1 Hale 435.

(e) Fost. 125.

(f) 1 Hale 617; 2 Hawk. P. C. c. 28, s. 18; 4 Bla. Com. 37; Dy. 185.

(g) 1 Hale 435; 2 Hawk. P. C. c. 29, s. 18; 4 Blac. Com. 37.

(h) 2 Hawk. P. C. c. 29, s. 18.

(i) *Ante*, p. 57, from "An accessory before the fact" to "accessories before the fact."

(k) *Ante*, p. 62, from "where the principal goes beyond," &c., to "instigation of A."

(l) Reg. v. Bernard, 1 F. & F. 240.

poison to C., who eats part of it, and gives the rest to D., who is d by it, A. is guilty of a great misdemeanor only in respect of D., but ot an accessory to his murder; because it was not the direct and imme- effect of the act done in pursuance of the command.(m) And if A. sel or command B. to beat C. with a small wand or rod, which would not l human reason cause death, and B. beat C. with a great club, or wound him a sword, whereof he dies, it seems that A. is not accessory; because there was ommand of death, nor of anything that could probably cause death; and B. rted from the command in substance, and not in circumstance.(n) But if the e committed be the same in substance with that which was commanded, and only in some circumstantial matters; as where a man advises another to kill a on in the night, and he kills him in the day; or to kill him in the fields, and ills him in the town; or to poison him, and he stabs or shoots him; the person ig such command is still accessory to the murder; for the substance of the z commanded was the death of the party killed, and the manner of its execu- is a mere collateral circumstance.(o)

n accessory after the fact, in murder, as in any other felony, may be where a on, knowing a murder to have been committed, receives, relieves, comforts, or ts the offender; as to which kind of accessory some points are noticed in a er chapter.(p) And the question for the jury in such a case is whether such son knowing the offence had been committed, was either assisting the [710 lerer to conceal the death, or in any way enabling him to evade the uit of justice.(q) It may be here observed, however, that if one wounds another ally, and after the wound given, but before death ensues, a person assists or ves the delinquent, this does not make such person accessory to the homicide; ill death ensues there is no felony committed.(r) y the 24 & 25 Vict. c. 100, s. 1, "Whosoever shall be convicted of murder suffer death as a felon."

xc. 67. "In the case of every felony punishable under this Act, every principal is second degree, and every accessory before the fact, shall be punishable in same manner as the principal in the first degree is by this Act punishable; and y accessory after the fact to the murder shall be liable, at the discretion of the t, to be kept in penal servitude for life or for any term not less than three s, or to be imprisoned for any term not exceeding two years, with or without labor."

xc. 8. "Every offence which before the commencement of the Act of the 9 4, c. 31, would have amounted to petit treason, shall be deemed to be murder , and no greater offence; and all persons guilty in respect thereof, whether as cipals or as accessories, shall be dealt with, indicted, tried, and punished as prin- s and accessories in murder."(s)

) Id. Ibid. *Sed quære et vide* Reg. v. Michael, 2 M. C. C. R. 120, *post*, and 1 Hale 431.
) 1 Hale 436.

2 Hawk. P. C. c. 29, s. 20; 4 Blac. Com. 37.

) *Ante*, p. 64; and see Reg. v. Good, 1 C. & K. 185 (47 E. C. L. R.), *ante*, p. 47, as to e being accessory after the fact to her husband.

Rex v. Greenacre, 8 C. & P. 35 (34 E. C. L. R.), Tindal, C. J., Coleridge and Colt- JJ.

) 4 Blac. Com. 38; 2 Hawk. P. C. c. 29, s. 35. But it should seem that he is accessory e maliciously wounding. C. S. G.

This clause is taken from the 9 Geo. 4, c. 31, s. 2; 10 Geo. 4, c. 34, s. 3 (1). Petit Treason is breach of the lower allegiance of private and domestic faith; and considered as pro- ng from the same principle of treachery in private life as would have led the person ring it to have conspired in public against his liege lord and sovereign. At common be instances of this kind of crime were somewhat numerous and involved in some uncer- y: 1 Hale 376; but, by the 25 Edw. 3, st. 5, c. 2, they were reduced to the following :—1. Where a servant killed his master. 2. Where a wife killed her husband. 3. Where eclesiastical person, secular or regular, killed his superior, to whom he owed faith obedience. The principles relating to wilful murder were also applicable to the s of petit treason, which, though it appears to have been sometimes regarded differ- [by unwary people, as Mr. J. Foster says, *Fost.* 323], was substantially the same ce as murder, differing only in degree: [*Fost.* 323, 327, 336; 4 Blac. Com. 203]. It murder aggravated by the circumstance of the allegiance, however low, which the lerer owed to the deceased; and in consequence of that circumstance of aggravation,

It has been before submitted, that a statement of the several instances of gross and direct wilful murder cannot be thought necessary. But there are a variety of cases of a less decided character, and some upon which doubts have arisen which may properly be here considered. An apt arrangement of them is a matter of some difficulty; but the following order seems to be appropriate: I. Cases of provocation. II. Cases of mutual combat. III. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace. IV. Cases where the killing *711] takes place in the prosecution of some other criminal, *unlawful, or wanton act. V. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.

Sec. I.—Cases of Provocation.

As the indulgence which is shown by the law in some cases to the first transport of passion is a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders a man deaf to the voice of reason; so the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed.(*t*) All the circumstances of the case must lead to the conclusion that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but solely imputable to human infirmity.(*u*) For there are many trivial, and some considerable provocations, which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead.

No *breach* of a man's *word* or *promise*; no *trespass*, either to lands or goods; no affront by bare *words* or *gestures*, however false and malicious, and aggravated with the most provoking circumstances, will free the party killing from the guilt of murder.(*v*) And it is conceived that this rule will govern every case where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill, or do some great bodily harm.(*w*)

A. passing by the shop of B. distorted his mouth, and smiled at him, and B. killed him: this was held murder; for it was no such provocation as would abate the presumption of malice in the party killing.(*x*)

Dangerfield was sentenced for a gross libel to be flogged from Newgate to Tyburn, and as he was returning from Tyburn, Frances, a barrister, asked him, in a jeering way, whether he had run his heat that day; he replied in scurrilous words; whereon Frances ran him into the eye with a small cane in his hand and of this wound Dangerfield died, and Frances was executed for his murder.(*y*)

If A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall) take the wall of him, and thereupon A. kill B. this is a murder; but if B. had justled A. this justling had been a provocation, and would have made it manslaughter.(*z*)

*If there be a chiding between husband and wife, and the husband strike *712] his wife thereupon with a pestle, so that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter.(*a*)

and of that alone, the judgment upon a conviction was more grievous in one case than in the other; though in common practice no material difference was made in the manner of the execution. As the offence of petit treason is now rendered the same as murder, the course is always to indict for murder, and it has therefore been thought unnecessary to reprint the chapter on Petit Treason, which was in the former editions. C. S. G.

(*t*) Fost. 315.

(*u*) 1 East P. C. c. 5, s. 19, p. 232.

(*v*) Fost. 290; 1 Hawk. P. C. c. 31, s. 33; 1 Hale 455; Woodhead's case, 1 Lewin 163, Hullock, B.

(*w*) Fost. 290, 291.

(*x*) Brain's case, 1 Hale 455; Cro. Eliz. 778; Kel. 131.

(*y*) Rex v. Frances, 3 Mod. R. 68, in Rex v. Dangerfield.

(*z*) 1 Hale 455. But this case probably supposes considerable violence and insult in the justling.

(*a*) Crompt. fol. 120 (*a*). See also Kel. 64; 1 Hale 456.

A woman called a man, who was sitting drinking in an alehouse, "*a son of a whore*," upon which the man took up a broomstaff, and at a distance threw it at her and killed her; and it was propounded to the Judges whether this was murder or manslaughter. Two questions were made, 1. Whether bare words, or words of this nature would amount to such a provocation as would extenuate the fact into manslaughter. 2. Admitting that they would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword or shooting with a pistol; yet whether this striking, so improbable to cause death, would not alter the case. The Judges were not unanimous upon this case; and a pardon was recommended.(b)

If, without adequate provocation, a person strikes another with a deadly weapon, likely to occasion death, although he had no previous malice against the party, yet he is to be presumed to have had such malice at the moment from the circumstances, and he is guilty of murder.(c) Where, therefore, a boy, twelve years old, who had been in the habit of going to a cooper's shop and taking away chips, was told one morning by the cooper's apprentice not to come again; he however went again in the afternoon, and the apprentice spread his arms out to prevent his reaching the spot where he usually gathered the chips, on which the boy started off, and in passing a work bench, took up a whittle (a sharp-pointed steel knife with a long handle) and threw it at the apprentice, and the blade of the whittle entered his body, to the depth of four inches, and caused his death; the jury having found him guilty upon an indictment for manslaughter; Hullock, B., observed, that had he been indicted for murder, the evidence would have sustained the charge.(d) So where on an indictment for wounding it appeared that Withy and two women met the prisoner at midnight on the highway, and some words passed between them; when Withy struck the prisoner, who then made a blow with a knife, it was held that unless the prisoner apprehended robbery or some similar offence, or danger to life or some serious bodily harm, not simply being knocked down, he would not be justified in using the knife in self-defence.(e)

In a case where it was decided that if A. give slighting words to B., and B. thereupon immediately kill him, such killing would be murder in B., it is also stated to have been holden, that words of *menace* or *bodily harm* would amount to such a provocation as would reduce the offence of killing to manslaughter.(f)¹ But it should be observed that in another report of the same case this latter position is not to be found.(g) And it seems that such *words ought at least to be accompanied by some act, denoting an immediate intention of following them [*713 up by an actual assault.(h)

Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault;

(b) 1 Hale 455, 456.

(c) Per Hullock, B., Langstaffe's case, 1 Lewin 162.

(d) Langstaffe's case, *supra*.

(e) Reg. v. Hewlett, 1 F. & F. 91, Crowder, J.

(f) Lord Morley's case, 1 Hale 455.

(g) Kel. 55.

(h) 1 East P. C. c. 5, s. 20, p. 233.

¹ That words or threats are not a sufficient provocation to reduce a killing to manslaughter, see *State v. Jarrot*, 1 Ired. 76; *State v. Barfield*, 8 Ibid. 344; *State v. Mullen*, 14 La. Ann. 570; *Wall v. State*, 18 Tex. 682; *Lingo v. State*, 29 Geo. 470; *Dupree v. State*, 33 Ala. 380; *Hawkins v. State*, 25 Geo. 207; *Rapp v. Comm.*, 14 B. Mon. 614; *People v. Lombard*, 17 Cal. 316; *State v. O'Connor*, 31 Mo. 389; *People v. Butler*, 8 Cal. 435. Mere threats, however violent, uttered by A. that he would kill B. on sight, having then his gun in his hand and saying he was hunting, does not justify B. in lying in wait and killing A.: *Lander v. State*, 12 Texas 462. For other cases of threats by the deceased to kill the prisoner communicated to him: *Myers v. State*, 33 Texas 525; *People v. Scaggins*, 37 Cal. 676; *Pridgen v. State*, 31 Texas 420; *Gonzalez v. State*, Ibid. 495; *State v. Gregor*, 21 La. Ann. 473; *Coker v. State*, 20 Ark. 53; *Ripley v. State*, 2 Head 217; *Keoner v. State*, 18 Geo. 194; *Atkins v. State*, 16 Ark. 568; *Newcomb v. State*, 37 Miss. 383. As to fear of personal violence: *Merideth v. Comm.*, 18 B. Mon. 49; *Dupree v. State*, 33 Ala. 380; *Wesley v. State*, 37 Miss. 327.

nor in all cases even by a blow.⁽ⁱ⁾ Violent acts of resentment, bearing no proportion to the provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty; and barbarity will often make malice.^(k)¹

If a person kill another under the influence of provocation occasioned by a blow, accompanied by very aggravating language, if the blow were by itself insufficient to reduce the crime to manslaughter, possibly the aggravating language may be taken into consideration together with the blow, and amount to such a provocation as will reduce the offence to manslaughter. Upon an indictment for murder it appeared that upon the evening before the death the prisoner and the deceased had been quarrelling, and that the deceased had used very aggravating language, as well as very indecent and insulting gestures to the prisoner. The deceased was found dead the next morning with a wound in the throat, which had caused her death, and had been inflicted by some sharp instrument, such as a razor. Within a short distance of the deceased there was lying a sweeping-brush in such a position that it might be supposed to have fallen from the hand of the deceased, supposing that a scuffle had taken place before the fatal wound had been inflicted. Pollock, C. B., in summing up said, "It is true that no provocation by words only will reduce the crime of murder to that of manslaughter; but it is equally true that every provocation by blows will not have this effect, particularly when, as in this case, the prisoner appears to have resented the blow by using a weapon calculated to cause death. Still, however, if there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only."^(l)

There being an affray in the street, one Stedman, a foot soldier, ran hastily towards the combatants. A woman, seeing him run in that manner, cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman

(i) See *Rex v. Lynch*, 5 C. & P. 324 (24 E. C. L. R.), per Lord Tenterden, C. J., *post*, p. 726.

(k) Per Lord Holt in Keate's case, Comb. 408.

(l) *Reg. v. Sherwood*, 1 C. & K. 556 (47 E. C. L. R.).

¹ A. seeks B. and threatens his life; they meet; a quarrel ensues; B. strikes A. with his fist; they separate; A. attempts to arm himself with a stick, which he is unable to do; again stoops to raise another stick or billet of wood of a dangerous kind; whilst stooping B. stabs him. Held that this was not murder, but manslaughter: *Allen v. State*, 5 Yerg. 453. Where, on a trial of an indictment for murder, the facts proved show, on the part of the prisoner, a deep and settled hatred towards the deceased, mixed up with a recent combat, the difficulty is to assign the homicide to its proper cause, to decide whether it was committed under the sole influence of passion justly excited, or whether it was the carrying into effect of a settled and deliberate purpose. In such case there is no rule, and can be none, other than that the jury must draw their conclusions from all the facts of the case, relying upon legal presumptions, so far as these are applicable to the case: *State v. Ford*, 1 Spears 146. An assault is in general such provocation, as if the party striking is struck again and death ensue, it is only manslaughter. In determining, however, whether the killing upon provocation amounts to murder or manslaughter, the instrument with which the homicide was effected must be taken into consideration. If it were effected with a deadly weapon, the provocation must be great indeed to extenuate the offence to manslaughter: if with a weapon or other means not likely or intended to produce death, a less degree of provocation will be sufficient. The mode of resentment must bear a reasonable proportion to the provocation: *Jacob v. State*, 3 Humph. 493. The question, whether a weapon is a deadly weapon or not, is one of law for the court; but when it has been left to the jury, as it is for the benefit of the accused, it will not be ground for a new trial: *State v. Collins*, 8 Ired. 407.

When it was proved, on a trial for murder, that the deceased and the prisoner were quarrelling, and as the prisoner approached the deceased he pitched over his head a chair without touching him and with no apparent intention so to do, it was held, that this was no provocation, as nothing less than an actual assault or battery, or an attempt to assault, within striking distance, is a legal provocation to reduce murder to manslaughter: *State v. Barfield*, *Ibid.* 344.

struck her on the breast with the pommel of his sword. The woman then fled; and Stedman, pursuing her, stabbed her in the back. It seemed to Holt, C. J., that this was murder, a single box on the *ear from a woman not being a [*714 efficient provocation to kill in such a manner, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter argued specially; but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter.(m) The smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact.(n)

Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about *civility money*, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom; which, at the importunity of his servant, he laid down upon the table, saying, "He did not intend to hurt the officers; but he would not be ill used." The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him; one stabbed him in nine places, he all the while on the ground, begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death wound. And this is reported to have been holden manslaughter *by reason of the first assault with the cane.*(o) This (says Mr. J. Foster) is the case as reported by *Sir John Strange*; and an extraordinary case it is; that all these circumstances of aggravation, two to one, helpless and on the ground, begging for mercy, stabbed in nine places, and then dispatched with a pistol; that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane."(p)

If two persons fight, and one overpower the other, and knock him down, and then strangle him with a rope, this is murder. Upon an indictment for murder by strangling, it appeared that the prisoner had said, "We quarrelled about some money I had won from him; he wanted it back, and I would not give it to him; he struck me, and I knocked him down; he got up, and I knocked him down again, and kicked him, and then I put a rope round his neck, and dragged him into the street." Patteson, J., said to the jury, "if you even believe the prisoner's statement, that will not prevent the crime from being murder, and reduce it to manslaughter. If two persons fight, and one of them overpowers the other, and knocks him down, and then puts a rope round his neck, *and strangles him, that is murder. The act is so wilful and deliberate that nothing can justify it."(q) [*715 As an assault, though illegal, will not reduce the crime of the party killing the person assaulting him to manslaughter, where the revenge is disproportionate and barbarous, much less will such personal restraint and coercion as one man may lawfully use towards another form any ground of extenuation. Two soldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refused, alleging the unseasonableness of the hour, and advised them to go to their quarters; whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company, who had been detained there on business, one of them rushed in, the other remaining without, and renewed his demand for beer; to which the landlord returned the same answer; and on his

(m) Stedman's case, Fost. 292; MS., Tracy and Denton, 57; 1 East P. C. c. 5, s. 21, 234.

(n) Fost. 292.

(o) Rex v. Tranter, 1 Stra. 49.

(p) Fost. 293, where Mr. J. Foster states many circumstances of the case which the reporter had omitted; and also the direction to the jury, in which the Chief Justice, upon her grounds than the first assault with the cane, told them it could be no more than manslaughter. See this case more fully stated, *post*, Chap. On Manslaughter.

(q) Rex v. Shaw, 6 C. & P. 372 (25 E. C. L. R.), Patteson, J.

refusing to depart, and persisting to have some beer, and offering to lay hold of the landlord, the latter at the same instant collared him; the one pushing and the other pulling each other towards the outer door; where when the landlord came he received a violent blow on the head with some sharp instrument from the other soldier, who had remained without, which occasioned his death a few days afterwards. Buller, J., held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them. For the landlord did no more in attempting to put the soldier out of his house at that time of the night, and after the warning he had given him, than he lawfully might; which was no provocation for the cruel revenge taken; more especially as there was reasonable evidence of the prisoners having come the second time with a deliberate intention to use personal violence, in case their demand for beer was not complied with.(r)

If A. stands with an offensive weapon in the doorway of a room wrongfully to prevent J. S. from leaving it, and others from entering, and C., who has right in the room, struggles with him to get his weapon from him; upon which D., a comrade of A.'s, stabs C., it will be murder in D. if C. dies. A drummer and a private soldier stopped at an inn with a deserter, and were pressed by one Martin to enlist him; and they gave him a shilling for that purpose, but they had no authority to enlist anybody. Martin wanted afterwards to go away; but they would not let him, and a crowd collected. The drummer drew his sword, stood in the doorway off the room where they were, and swore he would stab any one who offered to go away. The landlord, however, got by him; and the landlord's son seized his arm in which the sword was, and was wresting the sword from him, when the private, who had been struggling with Martin, came behind the son, and stabbed him in the back. He was indicted upon the statute 43 G. 3, and it was urged for the prisoner, that the soldiers had a right to enlist Martin, and to detain him; and that *716] if death had ensued, the offence would not have been murder; but, *upon the point being saved, the Judges were all of a contrary opinion.(s)

In cases of provocation of a slighter kind, not amounting to an assault, as the ground of extenuation would be that the act of resentment, which has unhappily proved fatal, did not proceed from malice, or a spirit of revenge, but was intended merely for correction; so the material inquiry will be, whether malice must be inferred from the sort of punishment inflicted, from the nature of the instrument used, or from the manner of the chastisement.(t) For if, on any sudden provocation of a slight nature, one person beat another in a cruel and unusual manner, so that he dies, it is murder by express malice; though the person so beating the other did not intend to kill him.(u)

Thus the case which had been before mentioned, where, upon a chiding between husband and wife, the husband struck his wife with a pestle,(v) proceeded upon the ground of the pestle being an instrument likely to endanger life.(w) And it is probable that the doubt which was felt by some of the judges in a case where a man, upon being called by a woman "a son of a whore," took up a broomstaff and threw it at her, and killed her,(x) arose from the consideration that the instrument was not such as was likely, when thrown from the given distance, to have occasioned death, or great bodily harm.(y)

And in order to negative malice, in a case where death has ensued from a blow not likely to have produced death, or mortal disease, all circumstances of aggravation (though not sufficient to warrant giving a deadly blow) will be material.¹ One

(r) *Rex v. Willoughby and another*, Bodmin. Sum. Ass. 1791, MS.; 1 East, P. C. c. 5, s. 56, p. 288.

(s) *Rex v. Longden*, MS., Bailey, J., and R. & R. 228.

(t) 1 East P. C. c. 5, s. 22, p. 235, and s. 23, p. 238, 9.

(u) 4 Blac. Com. 199.

(v) 1 East P. C. c. 5, s. 22, p. 235.

(y) 1 East P. C. c. 5, s. 22, p. 236.

(v) *Ante*, p. 712.

(x) *Ante*, p. 712.

¹ Malice is presumed from the use of a deadly weapon: *State v. Decklotts*, 19 Iowa 447; *State v. Shippey*, 10 Minn. 223; *Smith v. Comm.*, 1 Duvall 224; *Woodside v. State*, 2 Plow. 656; *Head v. State*, 44 Miss. 731; *Evans v. State*, *Ibid.* 762; *State v. Gillick*, 7 Clarke 287; but not conclusively so: *State v. Newton*, 4 Nev. 410. See also *Alford v.*

Freeman, a soldier, was in a public-house drinking, and asked a girl who was sitting there to drink with him: upon which one Ann Simpson, with whom he had cohabited, seized his pot, abused him very much, and threw down his beer. Freeman then caught the pot from her, and struck her twice on the head with it: the blood gushed out, and she was taken to the hospital, where the wound was examined, and did not appear dangerous, being about a quarter of an inch deep: but it produced an erysipelas, which caused an inflammation of the brain, and the woman died. The witness, who saw the blows, did not think the prisoner intended to do the woman any grievous bodily harm. Gibbs, C. B., told the jury, that if the disease which caused the death originated from the wound, it was the same as if the wound had caused the death; that the primary cause was to be considered; that the aggravation, though not constituting a provocation which would extenuate the giving a deadly blow, would palliate the giving a moderate blow; and he left it to the jury whether those blows were such as were likely to be followed by death, or by a disease likely to terminate in death. The jury thought that the blows were not of this kind, and the prisoner was found guilty of manslaughter only.^(z)

The nature of the *instrument used* has been much considered in *the following case:—The prisoner's son fought with another boy, and was [*717 beaten; he ran home to his father all bloody, who presently took a cudgel, ran three-quarters of a mile, and struck the other boy upon the head, upon which he died.^(a) This was ruled manslaughter, because done in a sudden heat and passion; but upon this case Mr. J. Foster makes the following remarks:^(b) "Surely the provocation was not very grievous. The boy had fought with one who happened to be an over-match for him, and was worsted; a disaster slight enough, and very frequent among boys. If upon this provocation the father, after running three-quarters of a mile, had set his strength against the child, had despatched him with a hedge stake, or any other deadly weapon, or by repeated blows with his cudgel, it must, in my opinion, have been murder; since any of these circumstances would have been a plain indication of malice; but with regard to these circumstances, with what weapon, or to what degree, the child was beaten, Coke is totally silent. But Croke^(c) sets the case in a much clearer light, and at the same time leads his readers into the true grounds of the judgment. His words are, 'Rowley struck the child with a *small cudgel*, of which stroke he *afterwards* died.' I think it may be fairly collected from Croke's manner of speaking, and Godbolt's report,^(d) that the accident happened *by a single stroke with a cudgel not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import malice, and therefore manslaughter. I observe that Lord Raymond lays great stress on this circumstance: *that the stroke was with a cudgel, not likely to kill.*"^(e)

(z) *Rex v. Freeman*, O. B. Jan. 1814, S., Bayley, J.

(a) Rowley's case, 12 Rep. 87; s. c., 1 Hale 453, in which report the words are, "and strikes C that he dies." Mr. J. Foster, in citing the case, says, that the father, after running three-quarters of a mile, beats the other boy, "who dieth of this beating:" *Post.* 294.

(b) *Post.* 294.

(c) *Cro. Jac.* 296.

(d) *Godb.* 182. It is there said to have been a "rod," meaning probably a small wand.

(e) 2 *Lord Raym.* 1498. *Ante*, note (a).

State, 33 Geo. 303; *Clem v. State*, 31 Ind. 480; *Murphy v. State*, *Ibid.* 511; *Bradley v. State*, *Ibid.* 492; *Donnellan v. Comm.*, 7 Buck 676; *Hill v. State*, 41 Geo. 484; *State v. Ward*, 5 Harring. 496; *State v. West*, 6 Jones (Law) 505; *Comm. v. Braugham*, 6 Buck 387.

Whether, on the trial of an indictment for homicide, the weapon, alleged to have been used, is a deadly weapon or not, is a question for the court, not for the jury: *State v. Collins*, 8 Ired. 407. Whether an instrument by which death is occasioned, if it be in fact as described by the testimony, be one by which death may or may not be probably caused, is a question of general reason, and therefore proper for the court; and if it be doubtful whether it would probably cause death, the court should direct a conviction for manslaughter only: *State v. Craton*, 6 Ired. 164. And see *State v. Ostrander*, 19 Iowa 435; *State v. Dineen*, 10 Minn. 407; *Flournoy v. State*, 16 Texas 31.

¹ A father is informed on the evening of one day that his son, a small boy, has been wantonly whipped by a man. He meets the man on the evening of the next day, and then

Where upon a special verdict it was found that the prisoner, having employed her daughter-at-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted threw at a child a *four-legged stool*, which struck her on the right side of the head on the temple, and caused her death soon after the blow so given; and the stool was of sufficient size and weight to give a mortal blow, but the prisoner did not intend, at the time she threw the stool, to kill the child; the matter was considered as of great difficulty, and no opinion was ever delivered by the Judges. (f) The doubt appears to have been principally upon the question, whether the instrument was such as would probably, at the given distance, have occasioned death or great bodily harm. (g)

Where A finding a trespasser upon his land, in the first transport of his passion, beat him and unluckily killed him, and it was holden to be manslaughter. (h) it must be understood that he beat the trespasser, not with a mischievous intention, but *merely to chastise him*, and to deter him from a future commission of such a *718] trespass.¹ For if A. had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an *ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. (i) Moir having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a pistol at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died: he was convicted of murder, and executed. (k)

It seems therefore, that it may be laid down, that in all cases of slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill, or to do some great bodily harm, such homicide will be murder. Accordingly, where a parker, finding a boy stealing wood in his master's ground, bound him to his horse's tail and beat him, and the horse taking fright, and running away, the boy was dragged on the ground till his shoulder was broken, whereof he died; it was ruled murder; for it was not only an illegal, but a deliberate and dangerous act; the correction was excessive, and savored of cruelty. (l)

It should be furthered remembered, upon the grounds which have been before mentioned, (m) that the plea of provocation will not avail where there is evidence of

(f) Hazel's case, 1 Leach 368.

(g) 1 East P. C. c. 5, s. 22, p. 236.

(h) 1 Hale 473.

(i) 1 Fost. 291.

(k) Moir's case, Rosc. Cr. E. 717, Lord Tenterden, C. J. See this case as stated in Rex v. Price, 7 C. & P. 178 (32 E. C. L. R.). Moir had gone home to fetch his pistols after he found the deceased trespassing, and the deceased persisted in trespassing, and some angry words passed before the pistol was discharged.

(l) Halloway's case, Cro. Car. 131; Palm. 545; 1 Hawk. P. C. c. 39, s. 42; W. Jones 198; 1 Hale 453; Kel. 127; 1 East P. C. c. 5, s. 22, p. 237.

(m) *Ante*, p. 669.

with his fists and feet beats and stamps him, whilst he is unresisting, with so much violence that the man dies from the effects of the beating on the next night. This is murder: M'Whirt's case, 3 Gratt. 594.

¹ That a trespass is not sufficient provocation to reduce the killing to manslaughter. See Comm. v. Drew, 4 Mass. 391; State v. Morgan, 3 Ired. 186; Noles v. State, 26 Ala. 31; People v. Divine, 1 Edm. S. C. 594; State v. McDonald, 4 Jones (Law) 19; Lyon v. State, 22 Geo. 399; People v. Norton, 4 Mich. 67; Harrison v. State, 24 Ala. 67; State v. Brandon, 8 Jones (Law) 463; State v. Skippey, 10 Minn. 223.

What a man may not do directly, he may not do indirectly. A man may not therefore place instruments of destruction for the protection of his property, when he would not be authorized to take life with his own hands for its protection: State v. Moon, 31 Conn. 477. A man has a right to order another to leave his house, but he has no right to put him out by force until gentle means fail; and if he attempts to use violence in the outset, and is slain, it will not be murder in the slayer, if there is no previous malice: M'Coy v. State, 3 Engl. 451.

press malice.(n) In such case not even previous blows or struggling will extenuate homicide.¹

The prisoner, with the deceased, who was his brother, and some neighbors, were drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled; one fell, and soon afterwards they lay at cudgels by agreement. All this time no token of anger appeared on either side, till the prisoner in the cudgel-play gave the deceased a smart blow on the temple. The deceased thereupon grew angry; and throwing away his cudgel, rushed in with the prisoner, and they fought a short space in good earnest: but the company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street, was heard to say, "Damnation seize me if I do not fetch something, and stick him!" And being reproved for using such expressions, he answered, "I'll be damned to all eternity if I do not fetch something and run him through the body!" The deceased and the rest of the company continued in the room where the affray happened; and in about half an hour the prisoner returned, having put off a thin slight coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open to the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right, looking in upon the company, but not speaking a word. The deceased seeing him in that posture, invited him to the company: but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you will fall on me and beat me." The deceased assured him he would not; and added, "besides, you think yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so, if you will keep off your fists." Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a cut-throat sword, crying, "Damn you, stand off, or I'll stab you;" and immediately, without giving the deceased time to step back, made a pass at him with the sword, and missed him. The deceased thereupon gave back a little; and the prisoner shortening the sword in his hand, leaped forward towards the deceased and stabbed him to the heart, and he instantly died. The Judges unanimously agreed, that there were in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence could not be less than wilful murder. He owed he would fetch something to stick him, to run him through the body. Whom did he mean by him? Every circumstance in the case showed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon: but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the

(n) See Reg. v. Sattler, D. & B., C. C. 525, *post*, p. 763.

¹ No provocation, however grievous, will excuse from the crime of murder, when from the weapon or the manner of the assault, an intention to kill or to do some great bodily harm was manifest: *State v. Ferguson*, 2 Hill 619. Two persons quarrel, and one throws brick-bat at the other, who has privately armed himself with a deadly weapon and keeps concealed, in expectation of the affray, and on such assault being made upon him, immediately draws forth the weapon, and with it kills the assailant, though then retreating; try and this killing, murder in the second degree. *Held*, upon these circumstances, even without proof of any previous malice, the verdict could not be disapproved: *Slaughter v. Commonwealth*, 11 Legh. 681. The circumstance that the prisoner, after the killing, wipes the blood with which the fatal wound is inflicted, is not so controlling or so insignificant as to warrant the prisoner in calling for the charge that it is not evidence of murder or to stify the court in instructing the jury that it was. It is a fact evincing coolness and self-possession, and as such is proper to be left to the jury, in connection with the other circumstances of the case, for them to determine whether the killing was with malice prethought or in sudden heat and passion: *Pierson v. State*, 13 Alab. 149.

weapon. He stood at the door, refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother stand off: but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second: but he advanced as fast, and took the revenge he had vowed. The circumstance of the blows before the sword was produced, which probably occasioned the doubt, did not alter the case, nor did the precedent quarrel; because, all circumstances considered, he appeared to have returned with a deliberate resolution to take a deadly revenge for what had passed: and the blows were plainly a provocation *sought* on his part, that he might execute the wicked purpose of his heart with some color of excuse.^(o)¹

In the foregoing case it was considered that the blows with the cudgel were a *provocation sought* by the prisoner, to give occasion and pretence for the dreadful vengeance which he meditated; and it should be observed, that where the provocation is sought by the party killing, and induced by his own act, in order to afford him a pretence for wreaking his malice, it will in no case be of any avail.^(p) [Thus where A. and B. having fallen out, A. said he *would not strike, but *720] would give B. a pot of ale to strike him; upon which B. did strike, and A. killed him, it was held to be murder.^(q) So where A. and B. were at some difference; A. bade B. take a pin out of his (A.'s) sleeve, intending to take the occasion to strike or wound B.; B. accordingly took out the pin, and A. struck him and killed him; and this was ruled murder: first, because it was no provocation when B. did it by the consent of A.; and, secondly, because it appeared to be a malicious and deliberate artifice, by which to take occasion to kill B.^(r)

Where upon an indictment for maliciously wounding under the 9 Geo. 4, c. 31, it appeared that some words passed between the prisoner and a third person, after which he walked up and down the passage of the house with a sword-stick in his hand, with the blade open, and was heard to say, "If any man strikes me I will make him repent it." He was desired to put up the stick, which he refused to do; and shortly after the prosecutor, ignorant of what had occurred, but perceiving the prisoner was creating a disturbance, struck the prisoner twice with his fist, when the prisoner stabbed him; Mr. Baron Parke told the jury, "If a person receives a blow, and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation; for anger is a passion to which good and bad men are both subject. But the law requires two things: first, that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion arising from that provocation.^(s) There is no doubt here, but that a violent assault was committed; but the question is, whether the blow given by the prisoner was produced by the passion of anger excited by that assault? If you see that a person denotes, by the manner in which he avenges a previous blow, that he is not excited by a sudden transport of passion, but under the influence of that wicked disposition, that bad spirit, which

^(o) Mason's case, Fost. 132; 1 East P. C. c. 5, s. 23, p. 239.

^(p) 1 East P. C. c. 5, s. 23, p. 239.

^(q) 1 Hawk. P. C. c. 31, s. 24.

^(r) 1 Hale 456.

^(s) Reg. v. Kirkham, 8 C. & P. 115 (34 E. C. L. R.), per Coleridge, J., s. r.

¹ Upon a quarrel one of the parties retreated about fifty yards, apparently with a desire of avoiding a conflict; the other party pursued, with his arm uplifted, and when he reached his opponent stabbed and killed him, the latter having stopped and first struck him with his fist. *Held*, that this was a clear case of murder: *State v. Howell*, 9 Ired. 485.

When the prisoner attacked the deceased who shot at him, held no justification: *Lingo v. State*, 29 Geo. 470; *People v. Honshall*, 10 Cal. 53.

If, after angry words, the prisoner took up an axe and approached the deceased, who had sufficient ground to believe that death or great bodily harm was intended, and he struck the prisoner in self defence, such blow will not be a provocation to reduce the crime to manslaughter: *State v. Baker*, 1 Jones (Law) 267.

the law terms "malice," in the definition of wilful murder, then the offence would not be manslaughter. Suppose, for instance, a blow were given, and the party struck beat the other's head to pieces by continued, cruel, and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder. And so, if you find that before the stroke is given, there is a determination to punish any man, who gives a blow, with such an instrument as the one which the prisoner used: because if you are satisfied that before the blow was given the prisoner meant to give a wound with such an instrument, it is impossible to attribute the giving such wound to the passion of anger excited by that blow; for no man who was under proper feelings, none but a bad man of a wicked and cruel disposition, would really determine beforehand to resent a blow with such an instrument." (t)

On a trial for murder, it appeared that the prisoner and his son were wrestling on a floor together, the son being uppermost, the son got up, and went to the door, and the prisoner took up a coal pick, and threw it at deceased and hit him on the back. The deceased said it hurt him, and the prisoner said he would have his revenge. The deceased stood at the door with his hands against it, when the prisoner took a knife off the table and jobbed the deceased with it on the left side. The deceased said, "Father, you have killed me!" and retreated a few paces into the street, reeling as he went. A person told the prisoner he had stabbed his son. He said, "Joe, I will have my revenge!" The deceased came into the house again, and the prisoner stabbed him again in the left side. There was also evidence of expressions of ill will by the prisoner towards the deceased, and of threats uttered a short time before. Coleridge, J., told the jury that "in some instances you must feel certain, from the acts of the party, that he had a grudge. Suppose a man destroyed another by poison; if it were proved that he had previously bought the poison and prepared the cup, although he should have had a quarrel with the party at the very time of administering it, you could not doubt that there was express malice. If a person has received a blow, and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and therefore, as in the case of poisoning, though there have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, all the blows would go for nothing. So, in the present case, if there was a stab given in consequence of a grudge entertained a day or two before, all that passed between these parties at the very time must go for nothing, for the simple reason, that the blows were not the cause of the crime." After observing on the danger of relying on the previous threats, the very learned Judge proceeded, "Then I will suppose that all was unpremeditated till C. came, and then the case will stand thus, the father and son have a quarrel, the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if when he got up and threw the pick at the deceased, he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question (the son having given no further provocation), whether in truth that, which was in the first instance sufficient provocation, was so recent to the actual deadly blow, that it excused the act that was done, and whether the father was acting under the recent sting or had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent, and he acting on its sting, and the blood remained hot: but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows; because, though the law condescends to human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions." (u)

On a trial for murder, it appeared that the prisoner, on the evening of the day

(t) **Rex v. Thomas**, 7 C. & P. 817 (32 E. C. L. R.). Parke, B.

(u) Reg. v. Kirkham, 8 C. & P. 115 (34 E. C. L. R.), Coleridge, J.

*722] on which he was discharged from the Coldstream *Guards, went to a public-house in company with his brother and another person; there were two more soldiers in the house, and the deceased was sitting with them: a dispute arose about paying the reckoning, and a fight took place between the prisoner and one Burrows: in the scuffle B. fell down by the fire-place on his knees, and the deceased jumped over the table and struck the prisoner: the deceased was turned out by the landlord, but admitted again in about ten minutes, and the parties all remained drinking together after that for a quarter of an hour, when the prisoner and his brother went out; the deceased remained about a quarter of an hour after the prisoner, and then left; the prisoner and the deceased were both in liquor; the deceased tried to get out directly after the prisoner left, but was detained by the persons in the room; as soon as they let him go, he jumped over the table, and went out of the house, saying as he went, that if he caught them he would serve them out: the deceased was a person who boasted of his powers as a fighter; the deceased followed the prisoner and his brother into a mews not far from the public-house where they had been drinking; and a witness, who lived near, stated that he heard a noise, and went to the door of his house, and then heard a bayonet fall on the ground, and on going out heard one Croft crying out "Police, police; a man is stabbed!" and on going up found the deceased lying on the ground wounded. Croft stated that he was near and heard voices, which induced him to run towards a bar, and when within a yard of the bar he heard a blow like the blow of a fist, this was followed by other blows; after the blows he heard a voice say "take that!" and in half a minute the same voice said, "he has stabbed me!" the deceased then ran towards him, and said, "I am stabbed!" and soon fell on the ground: the prisoner was soon afterwards taken into custody, and was then bleeding at the nose; the prisoner had not any side-arms; but his brother had a bayonet: for the defence the brother stated that when they got about twenty yards through the bar mentioned by Croft, he heard somebody say something, and deceased came up and struck him on the back of the head, which caused him to fall down, and his bayonet fell out of the sheath upon the stones, and the deceased picked it up, and followed the prisoner who had gone on; there was a great struggle between them, and very shortly after the deceased cried out "I am stabbed!" A surgeon proved that there were wounds on the prisoner's hands, such as would be made by stabs of a bayonet, and that his back was one uniform bruise. Bosanquet, J., told the jury, "the question for you, on a careful consideration of the whole evidence, will be, whether the prisoner was guilty of either murder or manslaughter, or whether the circumstances of the case were such as to entitle him to an acquittal; whether he is guilty of murder or manslaughter, or whether his act was justifiable or excusable: upon the question of whether it amounts to murder you have to consider this: did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? For if he did, it will amount to murder. But if he did not enter into the contest with an intention of using it, then the question will be, did he use it in the heat of passion in consequence of an attack made upon him? *723] If he did, then it *will be manslaughter. But there is another question, did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it; and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he will be justified." (v)

Upon an indictment for murder, it appeared that the prisoner, a very powerful man, had met the deceased, an old umbrella-seller, whom he did not appear to have known, at a public-house, and he took hold of one of his umbrellas and asked what it would be, and the deceased said a shilling; the prisoner offered fourpence, and thereupon idle talk took place, from which it appeared that the deceased was

(v) Reg. v. Smith, 8 C. & P. 160 (34 E. C. L. R.), Bosanquet and Coltman, JJ., and Bolland, B.

annoyed at the trifling value set on the umbrella, and the prisoner at some of the remarks of the deceased. The deceased was going away, when he tripped, and though the witness did not see the prisoner put out his foot to trip him up, it appeared that he had done so, for the deceased angrily said that if he did that again he would knock him down, or something to that effect. The deceased then was again going away, when he again tripped and, as would appear from the same cause. Thereupon the deceased turned and struck the prisoner as hard as he could on the head with an old umbrella, the handle of which (not very strong) was broken with the blows. The prisoner said nothing while the blows were being given, nor was he seen to draw anything, nor was it seen whether he had a knife in his hand before; if not, he must then, or immediately afterwards have drawn it out of his pocket and unclasped it; for immediately after he was seen to strike out at the deceased, and the latter staggered away, and was found to have received a wound in the stomach, inflicted with such force, that the weapon went right through to the spine, severing an artery, and so causing death in a short time. The prisoner was found to have an open clasp-knife in his hand, and a minute after he said, "I have given him this," showing it. Erle, C. J., told the jury that the essence of the crime of murder is the malice, and the law implies malice where one has killed another by the use of a deadly weapon, unless the circumstances rebut the inference, and reduce the offence to manslaughter. The circumstances of the case do rebut the inference of malice, if they show that the blow was given in the heat of passion arising on a sudden provocation, and before the passion had time to cool. This you are to judge of. In the present case the quarrel was sudden; the knife was a clasp-knife, such as might naturally be carried about the person, and was not fetched for the purpose; and the deceased struck the first blow, and struck repeated blows; these blows were not severe enough to excuse the use of a deadly weapon (especially as the prisoner was so much the more powerful man, and had not used his natural weapons); but if they excited a passion, in the heat of which the *prisoner gave the fatal blow, then you may find him guilty of manslaughter, a crime [*724 which greatly varies in intensity, and may come very nearly up to murder." (w)

On an indictment for murder it appeared that the prisoner and his wife, who had been to look for him, came home about midnight: he was not sober, and she upbraided him for staying out so late: he took some money out, and she said he could treat other persons and not her; he then took down a sword from a shelf, pulled it out of the sheath, and struck her on the back with the flat part of it; her daughter ran to the door; the mother attempted to follow her, and her daughter took hold of her hand to pull her through; the father, according to the daughter's first account, went to his wife at the door, and ran the sword into her left side; but it appeared that she could not see the actual thrust; a wound nine inches long was found in the left side which caused the death. She stated in her husband's presence that he had done it with a sword. The authorities cited *ante*, p. 667, having been referred to, Cresswell, J., after referring to them, said, "This is expressed more intelligibly by the late Mr. J. Littledale, who says that 'malice' in its legal sense, denotes a wrongful act, done intentionally, without just cause or excuse." (x) Therefore if you think the prisoner used the weapon wilfully, then that is such malice as the law requires. The great question for your consideration is whether the wound was given wilfully. If done by the accident of the woman rushing on the sword, the prisoner would not be responsible. If you can find any evidence that he used the sword carelessly, and that, without intending to inflict the wound, he caused it, then he is guilty of manslaughter; but if he used it intending to inflict a wound, then he is guilty of murder. When there is a contest the law makes great allowances for blows and a personal encounter, but not for words. If, therefore, in consequence of words, the prisoner was provoked, and intended to do the deceased

(w) *Reg. v. Eagle*, 2 F. & F. 827. If the statement of facts in this case could be relied upon, the case ought to have been left to the jury to decide whether the prisoner did not bring the blows on himself by tripping up the deceased twice over in order that he might use the knife, in which case it would have been murder. See *Rex v. Thomas*, *ante*, p. 720.

(x) See this passage in note (i), *ante*, p. 668.

a grievous injury, that is no justification or alleviation of the offence. There is no evidence of any conflict or of any provocation in law. If the prisoner used the sword intending to do a serious injury, that is such evidence of malice as the law holds to be murder. If the deceased rushed upon it, then it was an accident, and he is not guilty. If the wound was inflicted in a struggle without any intention on the part of the prisoner to use it, then there was such a careless use of it as to make him guilty of manslaughter."*(xx)*

It must be further observed also, that in every case of homicide upon provocation, how great soever that provocation may have been, if there be sufficient time for passion to subside and reason to interpose, such homicide will be murder.*(y)*^f Therefore, in the case of the most grievous provocation to which a man can be exposed, that of finding another in the act of adultery with his *wife, though *725] it would be but manslaughter if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately, and upon revenge after the fact and sufficient cooling time, it would undoubtedly be murder.*(z)* "For let it be observed, that in all possible cases, deliberate homicide upon a principle of revenge is murder. No man under the protection of the law is to be the avenger of his own wrongs. If they are of a nature, for which the laws of society will give him any adequate remedy, thither he ought to resort : but be they of what nature soever, he ought to bear his lot with patience, and remember that vengeance belongeth only to the Most High."*(a)* With respect to the interval of time which shall be allowed for passion to subside, it has been observed that it is much more easy to lay down rules for determining what cases are without the limits, than how far exactly those limits extend.*(b)* In cases of this kind the immediate object of inquiry is whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given ; for if from any circumstance whatever it appear that the party reflected, deliberated, or cooled any time before the fatal stroke given ; or if in legal presumption there was time or opportunity for cooling ; the killing will amount to murder, as being attributable to malice and revenge, rather than to human frailty.*(c)* Whether the blood has had time to cool or not is a question for the Court and not for the jury, but it is for the jury to find what length of time elapsed between the provocation received and the act done.*(d)*

Upon an indictment for murder, it appeared that the prisoner and the deceased, who had been upon terms of intimacy for three or four years, had been drinking together at a public house till about twelve o'clock at night ; about one they were together in the street, and had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist, and gave him a black eye. The prisoner called for the police, and on a policeman coming, went away ; he, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen : the knife, a common bread-

(xx) Reg. v. Noon, 6 Cox C. C. 137.

(y) Fost. 296.

(z) Fost. 296 ; 1 East P. C. c. 5, s. 20, p. 234, and s. 30, p. 251. See *post*, p. 786, and Reg. v. Fisher, *infra*, note *(d)*.

(a) Fost. 296 ; Rom. chap. xii. v. 19.

(b) 1 East P. C. c. 5, s. 30, p. 251.

(c) Oneby's case, 2 Lord Raym. 1485.

(d) Reg. v. Fisher, 8 C. & P. 182 (34 E. C. L. R.), Park, J. A. J., and Parke, B., and Law Recorder. *Sed quere*, and see the following cases.

¹ Where it becomes material to inquire whether a homicide committed in a second, after a previous combat, in which it might have been manslaughter, was in course of the first or a continuance of it, or after such an interval of time as would imply premeditation, the proper case is, not whether the suspension of reason continued down to the moment of the mortal stroke given, but did the prisoner cool, or was there time for a reasonable man to have cooled ? State v. McCauts, 1 Spears 334. If between the provocation received and the mortal stroke given, the prisoner fall into other discourse or diversion, and continue so a reasonable time for cooling, or if he take up and pursue any other business or design not connected with the immediate object of his passion, nor subservient thereto, so that it may be reasonably supposed that his intention was once called off from the subject of the provocation, any subsequent killing of his adversary, especially where a deadly weapon is used, is murder : Comm. v. Green, 1 Ashm. 289.

and-cheese knife, was one that the prisoner was in the habit of carrying about with him, and he was rather weak in his intellect, but not so much so as not to know right from wrong. Lord Tenterden, C. J., "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter: but it depends upon the time elapsing between the blow and the injury; and also whether the injury was inflicted with an instrument at the moment in the possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent; the witness says from five to ten minutes, according to the best of his knowledge. Unless attention *is particularly [*726 called to it, it seems to me that evidence of time is very uncertain; the prisoner may have been absent less than five minutes; there is no evidence that he went anywhere for the knife. The father says it was a knife he carried about with him; it was a common knife, such as a man in the prisoner's situation in life might have; for ought that appears he might have gone a little way from the deceased and then returned, still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner with respect to each other; if there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious, and diabolical mind (which, under the circumstances, I should think you hardly would), then you will find him guilty of murder." (e)

If thought, contrivance, and design be shown by a prisoner in the mode of procuring a deadly weapon after provocation has been given, and in again replacing the weapon immediately after the blow with it has been struck, this tends to show that the prisoner was acting under the influence of judgment and reason, rather than of violent and ungovernable passion. The deceased was requested by his mother to turn the prisoner out of her house, which after a short struggle with the prisoner he effected, and in doing so he gave him one kick. The prisoner said he would make him remember it, and instantly went to his own lodgings, from two to three hundred yards distant, passed through his bed-room and a kitchen into a pantry, and returned thence hastily back again. Within five minutes after the prisoner had left the deceased, the latter followed him to give him back his hat, which had been left behind, and they met about ten yards from the prisoner's lodgings. They stopped for a short time, when they were heard talking together, but without any words of anger; after they had walked on together for about fifteen yards, the deceased gave the prisoner his hat, when the latter exclaimed with an oath, that he would have his rights, and instantly stabbed the deceased with a knife or some sharp instrument, in two places, giving him a mortal wound in the belly. As soon as he had stabbed him a second time, he said he had served him right, and instantly ran back to his lodgings, passed hastily through his bed-room and the kitchen to the pantry, and thence back to his bed-room, where he undressed himself and went to bed. Shortly afterwards he was apprehended, and no knife or other instrument found upon him. In the pantry the prisoner had a sharp butcher's knife, with which he usually ate, and which was kept on a shelf with his meat; and in another part of the pantry three other *knives [*727 of a similar description, which he used in his business of a butcher. The several knives were found the next morning in their usual places in the pantry. Tindal, C. J., told the jury that the question for them was, whether the wound was given by the prisoner while smarting under a provocation so recent and so strong that the prisoner might not be considered at the moment the master of his own understanding; or whether there had been time for the blood to cool, and for reason to resume its

(e) *Rex v. Lynch*, 5 C. & P. 324 (24 E. C. L. R.).

seat, before the wound was given. That in determining this question, the most favorable circumstance for the prisoner was the shortness of time between the original quarrel and the stabbing; but, on the other hand, the weapon was not at hand when the quarrel took place, but was sought for from a distant place. It would be for them to say whether the prisoner had shown thought, contrivance, and design in the mode of possessing himself of the weapon, and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason than of violent and ungovernable passion.(f)

From the cases which have been stated in the former part of this section, it appears that malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature; for the law supposes that a party capable of acting in so outrageous a manner upon a slight provocation must have entertained a general, if not a particular malice, and have previously determined to inflict such vengeance upon any pretence that offered.(g)

Sec. II.—Cases of Mutual Combat.

WHERE words of reproach and other sudden provocations have led to blows and mutual combat, and death has ensued, the important inquiry will be whether the occasion was altogether sudden, and not the result of pre-conceived anger or malice; for in no case will the killing, though in mutual combat, admit of alleviation, if the fighting were upon malice.(h)

Thus a party killing another in a deliberate duel is guilty of murder;¹ for where ever two persons in cold blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder,(i) and cannot help himself by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his intent only *728] to vindicate his reputation;(k) or that *he meant not to kill, but only to disarm his adversary.(l) He has deliberately engaged in an act, highly unlawful, in defiance of the laws, and he must at his peril abide the consequences; and upon this principle, wherever two persons quarrel over night and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or at any time afterwards so considerable that in common intendment it must be presumed that the blood was cooled, the person killing will be guilty of murder.(m) And in a case where, upon a quarrel happening at a tavern, Lord Morley objected to fighting at that time, on account of the disadvantage he should have by reason of the height of his shoes, and presently afterwards went into a field and fought; the circumstance was relied on as showing that he did not fight in the first passion.(n) So wherever there is an act of deliberation, and a meeting by compact, such mutual combat will not excuse the party killing from the guilt of murder; as where B. challenged A., and A. refused to meet him, but in order to evade the law, told B. that he should go the next day to a certain town about his business, and accordingly B. met him the next day in the road to the same town and assaulted him, whereupon they fought, and A. killed B., it is said that A. seems guilty of murder; but the same conclusion would not follow, if it should appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting.(o) Upon the same principle, if A. and B. meet deliberately to fight,

(f) *Rex v. Hayward*, 6 C. & P. 157 (25 E. C. L. R.), Tindal, C. J.

(g) 1 East P. C. c. 5, s. 30, p. 252.

(h) 1 East P. C. c. 5, s. 24, p. 241.

(i) *Reg. v. Young*, 8 C. & P. 644 (34 E. C. L. R.), Vaughan, J., and Alderson, B.; *Reg. v. Cuddy*, 1 C. & K. 210 (47 E. C. L. R.); *Baronet's case*, 1 E. & B. 1 (72 E. C. L. R.).

(k) As where he had been threatened that he should be posted for a coward: 1 Hale 452, and see *Rex v. Rice*, 3 East R. 581.

(l) 1 Hawk. P. C. c. 31, s. 21.

(m) 1 Hawk. P. C. c. 31, s. 22; 1 Hale 453.

(n) *Bromwich's case*, 1 Lev. 180; 1 Sid. 277; 7 St. Tr. 42. Bromwich was indicted for aiding and abetting Lord Morley in the murder of Hastings.

(o) 1 Hawk. P. C. c. 31, s. 25.

¹ *Smith v. State*, 1 Yerg. 228.

and A. strike B., and pursue B. so closely that B., in safeguard of his own life, kills A., this is murder in B.; because their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done. (p)

And the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his second, is guilty of murder; (q) and it has been held that the second also of the person killed is equally guilty by reason of the countenance given to the principal, and of the compact; but this was considered as a severe construction by Lord Hale, who thought that the law in that case was too far strained. (r) It is now, however, settled that the seconds [729] of both are guilty of murder. (s) Where therefore an indictment charged Monro with the murder of Fawcett and the prisoner as present, aiding and assisting in the murder, and the death was shown to have occurred in a duel, in which Monro was one of the principals and the prisoner was said to have acted as second to the deceased; the jury were told, as a matter about which no judge entertained any doubt, that where two persons go out to fight a deliberate duel, and death ensues, all persons who are present on the occasion, encouraging or promoting the death, will be guilty of abetting the principal offender, and that, without giving them any particular name, all persons who are present aiding, assisting, and abetting that deliberate duel are within the term of such an indictment as this. (t)

With regard to other persons who are present at a premeditated duel, the question is, did they give their aid and assistance by their countenance and encouragement of the principals in the contest? Mere presence is not sufficient; but if they sustain the principals by their advice or presence, or if they go for the purpose of encouraging and forwarding the unlawful conflict, although they do not say or do anything, yet if they are present and assisting and encouraging at the moment when the pistol is fired, they are guilty of murder. (u)

Where the combat is not an act of deliberation, but the immediate consequence of a sudden quarrel, it does not of course fall within the foregoing doctrine; yet in cases of this kind the law may come to the conclusion of malice, if the party killing began the attack with circumstances of undue advantage. (v) For in order to save the party making the first assault, upon an insufficient local provocation, from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be put on an equal footing in point of defence; at least at the onset: and this more particularly where the attack is made with deadly or dangerous weapons. (w)

(p) 1 Hale 452, 480, who says, "Thus is Mr. Dalton, cap. 93, p. 241 (new edit., c. 145, . 474), to be understood." But a *qu.* is added in 1 Hale 452, whether, if B. had really and truly declined the fight, ran away as far as he could, and offered to yield, and yet A., refusing to decline it, had attempted his death, and B. after this had killed A. in his own defence, it would excuse him from the guilt of murder; admitting clearly that if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it would be murder. This *quære* of Lord Hale's is discussed in 1 East P. C. c. 5, s. 54, p. 284 *et seq.*, and it is observed that Mr. J. Blackstone (4 Blac. Com. 185), expressly puts the same case of a duel as Lord Hale, but without subjoining the same doubt; and that it was considered as settled law by the Chief Justice in Oney's case (Lord Raym. 1489). Mr. East, after reasoning in favor of the extenuation of the crime of the duellist so declining to fight, proceeds thus: "Yet still it may be doubtful whether, admitting the full force of this reasoning, the offence can be less than manslaughter, or whether in such case the party can altogether excuse himself upon the foot of necessity or self-defence, because the necessity which was induced from his own faulty and illegal act, namely, the agreement to fight, was in the first instance deliberately foreseen and resolved upon, in defiance of the law." 1 East P. C. c. 5, s. 54, p. 285.

(q) 1 Hale 442, 452; 1 Hawk. P. C. c. 31, s. 31; Reg. v. Young, 8 C. & P. 644 (34 E. C. L. R.).

(r) 1 Hale 442, where he says that the book of 22 E. 3, Coron. 262, was relied upon: but, as he thinks, the law was too far strained in that case; and in page 452 he says, "some have thought it to be murder also in the second of the party killed, because done by compact and agreement: 22 Edw. 3, 262. *Sed qu. de hoc.*"

(s) Reg. v. Young, 8 C. & P. 644 (34 E. C. L. R.), Vaughan, J., and Alderson, B. Reg. v. Cuddy, 1 C. & K. 210 (47 E. C. L. R.), Williams, J., and Rolfe, B.

(t) Reg. v. Cuddy, *supra*.

(u) Reg. v. Young, *supra*.

(v) Post. 295.

(w) 1 East P. C. c. 5, s. 25, p. 242.

¹ If a party enters a contest dangerously armed and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder: *State v. Hildreth*, 9 Vred. 29.

Thus if B. draw his sword and make a pass at A., the sword of A. being then undrawn, and thereupon A. draw his sword, and a combat ensue, in which A. is killed, this will be murder; for B., by making the pass, while his adversary's sword was undrawn, shows that he sought his blood; and A.'s endeavor to defend himself, which he had a right to do, will not excuse B.(x)

In *Mawgridge's* case, words of anger happening, Mawgridge threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword. Mr. Cope returned a bottle at the head of Mawgridge, and wounded him; whereupon Mawgridge stabbed Mr. Cope. This was ruled to be murder; for Mawgridge, *in throwing the bottle, showed an intention to do some great mischief; and his drawing immediately showed that he intended to follow his blow; and it was lawful for Mr. Cope, being so assaulted, to return the bottle.(y)

Even if the parties are upon an equal footing when the combat begins, malice may be implied from the violent conduct which the party killing pursued in the first instance; more especially where there is time for cooling, and such expressions are used as manifest deliberation; as in the following case of Major Oneyby:—

Major Oneyby was indicted for the murder of Mr. Gower; and a special verdict was found, containing the following statement. The prisoner being in company with the deceased and three other persons at a tavern, in a friendly manner, after some time, began playing at hazard; when Rich, one of the company, asked if any one would set him three half crowns; whereupon the deceased, in a jocular manner, laid down three halfpence, telling Rich he had set him three pieces; and the prisoner at the same time set Rich three half crowns, and lost them to him. Immediately after which, in an angry manner, he turned about to the deceased, and said, it was an impertinent thing to set halfpence, and that he was an impertinent puppy for so doing, to which the deceased answered, whoever called him so was a rascal. Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head; but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased in return immediately tossed a candle-stick or bottle at the prisoner, which missed him; upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword; but the prisoner was prevented from drawing his by the company. The deceased thereupon threw away his sword; and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over;" and at the same time offered his hand to the prisoner, who made answer, "No, damn you; I will have your blood." After which, the reckoning being paid, all the company, except the prisoner, went out of the room to go home; and he called to the deceased, saying, "Young man! come back; I have something to say to you;" whereupon the deceased returned into the room, and the door was closed, and the rest of the company excluded; but they heard a clashing of swords, and the prisoner gave the deceased the mortal wound. It was also found, that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight; and that the deceased, being asked upon his death-bed, whether he received his wound in a manner among sword-men called fair, answered, "I think I did." It was further found that, from the throwing of the bottle, there was no reconciliation between the prisoner and the deceased. Upon these facts all the Judges were of opinion that the prisoner was guilty of murder; he *having acted upon malice and deliberation, and not from sudden passion. It should probably be taken, upon the facts found in the verdict and the argument of the Chief Justice, that, after the door had been shut, the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and so declared to be, was the evidence of *express malice*, after the interposition of the company, and the parties had all sat down again for an

(x) *Fost.* 295; 1 *Hawk. P. C. c.* 31, s. 27.

(y) *Rex v. Mawgridge*, *Kel.* 128, 129, cited in *Fost.* 295, 296, where it is said that the judgment in this case was holden to be good law by all the judges of England, at a conference in the case of *Major Oneyby*, 2 *Lord Raym.* 1485; 2 *Str.* 766.

hour. Under those circumstances the Court were of opinion that the prisoner had had reasonable time for cooling; after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, that he would have his blood. And again, the prisoner remaining in the room after the rest of the company retired, and calling back the deceased by the contemptuous appellation of young man, on pretence of having something to say to him, altogether showed such strong proof of deliberation and coolness as precluded the presumption of passion having continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances; for it must have been implied, according to *Mawgridge's* case, that he acted upon malice; having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of Mr. Gower, made a deadly assault upon him.^(z)

If, after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon and kills the other party with it, such killing will be only manslaughter. But if a party, under color of fighting upon equal terms, uses from the beginning of the contest a deadly weapon without the knowledge of the other party, and kills the other party with such weapon; or if, at the beginning of the contest, he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with the weapon; the killing in both these cases will be murder. The prisoner and Levy quarrelled and went out to fight. After two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places; and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner; who had a clasped knife before the affray. Bayley, J., told the jury, that if the prisoner used the knife privately from the beginning; or if before they began to fight he placed the knife so that he might use it during the affray, and used it accordingly, it was murder; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder.^(a)¹

Upon an indictment for maliciously cutting, it appeared that the prisoner had cut the prosecutor in a fight that took place *between them, but no instrument was seen either before or at the time in the prisoner's hands; Bayley, J., "When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to cause death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder. If you are of opinion that the prisoner entered into the contest, being unduly armed with an instrument calculated to produce the effects charged in the indictment, and with the instrument ready in his hand, in order that he might resort to it with any of the alleged intents, then he is guilty. For if death had ensued it would have been murder."^(b)

It seems to have been considered in one case that the nature of a mutual combat might be such as to render the case one of murder. Upon an indictment for manslaughter the evidence was that the prisoner and deceased were "fighting up and

(z) *Rex v. Oneby*, 2 Str. 766; 2 Lord Raym. 1485.

(a) *Rex v. Anderson*, O. B. December, 1816. Richards, B., and the Recorder, thought the direction right. MS., Bayley, J. See *Rex v. Kessal*, 1 C. & P. 437 (12 E. C. L. R.), post.

(b) *Whiteley's case*, 1 Lew. 173, Bayley, J.

¹ A prisoner who determines to take the life of another and seizes a musket to carry his intention into effect, not knowing whether it is loaded or otherwise, but with the expectation and desire that it is, is guilty of murder in any killing consequent upon its discharge: *Comm. v. Green*, 1 Ashm. 289.

down," and that the deceased died of the injury he sustained in the fight. Bayley, J., to the jury, "Fighting up and down is calculated to produce death, and the foot is an instrument likely to produce death. If death happens in a fight of that description it is murder, and not manslaughter." The prisoner having been convicted, Bayley, J., told him that if he had been charged with murder, the evidence adduced would have sustained the indictment.(c)

Though, where there has been an old quarrel between A. and B., and a reconciliation between them, and afterwards, upon a new and sudden falling out, A. kills B., this is not murder; yet if upon the circumstances it appears that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, it is murder.(d)

Sec. III.—Cases of Resistance to Officers of Justice, to Persons acting in their aid, and to private Persons lawfully interfering to apprehend Felons, or prevent a Breach of the Peace.

MINISTERS of justice, as bailiffs, constables, watchmen, &c..(e) while in the execution of their offices, are under the peculiar protection of the law; a protection *733] founded in wisdom and equity, *and in every principle of political justice; for without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the killing of officers so employed has been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of the justice of the kingdom. If, therefore, upon an affray, the constable, and others in his assistance, come to suppress the affray and preserve the peace, and in executing their office the constable or any of the assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden, because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it; and, therefore, the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm; so if the sheriff, or any of his bailiffs, or other officers, is killed in executing the process of the law, or in doing their duty, it is murder; the same is the law as to a watchman who is killed in the execution of his office.(f) This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business that brought him thither; for he is under the same protection of the law *eundo, morando, et redeundo*; and therefore if he come to do his office, and meeting with great opposition, retire, and be killed in the retreat, this will amount to murder; as he went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened. And, upon the same principle, if he meet with opposition by the way, and be killed before he come to the place, such opposition being intended to prevent his doing his duty (which is a fact to be collected from circumstances appearing in evidence), this likewise will amount to murder.(g)

A policeman is entitled to the same protection in the execution of his duty as a constable, and if he is killed in the execution of his duty it will be murder. Where, therefore, a policeman between eleven and twelve o'clock at night was called upon to clear a beer-house, which he did, and then went into the street where the prisoner and many others were standing near the door, when the prisoner re-

(c) Thorpe's case, 1 Lew. 171. "Fighting up and down" is described in Roscoe's Cr. E. 685, as "a brutal and savage practice in the north of England." It is to be remarked, that the observations of the very learned judge were quite unnecessary, as the indictment was only for manslaughter, and their correctness may well be questioned, as they are opposed to all those cases where deadly weapons have been used in mutual combat upon a sudden quarrel. See the cases, *post*, tit. *Manslaughter, Mutual Combat*. C. S. G.

(d) 1 Hale 451.

(e) 1 Hale 456, 460; 4 Co. 40.

(f) Case of Appeals and Indictments, 4 Co. 40. As to the authority for acting, and the exercise of that authority in a proper manner, see *post*, chap. iii. s. 3.

(g) Fost. 308, 309.

fused to go home, and used very abusive and violent language, and the policeman laid his hand on his shoulder gently, and told him to go away, on which the prisoner immediately stabbed him with a knife in the throat; it was held that if the policeman had died, this would have been murder; for if a policeman had heard any noise in the beer-house at such a time of night, he would have acted within the line of his duty, if he had gone in, and insisted that the house should be cleared; and much more so, if he was required by the landlady; and after that was done, if a knot of people remained in the street, and the crowd increased in consequence of their attention being drawn to the clearing of the house, and if anything was saying or doing likely to lead to a breach of the peace, the policeman was not *only bound to interfere, but it would have been a breach of his [734 duty if he had not done so, and if in so doing he ordered the people to go away, and any one was unwilling, and defied the policeman, and used threatening language, the policeman was perfectly justified in insisting upon that person going off; and if he had warned him several times, and he would not go away, and used threatening language if any one ventured to touch him, the policeman was entirely justified in using a degree of violence to push him from the place, in order to get him to go home; and therefore anything that he did would not be in the nature of an assault, but would be an act in the discharge of his duty, and therefore any blow that was given afterwards with a cutting instrument would be precisely the same as if it had been given without anything being done by the policeman.(h) So where a policeman saw the prisoner playing the bagpipes in a street at half-past eleven o'clock at night, by which he collected a large crowd around him, among whom were prostitutes and thieves, and the policeman told him he could not be allowed to play at that time of night, and he must go on, but he said he would be damned if he would, and the policeman took hold of him by the shoulder, and slightly pushed him, on which the prisoner wounded him with a razor; it was held, that if the prisoner was collecting a crowd of persons at that time of night, and the policeman desired him to go on, and laid his hand upon his shoulder with that view only, he did not exceed his duty, and if the prisoner then wounded him, it would have been murder if he had died; but if the policeman gave the prisoner a blow and knocked him down, he was not justified in so doing.(i)

The protection which the law affords to such ministers of justice is not, as we have seen, confined to their own persons. Every one coming to their aid, and lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself.(k) Nor is the protection which the law affords in these cases confined to the ordinary ministers of justice, or their assistants. It extends, under certain limitations, to the cases of private persons interposing for preventing mischief from an affray, or using their endeavors to apprehend felons, or those who have given a dangerous wound, and to bring them to justice: such persons being likewise in the discharge of a duty required of them by the law.¹ The law is their warrant, and they may not improperly be considered as persons engaged in the public service, and for the advancement of justice, though without any special appointment; and being so considered, they are under the same protection as the ordinary ministers of justice.(l) A person aiding a policeman in conveying a person suspected of felony to a station-house is entitled to the same protection *eundo, morando, et redeundo* as the policeman. The deceased having been required by a policeman to aid him in taking a man, whom he had apprehended on suspicion of stealing potatoes, to the station-house, did so for some time, and then was going away, when he was [735 attacked and beaten to death; it was objected that he was not at the time

(A) *Rex v. Hems*, 7 C. & P. 312 (32 E. C. L. R.), Williams, J.

(i) *Reg. v. Hagan*, 8 C. & P. 167 (34 E. C. L. R.), Bollaund, B., and Coltman, J.

(k) 1 Hale 462, 463; Fost. 309.

(l) Fost. 309.

¹ If one sees another about to commit a felony, he may use such force to prevent it as may be necessary; and if while so engaged he is intentionally killed, it will be murder *Dill v. State*, 25 Ala. 15.

aiding the policeman. Coltman, J., "He is entitled to protection *eundo, morando, et redeundo*." (m)

But with respect to private persons using their endeavors to bring felons to justice, it should be observed, by way of caution, that they must be careful to ascertain, in the first instance, that a felony has actually been committed, and that it has been committed by the person whom they would pursue and arrest. For if no felony has been committed, no suspicion, however well founded, will bring the person so interposing within this especial protection of the law : (n) nor will it be extended to those who, where a felony has actually been committed, upon suspicion, possibly well founded, pursue or arrest the wrong person. (o) But the law is otherwise in the case of an officer acting in pursuance of a warrant. For if A., being a peace-officer, has a warrant from a proper magistrate for the apprehending of B. by name, upon a charge of felony; or if B. stands indicted for felony; or if the hue and cry is levied against B. by name; in these cases if B., though innocent, fly, or turn and resist, and in the struggle or pursuit is killed by A., or any person joining in the hue and cry, the person so killing will be indemnified; and, on the other hand, if A., or any person joining in the hue and cry, is killed by B., or any of his accomplices joining in that outrage, such killing will be murder; for A. and those joining with him were in this instance in the discharge of a duty required from them by the law; and, in case of their wilful neglect of it, subject to punishment. (p)

Upon these principles it may be laid down as a general rule, that *where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take a part in such resistance*; for it is homicide committed in despite of the justice of the kingdom. This rule is laid down upon the supposition that *resistance* be made; and, upon that supposition, it is conceived that it will hold in all cases, whether civil or criminal; for under circumstances of resistance, in either case, the persons having authority to arrest or imprison may repel force by force, and will be justified if death should ensue in the struggle; while, on the other hand, the persons resisting will be guilty of murder. (q) And it has been decided, that if in any quarrel, sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavoring to keep the peace and suppress the affray, he who kills him will be guilty of murder. (r) But in such case the person slain must have given notice of the purpose for which he came, by commanding the parties in the King's name to keep the peace, or by otherwise showing that it was not his intention to take part in the quarrel, but to appease it; (s) unless, indeed, he were an *736] officer within his proper district, and known, or generally *acknowledged, to bear the office he had assumed. (t) As if A., B., and C. be in a tumult together, and D., the constable, come to appease the affray, and A., knowing him to be the constable, kill him, and B. and C., not knowing him to be the constable, come in, and finding A. and D. struggling, assist and abet A. in killing the constable, this is murder in A., but manslaughter in B. and C. (u) Where a constable interferes in an affray to keep the peace, and is killed, such of the persons concerned in killing him as knew him to be a constable are guilty of murder; and such as did not know it, of manslaughter only. (v)

But it must be well remembered, that this protection of the law is extended only to persons who have authority to arrest or imprison, and who use such authority in a proper manner; and that questions of much nicety and difficulty will often arise upon the points of authority, legality of process, notice, and regularity of proceeding. The consideration of these points will be attempted in a subsequent part of

(m) Reg. v. Phelps, C. & M. 180 (41 E. C. L. R.), and MS., C. S. G. See the *Sissinghurst-house* case, *post*, p. 738.

(n) Cro. Jac. 194; 2 Inst. 52, 172.

(o) 1 Hale 490; Fost. 318.

(p) Fost. 318.

(q) Fost. 270, 271; 1 Hale 494; 3 Inst. 56; 2 Hale, 117, 118.

(r) 1 Hawk. P. C. c. 31, s. 48, 54.

(s) Fost. 272.

(t) 1 Hawk. P. C. c. 31, s. 49, 50.

(u) 1 Hale 438.

(v) 1 Hale 446.

the work; for as the consequences of defects in any of these particulars will generally be to extenuate the crime of killing, and reduce it to manslaughter, the discussion of them will perhaps be better introduced in the chapter relating to that species of homicide.^(w)

With respect to the persons who shall be considered as *taking a part* in the resistance, it may be observed, that if the party who is arrested yield himself and make no resistance, but others endeavor to rescue him, and he do no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, this is murder in them, but not in the party arrested: but not so if he do any act to countenance the violence of the rescuers.^(x) And where *Jackson* and four others, having committed a robbery, were pursued by the country upon hue and cry, and *Jackson* turned upon his pursuers (others of the robbers being in the same field, and having often resisted the pursuers), and refusing to yield, killed one of the pursuers; it was held, that inasmuch as all the robbers were of a company and made a *common resistance*, and so one animated the other, all those of the company of the robbers that were in the same field, though at a distance from *Jackson*, were principals, viz., present, aiding and abetting: and it was also held, that one of the malefactors who was apprehended a little before the party was hurt, being in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated *Jackson* to kill the party.^(y)

If a man be arrested, and he and his company endeavor a rescue, and, while they are fighting, one who knows nothing of the arrest coming by act in aid of the party arrested, and one of the bailiffs be killed, the person so acting in aid is guilty of murder; for a man must take the consequence of joining in any unlawful act, such as fighting; and his ignorance will not excuse him where the fact is made murder by the law without any actual precedent malice, as in the case of [*737 killing an officer in the due *execution of his office.^(z) But it should be observed, that, in another report of the same case, it is said to have been resolved, that if a person, not knowing the cause of the struggle, had interposed between the bailiff and the party arrested, *with intent to prevent mischief*, it would not have been murder in such person, though the bailiff's assistant were killed by one of the rescuers;^(a) and it should seem that, in a case of this kind, the material inquiry would be, whether the stranger interfered with the intention of preserving the peace and preventing mischief; for if he interposed for the express purpose of aiding one party against the other, he must abide the consequences at his peril.^(b)

A. beat *B.*, a constable, who was in the execution of his office, and they were parted; and then *C.*, a friend of *A.*, rushed suddenly in, and took up the quarrel, fell upon the constable, and killed him in the struggle; but *A.* was not engaged in this after he was parted from *B.* And it was holden by two judges, that this was murder only in *C.*; and *A.* was acquitted, because it was a sudden quarrel, and it did not appear that *A.* and *C.* came upon any design to abuse the constable.^(c) But if a man begin a riot, and that same riot continue, and an officer be killed, he that began the riot would, if he had remained present at it, be a principal murderer, though he did not commit the fact.^(d)

A great number of persons assembled in a house called *Sissinghurst*, in Kent, issued out and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz., *A.*, was known, the rest were not known; and a warrant was obtained from a justice of the peace to apprehend the said *A.*, and divers other persons unknown, who were all together in *Sissinghurst House*. The

(w) *Post*, chap. ii. s. 3.

(x) *Sir Charles Stanley's case*, Kel. 87. See *Rex v. Whithorne*, 3 C. & P. 394 (14 E. C. L. R.), *post*, p. 745.

(y) *Jackson's case*, 1 Hale 464, 465.

(z) *Sir C. Stanley's case*, Kel. 87.

(a) *Rex v. Sir C. Stanslie*, 1 Sid. 160, MS.; *Burnet accord.* as cited 1 East P. C. c. 5, s. 63, p. 296.

(b) 1 East P. C. c. 5, s. 83, p. 318.

(c) By Holt, C. J., and Rooksby, at Hertford, temp. Will. 3, *ad incipium* MS., Tracey 53; 1 East P. C. c. 5, s. 63, p. 296; and see also *Fost.* 353.

(d) *Reg. v. Wallis*, 1 Salk. 334.

constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded entrance, and acquainted some of the persons within that he was the constable, and came with the justice's warrant, and demanded A. with the rest of the offenders that were then in the house; and one of the persons within came and read the warrant, but denied admission to the constable, or to deliver A. or any of the malefactors; but going in, commanded the rest of the company to stand to their staves. The constable and his assistants fearing mischief, went away; and being about five rods from the door, B., C., D., E., F., &c., about fourteen in number, issued out and pursued the constable and his assistants. The constable commanded the peace, yet they fell on, and killed one of the assistants of the constable, and wounded others, and then retired into the house to the rest of their company which were in the house, whereof the said A. and one G. that read the warrant were two. For this A., B., C., D., E., F., G., and divers others, were indicted of murder, and tried at the King's Bench bar, when these points were unanimously determined:

1. That although the indictment were, that B. gave the stroke, and the rest were present aiding and assisting, though in truth C. gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment; for in law it was the stroke of all that party, according to the resolution in *Mackally's case*.^(e)

2. That in this case all that were present and assisting to the rioters were guilty of the death of the party slain, though they did not all actually strike him or any of the constable's company.

3. That those within the house, if they abetted or counselled the riot, were in law present aiding and assisting, and principals, as well as those that issued out and actually committed the assault; for it was but within five rods of the house, and in view thereof, and all done as it were at the same instant.^(f)

4. That here was sufficient notice that it was the constable, before the man was killed. 1. Because he was the constable of the same vill. 2. Because he notified his business at the door before the assault, viz., that he came with the justice's warrant. 3. Because after his retreat, and before the man was slain, the constable commanded the peace; and notwithstanding, the rioters fell on and killed the party.

5. It was resolved that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That those who come in to the assistance of the constable, though not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That although the constable retired with his company upon the not delivering up of A., yet the killing of the assistant of that constable in that retreat was murder. 1. Because the retreat was one continued act in pursuance of his office; being necessary, when he could not attain the object of his warrant, and being in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. 2. Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace.

8. It seems that even if the constable had not commanded the peace, yet as he and his company came about what the law allowed them, and, when they could not effect it fairly, were going away, the rioters pursuing them and killing one made the offence murder in them all; for the act was done without provocation, and the constable and his company were peacefully retiring; but this point was not relied upon, because there was enough upon the former point to convict the offenders. In the conclusion, the jury found nine of them guilty, and acquitted those within; not because they were absent, but because there was no clear evidence that they

^(e) 9 Co. 67 b.

^(f) Vide Lord Dacre's case, 1 Hale 439. The Lord Dacre and divers others came to shoot deer in the park of one Pelham. Rayden, one of the company, killed the keeper in the park, the Lord Dacre and the rest of the company being in other parts of the park; and it was ruled that it was murder in them all, and they died for it: *Crompt. 25, a* Dalt. c. 145, p. 472; 34 Hen. 8, B. Coron. 172. See also *Moor 86*; *Kely. 56*.

ented to the assault as the jury thought; and therefore judgment was given
nst the nine to be hanged.(g)

c. IV.—Cases where the Killing takes place in the Prosecution of some
other Criminal, Unlawful, or Wanton Act. [*739]

F an action, unlawful in itself, be done deliberately, and with intention of
chief or great bodily harm to particular individuals, or of mischief indiscrimi-
ly, fall where it may, and death ensues against or beside the original intention
ie party, it will be murder.(h)

nder this head may be mentioned the cases of particular malice to one indi-
ial falling by mistake or accident upon another, which, by the ignorance or
y of juries, have been sometimes brought within the rule of accidental death.
though, in a loose way of speaking, it may be called accidental death when a
on dies by a blow not intended against him, the case is considered by the law
very different light. Thus, if it appears from circumstances that the injury
aded to A., whether by poison, blow, or any other means of death, would have
unted to murder if he had been killed by it, it will amount to the same offence
. happen to fall by the same means;(i) so that if C., having malice against A.,
es at and misses him, but kills B., this is murder in C.:(k) and upon the same
iple, if A. and B. engage in a deliberate duel, and a stranger coming between
a to part them is killed by one of them, it is murder in the party killing.(l)
it has also been resolved, that where A. had malice against D., the master of
and assaulted him, and upon B. the servant coming to the aid of his master, A.
d B., it was murder in A. as much as if he had killed the master.(m) So,
re A. gave a poisoned apple to his wife intending to poison her, and the wife,
rant of the matter, gave it to a child who took it and died; this was held
der in A., though he, being present at the time endeavored to dissuade his wife
giving the apple to the child.(n) And, upon the same principle, it was held
a murder where A. mixed poison in an electuary sent by an apothecary to her
and, which did not kill him, but afterwards killed the apothecary, *who
indicate his reputation, tasted it himself, having first stirred it about.(o) [*740
bt was entertained, because the apothecary, of his own hand, without incite-
t from any one, not only partook of the electuary, but mingled it together, so
incorporate the poison, and make its operation more forcible than the mixture
ade by the wife of A. : but the Judges resolved that she was guilty of murder;
he putting the poison into the electuary was the cause of the death: and if a
on prepares poison with intent to kill any reasonable creature, such person is
y of the murder of whatever reasonable creature is killed thereby.(p) So if

) Sissinghurst House case, 1 Hale 461, 2, 3 The award was for the marshal to do
ation, because they were remanded to the custody of the marshal, and he is the
ediate officer of the court, and precedents in cases of judgments given in the King's
h have commonly been *Et dictum est marescallo, &c., quod faciat executionem periculo
bente.*

) Fost. 261.

Id. Ibid.; 1 Hale 441; Williams's case, 1 Hale 469, which Holt, C. J., thought would
be a case of murder, if the indictment had been so laid. See Mawgridge's case,
131.

) 1 East P. C. c. 5, s. 17, p. 230.

1 Hale 441; Dalt. c. 145, p. 472. It appears to have been holden in such a case,
e the combating was by malice prepense, that the killing of the person who came to
them was murder in both the combatants: 22 Edw. 3, Coron. 262; Lambard out of
son's Report, p. 217. But Lord Hale thinks that this is mistaken, and that it is not
ler in both, unless both struck him who came to part them; and says that by the
of 22 Ass. 71, Coron. 180 (which seems to be the case more at large), he only that
the stroke had judgment, and was executed: 1 Hale 441, to which this note is sub-
d; "the other does not appear to have been before the court: but, upon putting
ase, the court said he that struck is guilty of felony, but said nothing as to him who
st strike."

) 1 Hale 438.

Saunders' case, Plowd. 474; 1 Hawk. P. C. c. 31, s. 45; 1 Hale 438.

Gore's case, 9 Co. 81; 1 Hawk. P. C. c. 31, s. 45; 1 Hale 436.

) *Ante*, note (o).

A. put poison into wine, with intent to kill B., and C. drinks thereof and dies, A. is guilty of the murder of C.; and it makes no difference that the wine, unless stirred up, would not have killed C., and that C., thinking there was sugar in it, stirred it up.(q)

So where a person gave medicine to a woman to procure an abortion,(r) and where a person put skewers into the womb of a woman for the same purpose;(s) by which in both cases the women were killed, these acts were held clearly to be murder; for, though the death of the woman was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they were practiced.

There are also other cases where no mischief is intended to any particular individual, but where there is a general malice or depraved inclination to mischief, fall where it may; and in these cases the act itself being unlawful, attended with probable serious danger, and done with a mischievous intent to hurt people, the killing will amount to murder.(t) Thus, if a man go deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharge a gun amongst a multitude of people, and death be the consequence of such acts, it will be murder.(u) So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice.(v) And upon the same principle, if a man knowing that people are passing along the street, throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of the previous malice, though not directed against any particular individual: for it is no excuse that the party was bent upon mischief generally.(w)

Whenever an unlawful act, an act *malum in se*, is done in prosecution of a felonious intention, and death ensues, it will be murder: as if A. shoot at the poultry of B. intending to steal the poultry, and by accident kill a man, this will *741] be murder by reason of the felonious intention of stealing.(x) So, if a man set fire to a house, whereby a person in it is burnt to death.(y) And it was held, that if such offenders as were mentioned in the statute *De malefactoribus in parvis*.(z) killed the keeper, &c., it was murder in all, although it appeared that

(q) 9 Co. 81 b. See Reg. v. Michael, 2 Moo. C. C. R. 120.

(r) 1 Hale 429.

(s) Tinckler's case, 1 East P. C. c. 5, s. 17, p. 230, and s. 124, p. 354.

(t) 1 Hale 475; 1 East P. C. c. 5, s. 18, p. 231.

(u) 1 Hale 476; 4 Blac. Com. 200; 1 Hawk. P. C. c. 29, s. 12; 1 East P. C. c. 5, s. 18, p. 231. Hawkins, speaking of the instance of the person riding a horse used to kick amongst a crowd, says, it would be murder, though the rider intended no more than to divert himself by putting the people into a fright: 1 Hawk. P. C. c. 31, s. 68, and see *ante*, p. 687.

(v) 4 Blac. Com. 200.

(w) 1 Hale 475; 3 Inst. 57; 1 East P. C. c. 5, s. 18, p. 231.

(x) Fos. 258, 259. Lord Coke, 3 Inst. 56, says, "if the act be unlawful it is murder; as if A., meaning to steal a deer in the park of B., shoots at the deer, and by the glance of the arrow kills a boy that is hidden in a bush, this is murder; for that the act was unlawful," and he cites Bract. Lib. 3, 120 b. And then he draws the distinction between shooting wild fowl and shooting at any tame fowl, and says, if the arrow by misadventure kills a man, it is murder; and cites for the latter position 3 Edw. 3, Coron. 354; 2 Hen. 4, 18, and 11 Hen. 7, 23. Lord Hale, 1 Hale 38, cites 11 Hen. 7, 23; Br. Coron. 229; Proclamation 12; 22 Ass. pl. 71, and see 1 Hale 568. In Rex v. Plummer, Kel. 117, the question is discussed in the judgment of the C. J., and Lord Coke's dictum is explained to mean that if two men have a design to steal a hen, and one shoots at the hen for that purpose, and a man be killed, it is murder in both, because the design was felonious; and it is said that with that explanation the books cited do warrant that opinion. Forster 258-9, cites 3 Inst. 56, and Kel. 117. There is, therefore, much in the books on the subject; and, with all deference to the opinions of others, the rule that any one who deliberately attempts to commit a felony and thereby occasions death, is guilty of murder, seems to be right. If this were not the rule, any person might burn any man's house and him in it, and be liable to no punishment for causing the death; for it never could be proved that he knew that there was any one in it. And a more salutary rule cannot be than that he who attempts to commit a felony shall be liable to the natural consequences of his felonious act.

(y) Reg. v. Smithies, 5 C. & P. 332 (24 E. C. L. R.).

(z) 21 Edw. 1, st. 2, now repealed by 7 & 8 Geo. 4, c. 27; 1 Hale 491.

the keeper ordered them to stand, assaulted them first, and that they fled, and did not turn till one of the keeper's men had fired, and hurt one of their companions.(a)

On an indictment for murder, it appeared that the prisoner had set fire to a stack of straw in an enclosure in which was an out-house or barn, but not adjoining to any house. While the fire was burning, the deceased was seen in the flames, and his body was afterwards found in the enclosure. It did not clearly appear whether he had been in the outhouse or merely lying on or by the side of the stack. There was no evidence who he was, or how or when he came there, nor that the prisoner had any idea that any one was or was likely to be there, and when he saw the deceased, he wanted to save him. It did not exactly appear how long the fire had been kindled before it was discovered, but very soon after it was discovered the deceased was seen in the flames. Bramwell, B., told the jury that "the law laid down was that where a prisoner, in the course of committing a felony, caused the death of a human being, that was murder, even though he did not intend it. And though that may appear unreasonable, yet, as it is laid down as law, it is our duty to act upon it. The law, however, is that a man is not answerable except for the natural and probable result of his own act: and therefore, if you should not be satisfied that the deceased was in the farm or enclosure at the time the prisoner set fire to the stack, but came in afterwards, then, as his own act intervened between the death and the act of the prisoner, his death could not be the natural result of the prisoner's act. And in that view he ought to be acquitted on the [*742 present charge."(b)

Also, where the intent is to do some great *bodily harm* to another, and death ensues, it will be murder; as if A. intended only to *beat* B., in anger, or from pre-conceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for all its consequences. He beat B. with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did.(c) So if a large stone be thrown at one with a deliberate intention to hurt, though not to kill him, and by accident it kill him, or any other, this is murder.(d) If a wrongful act (an act which the party who commits it can neither justify nor excuse) be done under circumstances which show an intent to kill, or do any serious injury, or any general malice, the offence is murder.(e) But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in all such cases.(f)

Upon an indictment for murder it appeared that the deceased, being in liquor, had gone at night into a glass-house, and laid himself down upon a chest; and that while he was there asleep the prisoners covered and surrounded him with

(a) 1 East P. C. c. 5, s. 31, p. 256, citing 1 MS., Sum. 145, 175; Sum. 37, 46; Palm. 546; 2 Roll. Rep. 120. The reason is the Act provides that, if after hue and cry made to stand, they will not yield, but flee or defend themselves, and the keepers kill them in taking them, they shall not be troubled in any way for it. Therefore all that the keepers did in this case was lawful, and consequently the killing was the killing of a party in the due execution of his duty.

(b) Reg. v. Horsey, 3 F. & F. 287. The natural and probable result of setting anything on fire is that it will burn whatever may happen to be in proximity to it during its progress, and not merely what happens to be so when the fire was lighted. If a man sets an infernal engine, with a lighted fuse, the natural and probable consequence is that it will kill whoever is near it at the time it explodes, and it has never been doubted that this would be murder if a person was killed by it, however far off he was when the fuse was lighted. See also and consider the cases of poisoning at p. 739. The proper mode to look at cases of this kind is to suppose that the prisoner actually applied a light to each particular thing to which the fire extended at the very time the fire reached it. That is the legal effect of the prisoner's act, and he may be indicted for setting fire to every new subject-matter reached by the fire. Suppose a rick were set fire to, and the fire extended to a house, and that there was no one in the house when the rick was set on fire, but that when the fire reached the house there was a man in it; can it be doubted that this would be setting fire to a house with a man in it within the 24 & 25 Vict. c. 97, s. 2? The learned Baron's ruling therefore seems to have been incorrect.

(c) Fost. 259.

(d) 1 Hale 440, 441.

(e) Per Tindal, C. J., Fenton's case, 1 Lewin 179. See the case, *post*, 852.

(f) Kel. 127; 1 East P. C. c. 5, s. 32, p. 257.

straw, and threw a shovel of hot cinders upon his belly; the consequence of which was that the straw ignited, and he was burnt to death: there was no evidence of express malice, but the conduct of the prisoners indicated an entire recklessness of consequences, hardly consistent with anything short of design. Patteson, J., adverted to the fact of there being no evidence of express malice, but told the jury that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter.(g)

Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers of people, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must, when they engage in such bold disturbances *of 743] the public peace, at their peril, abide the event of their actions. And therefore if in doing any of these acts they happen to kill a man, they are all guilty of murder.(h) But it should be observed, that in order to make the killing by any murder in all of those who are confederated together for an unlawful purpose, merely on account of the unlawful act done or in contemplation, it must happen during the actual strife or endeavor, or at least within such a reasonable time afterwards as may leave it probable that no fresh provocation intervened.(i)

Lee and Costen were indicted for the murder of S. J. Hill. Hill was at a public house where the prisoners were, and showed some money, and left to go home; the prisoners followed him. Lee first came up to Hill and pushed him through a hedge, so that he fell down a bank five feet high. Lee jumped down after him, and tried to rob him, but he resisted, and Lee called out to Costen to come and help him; Costen then went and helped to force the purse out of Hill's hand. It was not clearly proved what was the precise degree of violence used, as Hill said that he was so shaken with his fall that he hardly knew; but they both used some violence to force the money from him. Pollock, C. B., told the jury "that if two or more persons go out to commit a felony, with intent that personal violence shall be used in its committal, and such violence is used and causes death, then they are all guilty of murder, even although death was not intended." . . . "It is for you to consider whether there was any such joint design here, or, if not, whether Costen was party to such violence as tended in this case to cause death. If not you must acquit him, and I think there is no such evidence."(ii)

And it should also be observed, that the fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled; and therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepenae against one of his companions, finding an opportunity, kill him, the rest are not concerned in the guilt of that act, because it had no connection with the crime in contemplation.(k) So, where two men were beating another man in the street, and a stranger made some observation upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife; and both the men were indicted as principals in the murder; although both were doing an unlawful act in beating the man, yet as the death of the stranger did not ensue upon that act, and as it appeared that only one of them intended any injury to the person killed, the Judges were of opinion that the other could not be guilty, either as principal or accessory.(l)

Where a party of smugglers were met and opposed by an officer of the Crown, and during the scuffle which ensued a gun was discharged by a smuggler, which killed one of his own gang, the question was, whether the whole gang were guilty

(g) Errington's case, 2 Lewin 217.

(h) 1 Hawk. P. C. c. 31, s. 51; Staundf. 17; 1 Hale 439, *et seq.*; 4 Blac. Com. 200; 1 East P. C. c. 55, s. 33, p. 257.

(i) 1 East P. C. c. 5, s. 34, p. 259.

(ii) Reg. v. Lee, 4 F. & F. 63.

(k) 1 Hawk. P. C. c. 31, s. 52; Fost. 351. And see the charge of Foster, J., on a special commission for the trial of Jackson and others, at Chichester, 9 St. Tri. (ed. by Hargr.) 715, *et seq.*

(l) Anonymous, 8 Mod. 164; 1 Hawk. P. C. c. 31, s. 52.

of this murder; and it was agreed by the Court, that if the king's officer, or any of his assistants, had been killed by the shot, it would have been murder in all the gang; and also, that if it had appeared that the shot was levelled at the officer, or any of his assistants, it would also have amounted to murder in the whole of the gang, though an accomplice of their own were the person killed.(m) The point upon which this case turned was, that it did not appear from any of the facts found, that the gun was discharged *in prosecution of the purpose for which the party was assembled*.(n) In another case the prisoners were hired by a tenant to assist him in carrying away his household furniture in order to avoid a distress. They accordingly assembled for this purpose armed with bludgeons and other offensive weapons; and a violent affray took place between them and the landlord of the house, who, accompanied on his part by another set of men, came to prevent the removal of the goods. The constable was called in and produced his authority, but could not induce them to disperse: and, while they were fighting in the street, one of the company, but which of them was not known, *killed a boy who was standing at his father's door looking on, but totally unconcerned in the affray. The question was, whether this was murder in all the company; and Holt, C. J., and Pollexfen, C. J., were of opinion that it was murder in all the company, because they were all engaged in an unlawful act, by proceeding in the affray after the constable had interposed and commanded them to keep the peace; especially as the manner in which they originally assembled, namely, with offensive weapons and in a riotous manner, was contrary to law.(o) But the majority of the Judges held, that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not possibly affect the rest; for the homicide did not happen in prosecution of the illegal act.(p) And it seems that this opinion proceeded upon the ground that there was no evidence to show that the stroke by which the boy was killed was either levelled at any of the opposing party, or was levelled at him upon the supposition that he was one of the opponents, and therefore that it was not given in prosecution of the purpose for which the party was assembled.(q)

In these cases it seems that it is a question for the jury whether the act done was in prosecution of the purpose for which the party was assembled, or independent of it and without any previous concert. The prisoners, eight in number, each having a gun, upon being found poaching by some keepers, who went towards them for the purpose of apprehending them, formed into two lines, and pointed their guns at the keepers, saying they would shoot them; a shot was then fired which wounded a keeper, but no other shot was fired: it was objected that it was clear that there was no common intent to shoot this man, because only one gun was fired, instead of the whole number. Vaughan, B., "That is rather a question for the jury, but still on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their guns at the gamekeepers, and they are all giving their countenance and assistance to the one who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they were doing, the objection would have much weight in it."(r) Two private watchmen seeing the prisoner and another man with two carts laden with apples, which they suspected had been stolen, went up to them, and one walked beside the prisoner, and one beside the other man, at some distance from each other, and while they were so going along, the prisoner's companion stepped back, and with a bludgeon wounded the watchman he had been walking with; Garrow, B., "To make the prisoner a principal the jury must be satisfied that when he and his companion went out with a common

(m) Plummer's case, Kel. 109.

(n) Fost. 352, and see Mansell and Herbert's case, 1 Hale 440, 441, cited from Dy. 128 b.

(o) They cited Stamf. 17, 40; Fitz. Cor. 350; Crompt. 244.

(p) Rex v. Hodgson and others, 1 Leach 6. See Plummer's case, ante, note (m), 12 Mod. 629; Thompson's case, Kel. 66; Anon., cited by Holt, C. J., 1 Leach 7, note (a), and a case Anon., 8 Mod. 165. See also Keilw. 161, and Borthwick's case, Dougl. 202.

(q) 1 East P. C. c. 5, s. 33, p. 258, 259; and see the remarks of Lord Hale, upon the case of Mansell and Herbert (Dy. 128 b.) in 1 Hale 440, 441.

(r) Rex v. Edmeads, 3 C. & P. 390 (14 E. C. L. R.).

illegal purpose of stealing apples, they also entertained the common guilty purpose of resisting to death, or with extreme violence, any persons who might endeavor to *745] apprehend them; but if they had only the common purpose of stealing apples, and the violence of the prisoner's companion was merely the result of the situation in which he found himself, and proceeded from the impulse of the moment, without any previous concert, the prisoner will be entitled to an acquittal."^(s)

Where the whole of a party of poachers set upon and beat a keeper till he was senseless, and having left him lying on the ground, one of them after they had gone a little distance returned, and stole his money, it was holden that he alone was guilty of the stealing.^(t) Where two poachers were apprehended by some gamekeepers, and being in custody called out to one of their companions, who came to their assistance and killed one of the gamekeepers, it was held that this was murder in all, though the blow was struck while the two were actually in custody, but that it would not have been so, if the two had acquiesced and remained passive in custody.^(u)

Where four poachers were met by a keeper and his assistant, and after some words had passed, three of them ran in upon the keeper, knocked him down and stunned him; and when he recovered himself, he saw all of them coming by him, and one said, "Damn 'em we've done 'em:" and when they had got two or three paces beyond him, one of them turned back and wounded the keeper in the leg, and then the men set off and ran away; Bolland, B., told the jury if they thought the prisoners were acting in concert, they were all equally guilty of inflicting the wound.^(v)

Where, upon an indictment for maliciously cutting, the question was, how far one prisoner was concurring in the act of the other; Park, J., told the jury that, "if three persons go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of another kind, such as murder, the two who did not concur in this second felony will not be guilty thereof, notwithstanding it happened while they were engaged with him in the felonious act for which they went out."^(w)

On an indictment for murder it appeared that the six prisoners, who were shipmates, for some cause of offence unknown, chased a German sailor belonging to another ship through the streets, and as he took refuge from their attack against a railing, he was stabbed by one of them with a knife, of which wound he died in a few minutes. The evidence as to the hand by which the blow was given was very conflicting. Byles, J., told the jury that supposing they could fix upon the hand that stabbed, the first question would be what was his offence? The person who stabbed was clearly guilty of murder, whether he intended to kill or not. If he only intended to commit bodily harm, he was guilty of murder. The next question was in what condition were the other five men? The deceased sailor was leaning *746] against some iron railings when the stab was given, but before that he had been assaulted in a barbarous and dastardly manner by these six men; but did the other men contemplate the use of the knife, or was it an independent act of the man who used it? They were all guilty of murder if they participated in a common design and intention to kill. If they should think that the others did not intend and design to kill, yet these others would also be guilty of murder if the knife was used in pursuance of one common design to use it, because then the hand that used the knife was the hand of all of them. Supposing there was no common design to use the knife, if being present at the moment of stabbing, they assented and manifested their assent by assisting in the offence, they were guilty of murder. First, then, there must be a common design to kill; secondly, there must be a

^(s) *Rex v. Collison*, 4 C. & P. 565 (19 E. C. L. R.). See the observations of Littledale, J., in *Reg. v. Howell*, 9 C. & P. 450 (38 E. C. L. R.).

^(t) *Rex v. Hawkins*, 3 C. & P. 392 (14 E. C. L. R.), Park, J. A. J.

^(u) *Rex v. Whithorne*, 3 C. & P. 394 (14 E. C. L. R.), MSS., C. S. G., Vaughan, B. See *ante*, p. 736, notes (x) and (y).

^(v) *Rex v. Warner, R. & M. C. C. R.* 380; s. c., 5 C. & P. 525 (24 E. C. L. R.).

^(w) *Duffey's case*, 1 Lew. 194. See *Macklin's case*, 2 Lew. 225, per Alderson, B., *post*.

common design to use a murderous instrument; and, thirdly, there must be presence at the time and assent and assistance in the use of the knife. If, however, they should think neither of these three modes of putting the case proved against the *ive*, it would be their duty to find the stabber guilty and to acquit the others.(x)

Where on an indictment for murder it appeared that the deceased was found tied hand and foot with string, and something forced into her throat, by which she had been suffocated, and the house in which she was had been forcibly entered, and the object evidently had been robbery; the jury were told that if they were satisfied that the deceased met with her death from violence by any person or persons to enable them to commit a burglary or other felony, although they who inflicted the violence might not have intended to kill her, all who were parties to that violence were guilty of murder.(y)

On an indictment for manslaughter it appeared that more than nine men, of whom seven were armed with guns, were out at night in pursuit of game; and shots had been heard in one wood, and the prisoners were met in a meadow going towards another wood by a party of gamekeepers; the deceased had a flail, but none of them had any gun: the poachers drew up in a line, as one of them ordered them to do: one of them said, "The first man that takes a step forward I will shoot;" the deceased called out, "Oh, you would not be so cowardly as to shoot;" the man cried out, "So help me God, I will." The deceased said to his men, "Are you ready?" and they made a rush at the prisoners, and the flail was heard to rattle and then the deceased was shot, but not by the man he was assailing. It was by no means clear who fired the shot. Byles, J., told the jury that whoever fired the shot was guilty of manslaughter, and assuming that it could not be ascertained who fired the shot, all who were present, and were parties to the act, were certainly guilty, and that if all were in a row when the gun was fired that was strong evidence of a common purpose to shoot; but it was for the jury to decide whether there was such a common purpose or not, or whether the gun was fired in consequence of a personal encounter between a keeper and the man who fired it.(z)

On a trial for murder it appeared that a dispute had arisen between the deceased and Turner, who called the deceased a liar. The deceased then struck Turner, on which Staple took off his coat to fight, but the police prevented it, and the deceased left to go home; after a few minutes Turner and Staple followed him, and the police went after them, and just before they came up they heard a cry "Get up," and on coming up found the deceased lying on the road, one of the prisoners having hold of his head, the other of his feet. The deceased died the next day. The death was caused by an injury in the orbit of the eye, which had fractured the frontal bone, and which might have been caused by a blow from a blunt instrument or a kick from a heavy iron-shod boot, such as the prisoners wore. It was urged that as it was not proved which prisoner inflicted the blow, and there was no evidence of a common design to inflict felonious violence, or to do more than commit an assault, neither prisoner could be convicted even of manslaughter.(zz) Channell, B., agreed with the law laid down in that case, and held that on a charge of murder there must be evidence of a common design to kill or inflict murderous violence; but on a charge of manslaughter, if several were proved to have been parties to an unlawful act of violence, they are all guilty.(aa)

(x) *Reg. v. Price*, 8 Cox C. C. 96. This case is evidently so inaccurately reported that great caution must be used as to it.

(y) *Reg. v. Franz*, 2 F. & F. 580.

(z) *Reg. v. Luck*, 3 F. & F. 483. The marginal note is not warranted by the case, and the case is very inaccurately stated. Byles, J., is reported to have directed the grand jury that, "as the poachers were not engaged in a felony, the use of the flail with violence might reduce the offence to manslaughter." It is perfectly clear that there is no such distinction known to the law as to the manner of arrest between cases of felony and misdemeanor, where the right to arrest at the time and place, and by the person attempting it, exists; and an attack with such a dangerous instrument as a flail, in order to arrest any one for a felony, would clearly reduce the offence to manslaughter; it is plain there was no reason for drawing any such distinction, and therefore the report is probably erroneous.

(zz) *Reg. v. Luck*, 3 F. & F. 483.

(aa) *Reg. v. Turner*, 4 F. & F. 339.

*747] *Sec. V.—Cases where the Killing takes place in consequence of some Lawful Act being criminally or improperly performed, or of some Act performed without Proper Authority.

DUE caution should be observed by all persons in the discharge of the business and duties of their respective stations, lest they should proceed by means which are criminal or improper, and exceed the limits of their authority. This will more especially require the attention of officers of justice; and should be kept in mind by those who have to administer correction *in foro domestico*, and by persons employed in those common occupations from which danger to others may possibly arise.

It has been shown in a former part of this Chapter, (a) that *ministers of justice*, when in the execution of their offices, are specially protected by the law: but it behooves them to take care that they do not misconduct themselves in the discharge of their duty, on pain of forfeiting such protection. Thus, though in cases civil or criminal, an officer may repel force by force, where his authority to arrest or imprison is resisted, and will be justified in so doing if death should be the consequence; (b) yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. (c) And if he should kill where no resistance is made, it will be murder: and it is presumed that the offence would be of the same magnitude if he should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled. (d) And again, though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken; (e) yet where a party is accused of a misdemeanor only, and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise be overtaken; and if he do kill him, it will in general be murder. (f) So, in civil suits, if the party against whom the process is issued, fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer not being able to overtake him make use of any deadly weapon, and by so doing, or by other means, intentionally kill him in the pursuit, it will amount to murder. (g) And *748] also in the case of impressing seamen, *if the party fly, it is conceived that the killing by the officer in the pursuit to overtake him would be manslaughter at least, and in some cases murder, according to the rules which govern the case of misdemeanors; paying attention, nevertheless, to those usages which have prevailed in the sea-service in this respect, so far as they are authorized by the Courts, which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land. (h)

If an officer make an arrest out of his proper district (except as he may be authorized by some Act of Parliament), or if an officer have no warrant or authority at all, he is no legal officer, nor entitled to the special protection of the law; and if he purposely kill the party for not submitting to such illegal arrest, it will be murder in all cases, at least where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent. (i) Thus where a warrant had been directed from the Admiralty to Lord Danby to impress seamen, and one Browning, his servant, without any warrant in writing, (k) impressed a person

(a) *Ante*, 732, *et seq.*

(c) 4 *Blac. Com.* 180.

(e) 1 *Hale* 481; 4 *Blac. Com.* 179; *Fost.* 271.

(g) 1 *Hale* 481; *Fost.* 271; 1 *East P. C. c. 5*, s. 74, p. 306, 307. Laying hold of the prisoner, and pronouncing words of arrest, is an actual arrest; or it may be made without actually laying hold of him, if he submit to the arrest: *Horner v. Battyn* and another, *Bull. N. P.* 62, and see 1 *East P. C. c. 5*, s. 68, p. 300. But see *Arrowsmith v. Le Mesurier*, 2 *N. R.* 211, and *Berry v. Adamson*, 6 *B. & C.* 528 (13 *E. C. L. R.*).

(h) 1 *East P. C. c. 5*, s. 75, p. 308; *Borthwick's case*, *Dougl.* 207.

(i) 1 *East P. C. c. 5*, s. 78, p. 312.

(k) A verbal delegation of the power to impress seamen was held bad in *Borthwick's case*, *Dougl.* 207, though it appeared to be the usage of the navy, and that the petty officers had usually acted without any other authority than such verbal orders. But the usage was considered as directly repugnant to the laws of the land.

(b) *Ante*, 735.

(d) 1 *East P. C. c. 5*, s. 63, p. 297.

(f) *Fost.* 271; 1 *Hale* 481.

who was no seaman, and upon his trying to escape he killed him, it was adjudged murder (*l*) And where the captain of a man of war had a warrant for impressing mariners, upon which a deputation was indorsed in the usual form to the lieutenant; and the mate, with the prisoner Dixon, and some others, but without either the captain or lieutenant, impressed one Anthony How, who never was a mariner but was servant to a tobacconist, and upon How making some resistance, and for that purpose drawing a knife, which he held in his hand, Dixon, with a large walking-stick, about four feet long, and a great knob at the end of it, gave How a violent blow on the side of his head, of which he died in about fourteen days; it was adjudged murder. The capture and detention of How were considered as unlawful on two accounts; first, because neither the captain nor lieutenant were present, and Dixon was no lawful officer for the purpose of pressing, nor an assistant to a lawful officer; secondly, because How was not a proper object to be impressed. It was lawful therefore, under these circumstances, for How to defend himself; and Dixon's killing him, in consequence of an unlawful capture and detention, was murder. (*m*) So if a court-martial order a man to be flogged where they have no jurisdiction, and the flogging kills the man, the members who concurred in that order are guilty of murder. (*n*)

*It is no excuse for killing a man that he was out at night as a ghost dressed in white for the purpose of alarming the neighborhood, even though he could not otherwise be taken. The neighborhood of Hammersmith had been alarmed by what was supposed to be a ghost; the prisoner went out with a loaded gun to take the ghost; and upon meeting with a person dressed in white, immediately shot him. McDonald, C. B., Rooke and Lawrence, Js., were clear that this was murder, as the person who appeared as a ghost was only guilty of a misdemeanor; and no one might kill him, though he could not otherwise be taken. The jury, however, brought in a verdict of manslaughter; but the Court said that they could not receive that verdict; and told the jury that if they believed the evidence they must find the prisoner guilty of murder; and if they did not believe the evidence, they should acquit the prisoner. The jury then found the prisoner guilty, and sentence was pronounced; but the prisoner was afterwards reprieved. (*o*)

Gaolers and their officers are under the same special protection as other ministers of justice; but in regard to the great power which they have, and, while it is exercised in moderation, ought to have over their prisoners, the law watches their conduct with a jealous eye. If, therefore, a prisoner under their care die, whether by disease or accident, the coroner, upon notice of such death, which notice the gaoler is obliged to give in due time, ought to resort to the gaol; and there, upon view of the body, make inquisition into the cause of the death; and if the death was owing to cruel and oppressive usage on the part of the gaoler or any officer of his, or, to speak in the language of the law, to *duress of imprisonment*, it will be deemed wilful murder in the person guilty of such duress. (*p*) The person guilty of such duress will be the party liable to prosecution, because, though in a civil suit, the principal may in some cases be answerable in damages to the party injured through the fault of the deputy; yet in a capital prosecution, the sole object of which is the punishment of the delinquent, each man must answer for his own acts or defaults. (*q*)

A gaoler, knowing that a prisoner infected with the small-pox lodged in a certain room in the prison, confined another prisoner against his will in the same room. The second prisoner, who had not had the distemper, of which fact the gaoler had notice, caught the distemper, and died of it; this was holden to be murder. (*r*)

(*l*) O. B., 13th Oct., 1690, Rokeby's MS, cited in Serjt. Foster's MS., and in 1 East P. C. 312.

(*m*) Dixon's case, Kingst. Ass. 1756, cor. Dennison, J., (said to be 1758, in Serjeant Foster's MS.) cited in 1 East P. C. c. 5, s. 80, p. 313.

(*n*) By Heath, J., in *Warden v. Bailey*, 4 Taunt. 77.

(*o*) *Rex v. Smith*, O. B., Jan. 1804, MS., Bayley, J.; 4 Blac. Com. 201, n.

(*p*) Fost. 321; 1 Hale 465.

(*q*) Fost. 322; *Rex v. Huggins and Barnes*, 2 Str. 882. See *Rex v. Allen*, 7 C. & P. 153 (32 E. C. L. R.), and *Rex v. Green*, 7 C. & P. 156, *post*.

(*r*) Fost. 322, referring to the case of *Castell v. Bambridge and Corbet* (an appeal of murder), 2 Str. 854.

Huggins was warden of the Fleet prison, with power to execute the office by deputy, and appointed one Gibbon, who acted as deputy. Gibbon had a servant, Barnes, whose business it was to take care of the prisoners, and particularly of one Arne; and Barnes put Arne into a new-built room, over the common sewer, the walls of which were damp and unwholesome, and kept him without fire, chamber-pot, or other necessary convenience, for forty-four days, when he died. It appeared that Barnes knew *the unwholesome situation of the room, and that Huggins knew *750] the condition of the room fifteen days at least before the death of Arne, as he had been once present at the prison, and seen Arne under such duress of imprisonment, and turned away; at which time Barnes shut the door of the room, in which Arne continued till he died. It was found that Arne had sickened and died, by duress of imprisonment, and that during the time Gibbon was deputy, Huggins sometimes acted as warden. Upon these facts the Court were clearly of opinion that Barnes was guilty of murder. But they thought that Huggins was not guilty, as it could not be inferred, from merely seeing the deceased once during his confinement, that Huggins knew that his situation was occasioned by the improper treatment, or that he consented to the continuance of it; and they said, that it was material that the species of duress, by which the deceased came to his death, could not be known by a bare looking-in upon him. Huggins could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessities of life; and it was likewise material that no application was made to Huggins, which perhaps might have altered the case. And the Court seemed also to think that as Barnes was the servant of Gibbon, and Gibbon had the actual management of the prison, the accidental presence of the principal would not amount to a revocation of the authority of the deputy.(s)

With respect to the duty of officers in the execution of criminals, it has been laid down as a rule, *that the execution ought not to vary from the judgment*; for if it doth, the officer will be guilty of felony at least, if not of murder.(t) And in conformity to this rule it has been holden, that if the judgment be to be hanged, and the officer behead the party, it is murder;(u) and that even the King cannot change the punishment of the law by altering the hanging or burning into beheading, though when beheading is part of the sentence, the King may remit the rest.(v) But others have thought, more justly, that this prerogative of the Crown, founded in mercy and immemorially exercised, is part of the common law;(w) and that though the King cannot by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law, yet he may mitigate the pain or infamy of it: and accordingly that an officer, acting upon a warrant from the Crown for beheading a person under sentence of death for felony, would not be guilty of any offence.(x) But the rule may apply to an officer varying from the judgment of his own head, and without warrant or the color of authority.(y)

*751] *Parents, masters, and other persons having authority in *foro domestico*, may give reasonable correction to those under their care; and if death ensue without their fault, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, the death ensuing will be either murder or manslaughter, according to the circumstances of the case. Where the fact is done with a dangerous weapon, improper for correction, and likely (the age and strength of the party being duly considered) to kill or maim; such as an iron bar, a sword, a pestle, or great staff; or where the party is kicked to the ground, his

(s) *Rex v. Huggins and Barnes*, 2 Str. 882; 2 Lord Raym. 1574; Fost. 322; 1 East P. C. c. 5, s. 92, pp. 331, 332.

(t) 1 Hale 501; 2 Hale 411; 3 Inst. 52, 211; 4 Blac. Com. 179. See *Rex v. Antrobus*, 2 A. & E. 788 (29 E. C. L. R.).

(u) 1 Hale 433, 454 466, 501; 2 Hale 411; 3 Inst. 52; 4 Blac. Com. 179.

(v) 3 Inst. 52; 2 Hale 412. (w) Fost. 270; F. N. B. 244, h. 19 Rym. Fœd. 284.

(x) Fost. 268; 4 Blac. Com. 405; 1 East P. C. c. 5, s. 96, p. 335.

(y) It was, however, the practice, founded in humanity, when women were condemned to be burned for treason, to strangle them at the stake before the fire reached them, though the letter of the judgment was that they should be burnt in the fire *till they were dead*: Fost. 268. The 30 Geo. 3, c. 48, now directs that they shall be hanged as other offenders.

belly stamped upon, and so killed, it will be murder.(z) Thus, where a master had employed his apprentice to do some work in his absence, and on his return found it had been neglected, and thereupon threatened to send the apprentice to Bridewell, to which the apprentice replied, "I may as well work there, as with such a master;" upon which the master struck the apprentice on the head with a bar of iron which he had in his hand, and the apprentice died of the blow; it was held murder: for if a father, master, or schoolmaster, correct his child, servant, or scholar, it must be with such things as are fit for correction, and not with such instruments as may probably kill them; otherwise, under pretence of correction, a parent may kill his child; and a bar of iron is no instrument of correction.(a)

On an indictment for manslaughter, it appeared that the prisoner, a schoolmaster, having the care of the deceased, a boy of thirteen or fourteen, wrote to his father, stating that the boy was obstinate, and that, were he his own child, he should, after warning him, as he had done, subdue his obstinacy, by chastising him severely, and, if necessary, he should do it again and again, and continue it again even if he held out for hours. The father replied, "I do not wish to interfere with your plan." On the night of the next day after this letter, the prisoner took the boy into a room downstairs, and beat him for about two hours, between ten and twelve, with a thick stick; using also a skipping rope. About midnight the prisoner was heard dragging or pushing the boy upstairs to his bedroom, and there he beat him again, till about half-past twelve, when the beating and crying suddenly stopped. About seven the next morning, the prisoner said he had found the boy dead, and almost stiffening. A medical examination showed that the thighs and other parts of the body were covered with bruises, and that there had been profuse bleeding and extravasation of blood caused by excessive and protracted beating, and that the immediate cause of death was exhaustion arising therefrom. The medical witnesses stated that upon the evidence, coupled with the prisoner's statement, the boy, at seven o'clock in the morning, must have been dead about six hours; so that their evidence went to show that he died about the time when the beating was heard suddenly to cease. The prisoner had not avowed the beating until its effects had been discovered by a *post-mortem* examination, and had sent the body home so closely *wrapped up that the bruises were not detected [*752 until the coverings were removed in consequence of rumors prevailing. There was no *post-mortem* examination prior to the inquest, at which the surgeon, who was called in by the prisoner at seven o'clock, and who had only seen the boy's face, was examined, and the prisoner, who suggested that the boy had died of disease of the heart. The stick was at one end an inch thick; at the other it was edged with brass about the circumference of a sixpence, and there were holes in the shins of the deceased corresponding therewith, and which the medical witnesses thought must have been produced by poking therewith. The prisoner and his wife had been for some time going up and down stairs engaged in washing out the stains of blood in the night. Cockburn, C. J., "By the law of England, a parent or a schoolmaster, who for this purpose represents the parent, and has the parental authority delegated to him, may, for the purpose of correcting what is evil in the child, inflict moderate and reasonable corporal punishment, always however with this condition, that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature and degree, or if it be protracted beyond the child's powers of endurance, or with an instrument unfitted for the purpose and calculated to produce danger to life or limb; in all such cases the punishment is excessive, the violence is unlawful, and if death ensues it will be manslaughter" [at least]; and (after commenting on the evidence) "It is true that the father authorized the chastisement, but he did not, and no law could, authorize an excessive chastisement. There can be no doubt that the prisoner thought the boy obstinate, but that did not excuse extreme severity and excessive punishment."(b)

(z) 1 Hawk. P. C. c. 29, s. 5; 1 Hale 453, 473; Rex v. Keite, 1 Lord Raym. 144.

(a) Rex v. Grey, Kel. 64; Fost. 262.

(b) Reg. v. Hopley, 2 F. & F. 202. The indictment was for manslaughter: it certainly ought to have been for murder.

If persons, in pursuit of their lawful and common occupations, see danger probably arising to others from their acts, and yet persist, without giving sufficient warning of the danger, the death which ensues will be murder. Thus, if workmen throwing stones, rubbish, or other things from a house, in the ordinary course of their business, happen to kill a person underneath, the question will be, whether they deliberately saw the danger, or betrayed any consciousness of it. If they did, and yet gave no warning, a general malignity of heart may be inferred,^(c) and the act will amount to murder from its gross impropriety.^(d) So if a person driving a cart or other carriage, happen to kill, and it appear that he saw, or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder.^(e) The act is wilful and deliberate, and manifests a heart regardless of social duty.^(f)

*753]

*Sec. VI.—Of the Indictment, Trial, &c.

ALTHOUGH the prisoner may be charged with murder by the *inquisition of the coroner*, it is usual also to prefer an *indictment* against him. And it is said to be proper to frame an indictment for the offence of murder in all cases where the degree of the offence is at all doubtful;^(g) and unquestionably where there is any reasonable ground for supposing that the facts, as they will be given in evidence, may lead to the conclusion of the higher offence having been committed, it will be culpable not to prefer an indictment for murder.

With respect to the place in which the indictment is to be preferred, it will be necessary to state some of the legislative enactments by which trials for murder are regulated.

Murder, like all other offences, must regularly, according to the common law, be inquired of in the county in which it was committed. It appears, however, to have been a matter of doubt at the common law, whether, when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county:^(h) but by the 2 & 3 Edw. 6, c. 24, s. 2, it was enacted, that the trial should be in the county where the death happened. That statute was, however, repealed by the 7 Geo. 4, c. 64; sec. 12 of which, "for the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another," enacts, "that where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein."

It has been held under this section that, where the blow is given in one county, and the death takes place in another, the trial may be in the latter county.¹ Upon an indictment for manslaughter, found by the grand jury of the county of the city of Worcester, alleging the blow which caused the death to have been struck in the county of Worcester, it was objected that the words "begun in one county and completed in another," did not apply to such a case, as the word "completed" necessarily imported some active and continuing agency in the person committing the offence in the county where the felony was completed; but it was held that the clause did extend to this case.⁽ⁱ⁾

(c) *Ante*, p. 740.

(d) 3 Inst. 57; 4 Blac. Com. 192; 1 East P. C. c. 5, s. 38, p. 262.

(e) 1 Hale 475; Fost. 263; 1 East P. C. c. 5, s. 38, p. 262.

(f) Fost. 263.

(g) 1 East P. C. c. 5, s. 105, p. 340.

(h) 2 Hawk. P. C. c. 25, s. 36; 1 East P. C. c. 5, s. 128, p. 361.

(i) *Rex v. Jones*, Worcester Lent Ass. 1830, Jervis, K. C., MSS. C. S. G. Mr. Bellamy,

¹ Where a deadly blow is struck in one county, and the party struck dies thereof in another county, the offence will be held to have been committed in the county in which the blow was struck, and the offender must be indicted in such county: *Riley v. State*, 9 Kemp. 646. If a mortal blow be struck in one county, and death takes place therefrom in another, the offender may be indicted and tried in the latter: *Nash v. State*, 2 Greene 286.

*Sec. 12 only applies to trials in counties, and does not extend to limited jurisdiction within counties. Where, therefore, a larceny was committed in the city of London, but within five hundred yards of the boundary of the county of Surrey and of the borough of Southwark; it was held that the offence could not be tried by the quarter sessions for the borough of Southwark.^(k) [*754]

The trial of accessories to any felony is not provided for by the 24 & 25 Vict. c. 94, s. 7, which is to be found in its proper place.^(l)

If a person be stricken and die in the county of A., and the body be found in B., it is to be removed into A. for the coroner of that county to take the inquest.^(m)

Where an inquisition was taken by the coroner of the borough of Reading, on the oaths of jurors of that borough, in Reading, upon a body lying dead in the borough, and it appeared that the death was accidentally caused by the deceased falling in the county of Berks from a carriage, and that the deceased died in the borough, the Court of Queen's Bench quashed the inquisition, on the ground that the coroner of the borough had no jurisdiction to inquire into the cause of a death occasioned by an accident happening out of the borough.⁽ⁿ⁾

In consequence of the preceding decision, the 6 & 7 Vict. c. 12, s. 1, "An Act for the more convenient holding of Coroners' Inquests," was passed. This Act recites that "it often happens that it is unknown where persons lying dead have come by their deaths, and also that such persons may die in other places than those in which the cause of death happened," and enacts "that the coroner only within whose jurisdiction the body of any person upon whose death an inquest ought to be holden shall be lying dead shall hold the inquest, notwithstanding that the cause of death did not arise within the jurisdiction of such coroner; and in the case of any body found dead in the sea, or any creek, river, or navigable canal within the flowing of the sea, where there shall be no deputy-coroner for the jurisdiction of the Admiralty of England, the inquest shall be holden only by the coroner having jurisdiction in the place where the body shall be first brought to land."

Sec. 2, "For the purpose of holding coroners' inquests, every detached part of a county, riding, or division shall be deemed to be within that county, riding or division by which it is wholly surrounded, or, where it is partly surrounded by two or more counties, ridings, or divisions, within that one with which it has the longest common boundary."^(o)

Sec. 3, "If a verdict of murder or manslaughter, or as accessory before the fact to any murder, shall be found by the jury at any such inquest, against any person or persons, the coroner holding the said inquest, and the justices of Oyer and Terminer and Gaol *Delivery for the county, city, district, or place in which such inquest shall be holden, and all other persons, shall have the same [*755] powers respectively for the commitment, trial, and execution of the sentence of the person or persons so charged as they now by law possess with regard to the commitment, trial, and execution of the sentence upon any person or persons committed and tried within the jurisdiction where the death happened."

But where, after the passing of this Act, a person was found drowned in the river Medway, within the concurrent jurisdiction (exclusive of all others) of the coroner for the city of Rochester and the Admiralty, and the body was first brought to land in the county of Kent, beyond that jurisdiction, and placed in a hospital there, it

the clerk of arraigns, had consulted Mr. J. Littledale about this case, and he thought that the indictment ought to be preferred in the city, and it had been so preferred accordingly. C. S. G.

(k) *Rex v. Welsh*, R. & M. C. C. R. 175.

(l) *Ante*, p. 69.

(m) 2 Hale 66; 1 MS. Sum. 53; 1 East P. C. c. 5, s. 127, p. 361; but see the 6 & 7 Vict. c. 12, *infra*.

(n) *Reg. v. Great Western Railway Company*, 3 Q. B. 333 (42 E. C. L. R.). The Court held that the 2 & 3 Edw. 6, c. 24, did not apply to an accidental death. That statute had been repealed by the 7 Geo. 4, c. 64, s. 32, but this was not perceived either by the Bar or the Court. The question ought to have been determined with reference to the 7 Geo. 4, c. 64, s. 12, and if it had, probably the decision would have been the same, as that section clearly does not apply to accidental deaths.

(o) This provision is not altered by the 7 & 8 Vict. c. 61, s. 1.

was held that the coroner's jury of the city could not view the body at such place for the purpose of an inquest, and that an inquisition taken on such a view was a nullity.^(p) But where the cause of death and the death were in Surrey, and the body was brought into the city of London, where the coroner's inquest was held, and the prisoner tried on the inquisition at the Central Criminal Court, it seems to have been considered that the inquisition was rightly taken.^(q)

It has since been held that it is no objection to a coroner's inquisition taken in Warwickshire, where the death occurred and the body lay, that it appears by it that the cause of death occurred in Staffordshire.^(r)

By the 26 Hen. 8, c. 6, it is enacted, that murder and other felonies committed in Wales may be inquired of and tried upon an indictment in the next adjoining English county where the King's writ runneth: and Herefordshire has been holden to be the next adjoining English county to South Wales, and Shropshire to North Wales:^(s) but it has been considered as a doubtful point in what place the trial ought to be, supposing the stroke given in an English county, and the death in Wales.^(t)

There are also statutes which relate to the trial of murder, and other offences which have been committed upon the sea, and either within the King's dominions or without.

The 28 Hen. 8, c. 15, s. 1, enacts that all felonies, murders, &c., committed upon the sea, or in any haven, river, creek, or place, where the admiral has or pretends to have power, authority, or jurisdiction, shall be inquired, tried, &c., in such shires and places in the realm as shall be limited by the King's commission, in like form as if such offences had been committed upon the land. The proceedings upon this statute and the extent of the Admiralty jurisdiction have been already considered:^(u) it may, however, be again mentioned in this place, that by the 15 Rich. 2, c. 3, the admiral has jurisdiction given to him to inquire "of the death of a man, and of a *756] mayhem done in great ships hovering in the main *stream of great rivers, only beneath the bridges of the same rivers, nigh to the sea, and in none other places of the same river." In a case at the Admiralty session of a murder committed in a part of Milford Haven, where it was about three miles over, about seven or eight miles from the mouth of the river or open sea, and about sixteen miles below any bridges over the river, a question was made whether the place where the murder was committed was to be considered as within the limits to which commissions granted under the 28 Hen. 8, c. 15, extend by law: and upon reference to the Judges, they were unanimously of opinion that the trial was properly had.^(v)

By the 46 Geo. 3, c. 54, all murders and other offences committed upon the sea, or in any haven, river, &c., where the admiral has jurisdiction, may be inquired of and tried, according to the common course of the laws of the realm used for offences committed upon the land within the realm and not otherwise, in any of his Majesty's islands, plantations, colonies, dominions, forts, or factories, under the King's commission; and the commissioners are to have the same powers for such trial within any such island, &c., as any commissioners appointed under the 28 Hen. 8, c. 15, would have for the trial of offences within the realm. The provisions of this Act are extended by the 57 Geo. 3, c. 53, to murders and manslaughters committed in places not within his Majesty's dominions. It enacts, that murders

(p) Reg. v. Hinde, 5 Q. B. 944 (48 E. C. L. R.). Lord Denman, C. J., said the coroner for Kent should have held the inquest, and Patteson, J., said that to give the city coroner jurisdiction, the body should have been removed into the city.

(q) Reg. v. Ellis, 2 C. & K. 470 (61 E. C. L. R.), Tindal, C. J., and Rolfe, B. Tindal, C. J., said that the objection might be taken in arrest of judgment, if necessary, but the prisoner was acquitted.

(r) Reg. v. Grand Junction R. Co., 11 A. & E. 128, (a) (39 E. C. L. R.).

(s) Athos' case (father and son), 8 Mod. 136; Parry's case, 1 Leach 108; 1 Stark. Cr. Pl. 15.

(t) 1 East P. C. c. 5, s. 129, p. 363, *et seq.*, where see a learned argument upon this point. And see also 1 Stark. Cr. Pl. 14, 15. But see 7 Geo. 4, c. 64, s. 12, *ante*, p. 753.

(u) *Ante*, p. 153.

(v) Rex v. Bruce, 2 Leach 1093, *ante*, p. 153.

and manslughters committed on land at the settlement in the bay of Honduras, by any person residing or being within the settlement, and in the islands of New Zealand and Otaheite, or within any other islands, countries, or places not within his Majesty's dominions, nor subject to any European state or power, nor within the territory of the United States of America, by the master or crew of any British ship or vessel, or any of them, or by any person sailing in or belonging thereto, or that shall have sailed in and belonged to, and have quitted any British ship or vessel to live in any of the said islands, &c., or that shall be there living, may be tried and punished in any of his Majesty's islands, plantations, colonies, &c., by the King's commission, issued by virtue of the 46 Geo. 3, c. 54, in the same manner as if such offences had been committed upon the high seas.(w)

With respect to murders and other capital crimes committed in Newfoundland and the isles thereto belonging, it is enacted by the 10 & 11 Will. 3, c. 25, s. 13, that they may be tried in any county of England; and though the King is enabled by subsequent statutes(x) to erect courts of civil and criminal jurisdiction in that country, it does not appear that those statutes take away the jurisdiction given by the statute 10 & 11 Will. 3.

The 33 Hen. 8, c. 23, enacts, that if any person being examined before the King's council, or three of them, upon treasons, murders, &c., confess such offences, or the council, or three of them, upon such examination, think any person so examined to be **vehemently suspected of any treason or murder*, the King's commission [*757 may be made to such persons, and into such shires and places as shall be named and appointed by the King for the speedy trial of such offenders; and gave power to the commissioners to inquire and determine such offences within the shires and places limited by their commission, in whatsoever other shire or place, *within the King's dominions or without*, such offences so examined were done or committed. But this statute was repealed by the 9 Geo. 4, c. 31, which was repealed by the 24 & 25 Vict. c. 95, and by the 24 & 25 Vict. c. 100, s. 9, "Where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, *and whether the person killed were a subject of Her Majesty or not, every offence committed by any subject of Her Majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place*; provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or Ireland, in the same manner as such person might have been tried before the passing of this Act."(y)

(w) 57 Geo. 3, c. 53, s. 1. The 2d section provides that the Act shall not be construed to repeal the 33 Hen. 8, c. 23. And see further as to the trial of offences committed on land and in the bay of Honduras, the 59 Geo. 3, c. 44.

(x) 32 Geo. 3, c. 46; 33 Geo. 3, c. 76, continued by the 34 Geo. 3, c. 44, and 35 Geo. 3, 25.

(y) This clause is framed from the 9 Geo. 4, c. 31, s. 7, and 10 Geo. 4, c. 34, s. 10 (I.). By the 9 Geo. 4, c. 31, s. 7, any person charged with any offence specified in this clause might be examined and committed by any justice of the place where the person so charged was, and thereupon a special commission was to be issued for the trial of such person. By the 10 Geo. 4, c. 34, s. 10, where any person was charged in Ireland with any offence specified in this clause, he might be examined and committed by any justice of the place where the person so charged was, and thereupon he might be tried in that place in the same manner as if his offence had been there committed. This was a much better provision than that in the 9 Geo. 4, c. 31, s. 7, as it got rid of the necessity for a special commission, and avoided a difficulty which was very likely to arise under the 9 Geo. 4, c. 31, s. 7; for the special commission issued under that section recited the offence charged before the justice, and authorized the trial for that offence, and a fatal variance might well arise on the trial between the facts proved and the offence charged before the justice. The present section is substantially the same as the 10 Geo. 4, c. 34, s. 10, but uses the terms of 9 Geo. 4, c. 31, s. 8, and under it the party charged may be examined before any justice of the place where he is, and tried in the same place. The words "dealt with" apply to justices of the peace; "inquired of" to the grand jury; "tried" to the petit

By the Central Criminal Court Act, the 4 & 5 Will. 4, c. 36, s. 22, any offence committed, or alleged to have been committed, within the jurisdiction of the Admiralty, may be tried at the Central Criminal Court.(z)

*758] Though the 33 Hen. 8 was not confined to offences committed within the King's dominions, yet, in a case where a prisoner at war abroad had entered on board an English merchant ship, and whilst in that capacity had committed an offence upon an Englishman in a foreign country, it was decided that he could not be tried for it here under that statute, on the ground that he could not be deemed a subject of this country. The offender, *Depardo*, was a Spaniard, and taken prisoner at sea, and whilst abroad, volunteered on board an Indiaman, and received the usual bounty and part of his pay for about three months, which he served on board the Indiaman, and the Indiaman was lying at Canton in a part of the Canton river, about a third of a mile in width, within the tideway, at the distance of about eighty miles from the sea; the prisoner went ashore with the deceased, an Englishman, and there mortally wounded the deceased, who was carried on board ship, and died there the next day. Upon a case reserved, it was urged, that the prisoner was not liable to be tried here, because he never became subject to the laws of this country; that he was not so by birth, and did not become so by entering on board the Indiaman. No judgment was given, but the prisoner was discharged.(a)

But it was holden that a British subject was indictable under the 33 Hen. 8, for the murder of another British subject, though the murder were within the dominions of a foreign state; and that the indictment need not allege in terms that either the deceased or the offender were British subjects: the statement that the person murdered was at the time in the King's peace, being considered a sufficient allegation that he was a British subject; and the conclusion in the indictment that the offence was against the King's peace, being considered as showing sufficiently that the offender was a British subject. The indictment charged, in substance, that the prisoner, at Lisbon, in the kingdom of Portugal, in parts beyond the seas without England, one H. G., in the peace of God and of our lord the King, then and there being, feloniously did assault, shoot, and murder, against the peace of our said lord the King. After conviction, it was objected—1st, that the offence being out of the King's dominions, and within the dominions of a foreign state, was not triable under the 33 Hen. 8; and, 2d, that the prisoner and the deceased should have been stated to have been subjects of our lord the King at the time. But, after argument, the Judges held that the offence was triable here, though committed in a foreign kingdom, the prisoner and the deceased being both subjects of this realm at the time; and that the stating H. G. to be in the King's peace at the time, sufficiently imported that he was the King's subject at the time; and that the statement that this was against the King's peace, sufficiently imported that the prisoner *759] was also a subject of this realm at that time.(b) But *it was considered that an indictment upon the 9 Geo. 4, c. 31, must aver, that the prisoner

jury; and "determined and punished" to the Court; as was held by Lord Wensleydale in *Rex v. Buck*, 1 Russ. C. & M. 827. The 9 Geo. 4, c. 31, s. 7; and 10 Geo. 4, c. 34, s. 10 (1.), were confined to accessories after the fact in manslaughter, but the present clause is so framed as to include an accessory before the fact in that offence, wherever there can be such an accessory, as to which see *post*, *Manslaughter*. This clause was carefully framed in order to remove any question as to the killing of a foreigner being within it; and instead of the words of the 9 Geo. 4, c. 31, s. 7, "where any of his Majesty's subjects shall be charged in England with any murder or manslaughter, or with being accessory before the fact to any murder, &c." (which, from their collocation, might afford an argument that no murder was within the clause unless it were committed by a British subject, and therefore a British subject would not be within it if he were accessory to a murder by an alien), the wording of this clause has been adopted so as to include an accessory to any murder by whomsoever committed. See the note to the clause for conspiracy to murder, 24 & 25 Vict. c. 100, s. 4, *post*.

(z) See the section, *ante*, p. 158.

(a) *Rex v. Depardo*, 1 Taunt. 26; R. & R. 134. This case was misstated in the former editions. It is clear the case fell within no statute, as the wound was on shore, and the death within the Admiralty jurisdiction. See *Rex v. De Mattos*, *post*, 760; and *Rex v. Combes*, *post*, p. 762. According to R. & R., the indictment was for manslaughter.

(b) *Rex v. Sawyer*, MS., Bayley, J.; R. & R. 294; and 2 C. & K. 101 (61 E. C. L. R.). In the latter report there is a very full account given of the previous cases. Another ob-

and deceased were subjects of his Majesty, but that the declarations of the prisoner were evidence to go to the jury to prove this fact. The indictment charged the murder to have been committed "at Boulogne, in the kingdom of France, to wit, at the parish of St. Mary-le-bow, in the ward of Cheap," &c. The grand jury objected to finding the bill, as it stated the death to have occurred in two different places. Bayley, J. (having conferred with Bosanquet, J., and the Recorder), directed the words "to wit, at the parish of St. Mary-le-Bow, in the ward of Cheap," &c., to be struck out. His Lordship also said, that it was deemed by the Court to be necessary to have inserted in the bill an allegation that the prisoner and the deceased were subjects of his Majesty; and the bill was so amended accordingly. Upon the trial it appeared that the deceased was killed in a duel at Boulogne, and that he was an Englishman, born at Islington; and the prisoner had said he was an Irishman, and had come from Kilkenny. It was objected that, under the 9 Geo. 4, c. 31, it was necessary to prove that the parties were natural-born subjects of his Majesty; the present Act differed from the 33 Hen. 8, c. 23, the words of which were "any person or persons." It never could have been intended that this Act should apply to foreigners domiciled in England, or naturalized either by Act of Parliament, or by service to the state. That it was necessary to prove, by some one acquainted with the fact, where the prisoner was born, which was a fact the prisoner could not know of his own knowledge. But it was held, that the declaration of the prisoner, unexplained, was, as against himself, evidence to go to the jury; and the case was left to the jury to say, whether they were satisfied by the evidence that the prisoner was a British *born* subject; for that they must be quite satisfied that such was the fact before they could pronounce him guilty. (c)

Where an indictment for manslaughter, stated that the prisoner being a subject of his Majesty, on land out of the United Kingdom, to wit, at Zanzibar, in the East Indies, did make an assault on J. K., and did give him divers mortal wounds, &c., of which he died, at Zanzibar aforesaid, and it appeared that the prisoner, a Spaniard, being in England, entered into certain articles to serve in a ship bound on a voyage to the Indian seas, and elsewhere, on a seeking and trading voyage (not exceeding three years' duration), and back to the United Kingdom, and on the ship's arrival at Zanzibar, an Island in the Indian seas, under the dominion of an Arab king, the captain left the vessel, and set up in trade there, and engaged the prisoner (who was a black, and said to be by birth the son of a governor on another part of the African coast), to act as interpreter, the new captain not requiring his services, but the rest of the crew not consenting. The ship went on one or two short voyages without the prisoner, and having returned to anchor in a roadstead, a few hundred yards from Zanzibar, and the crew being allowed to go on shore, some dispute arose between the prisoner and the deceased, who was one of the crew, which led to the blows on the land, of which the deceased afterwards died on board the ship. It was held that there was no evidence of the prisoner being a British subject or under British protection. To claim his allegiance, it must at least be shown, that he was under British protection. And although he was on board a British ship for a time, yet it seemed as if the articles were abandoned, and he was living on shore, and had been so for months. And, secondly, that the offence was alleged to have been committed on land out of the United Kingdom, but though the blows were given on land, the death took place on board ship, and there was no clause in the 9 Geo. 4, c. 3, providing for such a case. (d)

action was that the indictment ought to have concluded *contra formam statuti*: but that was also overruled.

(c) *Rex v. Helsham*, 4 C. & P. 394 (19 E. C. L. R.), coram Bayley and Bosanquet, JJ., and Knowllys, R.

(d) *Rex v. M. A. de Mattos*, 7 C. & P. 458 (32 E. C. L. R.), Vaughan, and Bosanquet, JJ. It was doubted in this case by Rolfe, S. G., whether the limitation put upon the 9 Geo. 4, c. 31, s. 7, in *Rex v. Helsham*, was correct, and the Court seem to have thought that that construction was too narrow. Vaughan, J., in charging the grand jury said, "there are other ways which may constitute a man a British subject; as, for instance, he may owe allegiance for protection:" and the case was decided on the ground that the prisoner was not a British subject in any sense of those words. C. S. G.

The prisoner was convicted on an indictment under the 9 Geo. 4, c. 31, s. 7, for murder. The murder was committed at Smyrna. The prisoner, a native of Malta, of the age of twenty-one, was residing at Smyrna, under a passport from the Governor of Malta. The person murdered was a Dutchman. Malta is part of Her Majesty's dominions. Upon a case reserved it was contended that it was necessary, under the 9 Geo. 4, c. 31, s. 7, to constitute the offence of murder or manslaughter that the person killed should be a British subject; but the Judges were unanimously of opinion that the conviction was right.^(e)

A case which excited great interest was tried under the former clause. In it the prisoner was charged as accessory before the fact in England to a murder committed in France;^(f) and many points were taken at the close of the case, and reserved.^(g)

*Where a person was struck, &c., upon the high seas, and died upon *761] shore, it was holden that the admiral had no cognizance of the offence by virtue of his commission.^(h) And it was doubtful whether such offence could be tried at common law:⁽ⁱ⁾ the 2 Geo. 2, c. 21, therefore made provisions for such cases, but that Act was repealed by the 9 Geo. 4, c. 31, which was repealed by the 24 & 25 Vict. c. 95, and by the 24 & 25 Vict. c. 100, s. 10, "Where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such death, stroke, poisoning, or hurt shall happen, in the same manner in

^(e) Reg. v. Azzopardi, 2 M. C. C. R. 288; 1 C. & K. 203 (47 E. C. L. R.). It will be seen that the new clause expressly includes the killing of an alien.

^(f) The first count alleged that Orsini, Gomez, and Rudio at Paris murdered N. Batty; and that the prisoner incited, &c., them to commit the murder; the second count was similar, but described the deceased as unknown. The third count was framed in the old form before the 14 & 15 Vict. c. 100, by the Editor; because he thought it might be contended that the 14 & 15 Vict. c. 100, s. 4, did not extend to indictments against accessories; and it alleged an assault, &c., by the principals, and charged the prisoner with inciting, &c. The fourth count charged the prisoner, being a subject of the Queen, with murdering Batty at Paris. The fifth was like the fourth, but described the deceased as unknown.

^(g) Reg. v. Bernard, 1 F. & F. 240. The points were: 1. That the prisoner was not one of her Majesty's subjects within the 9 Geo. 4, c. 31, s. 7. 2. The prisoner was not an accessory before the fact to any murder within that section. 3. There was no proof of any murder having been committed within that section. 4. That the murder was committed by aliens on aliens in France. 5. No evidence of acts done by the prisoner on land out of the United Kingdom, and without the Queen's dominions, or of any act done by any other person in pursuance of any authority from him on land out of the United Kingdom and without the Queen's dominions, was receivable in evidence on this trial. 6. That the principal offence of murder charged in the first three counts was not alleged to have been committed by any of her Majesty's subjects. 7. That by the special commission the Court had only jurisdiction to try the prisoner as accessory before the fact, and had no jurisdiction to try the prisoner as principal. 8. That the prisoner, being an alien, could not be tried as principal for a murder alleged in the 4th and 5th counts to have been committed at Paris. As to the first objection, it is clear that a foreigner resident in England is a subject of the Queen; all the authorities prove that rule in general, and 1 Hale 542, and Courteen's case, Hob. R. 270, are express that a statute naming the subjects of the Queen includes aliens in England; and besides the 32 Hen. 8, c. 16, s. 9, enacts that every alien, who shall hereafter come into this realm or the dominions of the King, shall be bound by all the laws and statutes of this realm. As to the 2d, 3d, 4th, and 6th objections, see the new clause, and the note to sec. 4 relating to conspiracies to murder, *post*. As to the 5th objection, every case that has been tried where the death was on land abroad is an answer; for such evidence was admitted in all; and necessarily so; for how can a man be tried for any offence abroad unless the acts relating to it done abroad are admissible in evidence? As to the 7th objection, the 11 & 12 Vict. c. 46, s. 1 (now 24 and 25 Vict. c. 94, s. 1), making every accessory before the fact triable, &c., as a principal, is an answer. As to the 8th objection, see the remarks on the 24 & 25 Vict. c. 94, s. 1, *ante*, p. 67.

^(h) 2 Hale 17, 20; 1 East P. C. c. 5, s. 131, pp. 365, 366. *Ante*, p. 153.

⁽ⁱ⁾ *Id.* and 1 Hawk. P. C. c. 31, s. 12.

respects as if such offence had been wholly committed in that county or place."(*k*)

Upon an indictment for manslaughter it appeared that the prisoner was a Frenchman by birth, and a naturalized citizen of the United States, and not a subject of the Queen. He shipped on board an American ship at New York, and signed articles to serve as a seaman therein, and so did the deceased, who was a German by birth, and not a subject of the Queen. The ship was American owned, commanded by an American master, and sailed under the flag of the United States. The prisoner during the voyage to Liverpool exercised much cruelty to the deceased, which he died in a hospital in Liverpool on the same day the ship arrived there; the last act of cruelty was committed on the high seas four days before the ship arrived at Liverpool; and, upon a case reserved, it was held that the prisoner was liable to be tried in England under the 9 Geo. 4, c. 31, s. 8, as that section was obviously intended to prevent a defeat of justice, which, without it, might have arisen from the difficulty of trial where the death occurred in a different place from that at which the blow causing it was given; and that section ought not therefore to be construed as making a homicide cognizable in this country by reason only of the death occurring here, unless it would have been so cognizable in case the death had ensued at the place where the blow was given, which the homicide would have been, in this particular case, by sec. 8, if the offender [*762] had been a British subject, but not otherwise. In this case the injury which caused the death was inflicted by one foreigner upon another on board a foreign vessel upon the high seas, and, consequently, if death had then and there followed, no offence cognizable by the law of this country would have taken place.(*l*)

Where a person standing on the shore of a harbor fired a loaded musket at a revenue cutter which had struck upon a sandbank in the sea, about a hundred yards from the shore, by which another was maliciously killed on board the boat, it was held that the trial must be in the Admiralty Court, and not at common law.(*m*) By the 24 & 25 Vict. c. 100, s. 68, "All indictable offences mentioned in this Act which shall be committed within the jurisdiction of the Admiralty of England or Ireland shall be deemed to be offences of the same nature and liable to the same punishment as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in England or Ireland in which the offender shall be apprehended or be in custody, in the same manner in all respects as if they had been actually committed in that county or place; and in any indictment for any such offence, or for being an accessory to such an offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence shall be averred to have been committed 'on the high seas:' Provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's land or naval forces."(*n*)

(*k*) This clause is taken from the 9 Geo. 4, c. 31, s. 8, and 10 Geo. 4, c. 34, s. 11 (I.). This clause is also so altered as to include accessories before the fact in manslaughter. See note (*y*), *ante*, p. 757.

(*l*) *Reg. v. Lewis*, D. & B. C. C. 182.

(*m*) *Rex v. Coombes*, 1785-6; 1 Hawk. P. C. c. 37, s. 17; 1 Leach 388; 1 East P. C. c. s. 131, p. 367, *ante*, p. 156.

(*n*) This enactment is framed on the similar clauses contained in the 7 & 8 Geo. 4, c. s. 77; 7 & 8 Geo. 4, c. 30, s. 43; 9 Geo. 4, c. 31, s. 32; 9 Geo. 4, c. 55, s. 74 (I.); 9 Geo. 4, c. 56, s. 55 (I.); and 10 Geo. 4, c. 34, s. 41 (I.); together with the 7 & 8 Vict. c.

Some of these enactments simply provide for the trial of offences committed within the jurisdiction of the Admiralty; whilst others provide in addition, that the offences mentioned in the Act, which shall be committed within the jurisdiction of the Admiralty, shall be deemed to be offences of the same nature, and liable to the same punishments as they had been committed upon the land in England or Ireland. It seems clear that, wherever an Act creates new offences, this is the proper enactment; for, though in the case of offences against the laws of nature and nations, such as murder or piracy committed on the seas, the general course of legislation has been simply to provide for their trial, and no doubt correctly, because, in the eye of the law of England, they were offences of the same nature as if they had been committed on land in England, yet it may well be doubted whether that be sufficient in the case of newly created offences; and it is certainly much safer to have the provision with which this clause commences. The 33 Geo.

The prisoner, a foreigner, committed a larceny in England, and went to Ham-
 *763] burgh; a police-officer pursued him thither, and *with the assistance of the
 police of Hamburgh arrested him there, and brought him against his will
 on board an English steamer, in order that he might be tried for the larceny. The
 steamer left, the prisoner being in irons, and whilst the steamer was on the high
 seas, he shot the officer, who died of the wound. If the killing had been by an
 Englishman in England, it would have been murder. It was contended that as
 there was no extradition treaty between England and Hamburgh, the arrest and
 detention were illegal, and the offence only manslaughter; but it was held, on a case
 reserved, that where the killing was done with the intent of preserving liberty, the
 crime was reduced to manslaughter; but it must be taken here that the prisoner
 killed the officer, not to obtain his liberty, but out of revenge and malice prepense;
 in which case it is murder even if the custody were unlawful. For the prisoner, a
 foreigner, was in an English ship, and was under the protection of the English laws,
 and therefore owed obedience to those laws, and was guilty of the crime of murder
 against those laws—that is to say, he shot a detective officer, not for the purpose of
 obtaining his liberation, but for revenge and of malice prepense.(o)

We have already dealt with many cases occurring within the jurisdiction of the
 Admiralty, and it is sufficient to refer to that part of the work in this place.(p)

A few of the general rules relating to the form of the indictment may be men-
 tioned in this place.¹

If the name of the party killed be known, it should be correctly stated in the
 indictment; but it is sufficient to describe a party by the name by which he is
 commonly known.(q) A peer should properly be described only by his Christian
 name, and his name of dignity; as James, Duke of G.(r) But it seems that he
 may be described by his surname also; as William Byron, Baron Byron.(s) And

3, c. 37, s. 1, no doubt provides generally, that every offence committed upon the high
 seas shall be of the same nature, &c., as if it had been committed on shore, but it is by no
 means clear that that enactment applies to any offence created by a subsequent statute,
 and it was much better not to leave the matter open to any such question. In Ireland it
 was necessary to issue a special commission under the 11, 12, & 13 Jac. 1, c. 2 (I.); and
 23 & 24 Geo. 3, c. 14, s. 4 (I.), for the trial of all offences committed on the seas; but in
 England such offences might be tried under the ordinary commissions of Oyer and Ter-
 miner, or Gaol Delivery, by the 7 & 8 Vict. c. 2. The present section follows that Act in
 providing for the trial and form of indictment in such cases, and renders the law the same
 in both countries.

(o) *Reg. v. Sattler*, D. & B. C. C. 525; see *ante*, p. 160. Hamburgh is sixty miles from
 the sea, but the tide flows higher up than the place where the steamer was when the pris-
 oner was put on board. The questions reserved were, "Was the custody of the prisoner
 on board the steamer lawful, and is there any distinction as to the times when the steamer
 was in the river Elbe, and whilst she was upon the high seas? [On this the Court gave
 no opinion.] And, supposing the custody not to have been lawful, was the killing neces-
 sarily only manslaughter?"

(p) See *ante*, p. 153, *et seq.*

(q) 2 Hale 237; *Rex v. Norton*, R. & R. 510; *Rex v. Williams*, 7 C. & P. 298 (32 E. C.
 L. R.), *Williams*, J., and *Alderson*, B.; *Rex v. Berriman*, 5 C. & P. 601 (24 E. C. L. R.),
 Park, J.

(r) 2 Inst. 666.

(s) 19 St. Tr. 1177. In *Rex v. Brinklett*, 3 C. & P. 416, an indictment for manslaughter
 described the deceased as Henry Sandford, Baron Mount Sandford, of, &c., in Ireland,
 and it was proved that his Christian name was Henry, his surname Sandford, and his
 title Baron Mount Sandford, and it was held by Vaughan, J., that this was no variance.

¹ See *State v. Conley*, 39 Maine 78; *People v. Thurston*, 2 Parker C. R. 49; *Boyd v. State*, 17 Geo. 194; *Brester v. State*, 26 Ala. 107; *State v. Houston*, 19 Mo. 211; *State v. Jones*, 20 Ibid. 58; *State v. Taylor*, 21 Ibid. 477. A variance as to the instrument is not material, provided the party died the same kind of death as that alleged in the indictment: *State v. Fox*, 1 Dutch. 566.

Under an indictment for murder, the jury may find the prisoner guilty of the lesser offence of manslaughter, either voluntary or involuntary, and the verdict will be legal, although there is no count for manslaughter in the indictment: *Reynolds v. State*, 1 Geo. 227; *Roy v. Kansas*, 2 Kansas 405. All acts of felonious homicide may be prosecuted and punished under an indictment for murder, framed as at common law: *Livingston's case*, 14 Gratt. 592.

though the proper way to describe a baron be to describe him by his Christian name, and his degree in the peerage, as William Baron B., yet it is sufficient if he is described as William Lord B.^(t) If the name of the party killed be not known, it may be laid to be a certain person to the jurors unknown.^(u) Where a party is named, an indictment must either state the name or that the name was unknown to the jurors. An indictment stated that the prisoner murdered "an infant male child, aged about six weeks, and not baptized;" it was objected that the indictment was bad, as it neither stated the name of the child, nor that the name was unknown to the jurors; and, upon a case reserved, the Judges held that the objection was good, and the judgment was arrested.^(v) But where an indictment alleged that the prisoner, a single woman, on the 27th day of August did bring forth a male child alive, and that she afterwards on the day and year aforesaid made an assault, &c., on the said child; it was objected that the indictment was bad, as it neither stated the name of the child, nor that its name was unknown: but Coleridge, J., overruled the objection on the ground that there was a presumption that an illegitimate child had any name, as it could only gain a name by reputation, and that to state that its name was unknown assumed that it had acquired a name; and this decision was held right.^(w) So where the prisoners were indicted for the murder of "a certain illegitimate male child, then lately before the body of" one of them, it was held right; for it was the case of a party who had never acquired a name, and the indictment identified the party by showing the name of the parent.^(x) A bastard must not be described by his mother's name till he has gained that name by reputation. Frances Clark was indicted for the murder of George Lakeman Clark, a base-born infant male child, aged three weeks. The child was her's, and had been christened George Lakeman, the father's name. The murder was proved, but there was no evidence that the child had ever been called Clark; and, on a case reserved, the Judges held that, as it had not obtained the mother's name by reputation, it was improperly called Clark in the indictment; and as there was nothing but the name to identify it in the indictment, the conviction could not be supported.^(y) Upon an indictment for the murder of "a certain female child whose name to the jurors was unknown," it appeared that the child had not been baptized, but the prisoner had said she would like it to be called "Mary Ann," and had called it "her Mary Ann" at one time, and "Little Mary" at another; the father was a baptist, and the child was a bastard, and twelve days old: and, upon a case reserved, it was held that the child had not gained a name by reputation, and therefore the indictment was good.^(z) And where an illegitimate child, three weeks old, had been baptized by the name "Eliza," but no surname was mentioned at the time of baptism, and neither the register, nor any copy of it, was produced at the trial, and an indictment for murder described her as "Eliza Waters," Waters being the name of her mother; it was held, upon a case reserved, that the child had not acquired the name of Waters by reputation, and that the conviction was wrong.^(a) Where, however, an indictment charged the murder of Emma Evans, and it appeared that the deceased was an illegitimate child born in a workhouse, and baptized on the 9th of September by the name of Emma, and drowned on the 11th of the same month, when about six weeks old, and that up to the time of the baptism she was not called by any name, but that from the 9th to the 11th of September she was called Emma Evans, Evans being the mother's name; it was held that there was sufficient evidence of reputation for the consideration of the jury, and that this was distinguishable from the last, because there was no evidence there that the

(t) Reg. v. Pitts, 8 C. & P. 771 (34 E. C. L. R.), Erskine, J.

(u) 1 East P. C. c. 5, s. 114, p. 345.

(v) Reg. v. Bliss, 2 Moo. C. C. R. 93; 8 C. & P. 773 (34 E. C. L. R.); Reg. v. Hicks, 2 M. Rob. 302, s. p.

(w) Reg. v. Willis, 1 Den. C. C. 80; 1 C. & K. 722 (47 E. C. L. R.).

(x) Reg. v. Hogg, 2 M. & Rob. 380, Lord Denman, C. J.

(y) Rex v. Clark, East. T. 1818; MS., Bayley, J., and R. & R. 358.

(z) Rex v. Smith, R. & M. C. C. R. 402; 6 C. & P. 151 (25 E. C. L. R.), s. c.

(a) Rex v. Waters, R. & M. C. C. R. 457; 7 C. & P. 250 (32 E. C. L. R.).

child was ever called Walters at all.(b) Where one count described the child murdered as Lewis Drake; another as Lewis Tavern, and a third as a certain bastard male child called Lewis; the prisoner was the mother of the child, and sometimes called it Lewis, and by that name alone it had been baptized. It had been put out to nurse by its mother, who then went by the name of Tavern; the nurse used to call it Lewis, and when she learnt the mother's name was Drake, she called it Lewis Drake when speaking of it to other persons. The child was about two years old. There was no proof that the prisoner was married, and her brother had never heard of her marriage; but she had been absent from him thirteen years. It was held that there was no evidence of the child being Lewis Tavern; but that the case must go to the jury as to the two other names. As to the name of Lewis the child went by that name and was baptized by it; and it was for the jury to say whether, from the evidence they were not satisfied that the prisoner was never married; she went by her maiden name of Drake; she pleaded to that name in the indictment, and was there described as a single woman, and her brother never heard of her marriage. Whether all this might not satisfy the jury that the child was a bastard it was for them to decide, but undoubtedly there was evidence for them to consider.(c) The prisoner was indicted for the murder of her infant child, which was described in one count as Harriet Stroud, and in another as a female infant of tender age, whose name is to the jurors unknown. The prisoner, a single woman, gave birth to the child on the 16th of June, and it was called Harriet, and was baptized by that name on the 16th of July; no copy of the register was given in evidence; but it was said that the child was baptized by the name of Harriet, and not Harriet Stroud, and there was no evidence that she had ever been called by any name except Harriet; and the description was held wrong; the proper description would have been Harriet, the base-born child of the prisoner. The want of description is only excused where the name cannot be known.(d) Where an indictment for murder described the deceased as a certain infant female child not named, it was held sufficient; for though "not baptized" would not have been enough, "not named," which means that she had acquired no name, by baptism or usage, was quite sufficient.(e) Where the prisoner was indicted for killing William Scarborough, and he was the illegitimate son of the prisoner, and four years of age, and generally called "William" or "Coley," after his reputed father; but frequently spoken of as "Sarah Scarborough's child," and sometimes, his aunt said, she might have heard him called *766] "William Scarborough;" it was held that there was some evidence to go to the jury that the deceased, being Sarah Scarborough's bastard, and being frequently and generally addressed as William, had also acquired by reputation the name of William Scarborough; and a party may acquire more names than one by reputation, and he may be indifferently described by either in an indictment.(f)

Where there was no evidence of the name of the deceased as stated in two counts, and the third count described her as "a certain woman whose name is to the jurors unknown," and it appeared that the prisoner had asked for lodgings in Oxford "for himself and his wife," and the prisoner came with the deceased to the lodgings and they lived there as husband and wife for three or four days, and when taken up by the marshal the prisoner was asked if he had a wife in Oxford, and he said he had; but on the marshal's saying that she was dead, the prisoner replied "she is not my wife, she is a woman I have been travelling with for the last eight months." Erskine, J., held, that if the jury were satisfied that she was not the wife of the prisoner, and that the name could not be ascertained by any reasonable diligence, the description was right; but if the jury should think that she was the prisoner's wife, the description was wrong, for she ought then to have been described by the surname of the prisoner.(g)

(b) *Reg. v. Evans*, 8 C. & P. 765 (34 E. C. L. R.), *Erskine and Patteson, JJ.* See *Rex v. Sheen*, 2 C. & P. 639 (12 E. C. L. R.).

(c) *Reg. v. Drake*, 4 Cox C. C. 333, *Patteson and Talfourd, JJ.*

(d) *Reg. v. Stroud*, 2 M. C. C. 270; 1 C. & K. 187 (47 E. C. L. R.).

(e) *Reg. v. Waters*, 1 Den. C. C. 356; 2 C. & K. 864 (61 E. C. L. R.).

(f) *Reg. v. Scarborough*, 3 Cox C. C. 72, *Coltman, J.* It is said in the marginal note that the deceased had been called William Scarborough in his mother's presence.

(g) *Reg. v. Campbell*, 1 C. & K. 82 (47 E. C. L. R.).

Where a child was described as Annie Welton, and no evidence of any name was adduced; Byles, J., amended the indictment by inserting "a certain female child whose name is to the jurors unknown," under the 14 & 15 Vict. c. 100, s. 1, which, his Lordship said, should have a wide construction.^(h)

In other respects great particularity was required formerly in an indictment for murder. It was necessary to allege the manner of the death and the means by which it was caused, and many other particulars;ⁱ but this led to so many acquittals wholly beside the merits of the case, that a simple form of indictment was rendered sufficient by the 14 & 15 Vict. c. 100, s. 4, which was repealed by the 24 & Vict. c. 95; but by the 24 & 25 Vict. c. 100, s. 6, "In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against any accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner herein-before specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed."⁽ⁱ⁾

The word "indictment" in the 24 & 25 Vict. c. 100, s. 6, has been since held to include a coroner's inquisition.⁽ⁱⁱ⁾

^(h) Reg. v. Welton, 9 Cox C. C. 297. The indictment was for attempting to drown the child.

⁽ⁱ⁾ This clause is taken from the 14 & 15 Vict. c. 100, s. 4, which applied only to indictments for murder and manslaughter, and a serious doubt was entertained whether in an indictment against an accessory to murder or manslaughter, where the accessory was charged as an accessory and not as a principal, it might not still be necessary to adopt the old form of indictment, and in order to render that course unnecessary the new parts of this section were introduced.

The word "indictment" includes a coroner's inquisition whereby any person is charged with murder or manslaughter, or as an accessory before the fact to either of those offences; indeed, it is the term most appropriately applied to such an inquisition; for the term inquisition includes all inquests before the coroner, whether terminating in a charge against a person or not, and whether held in a case of death or otherwise: *e. g.* in a case of treasure trove. All our best law writers apply the term indictment quite as often as inquisition to a coroner's inquisition charging any one with any of the above offences. See 1st. 32, 550; 4 Inst. 271; 2 Hale P. C. 61, 64, 65, 66; 2 Hale P. C. 130; 2 Hawk. P. C. c. 15, ss. 15, 16, 17, 22, 26, 35, and c. 25, ss. 6, 119, 128. Lord Coke also, 3 Inst. 134, and Perkins, 2 Book, c. 25, *passim*, whilst treating of indictments, introduce such coroners' inquisitions. In *Borough v. Holcroft*, 2 Leon. 160, and *Wrote v. Wiggles*, 4 Rep. 45, which were appeals of murder, the defendants pleaded *autrefois acquit* on coroners' inquisitions, and in the pleas the inquisitions appear to have been called indictments. The legislature, in the 1 & 2 Will. and Mary, c. 13, s. 5 (repealed by the 7 Geo. 4, c. 64, s. 32), called a coroner's inquisition "the inquisition or indictment." And the 2 & 3 Edw. 6, c. 24, s. 4, s. 2, to an inquisition for feloniously striking or poisoning. See also Reg. v. King, 20 C. C. 95, and the introduction to Greaves' Cr. Acts, p. xvi, 2d Ed.

⁽ⁱⁱ⁾ Reg. v. Ingham, 10 Law T. 456, B. R. 9 Cox C. C. 508.

In a prosecution for murder, the defendant may be convicted, though it turns out that the mortal wound was given with a different weapon from the one mentioned in the indictment: *People v. Townsend*, 3 Hill 479. An indictment for murder, by poison, need not specify the particular kind of poison; and if it do so state, it will not be necessary that the proof correspond: *Carter v. State*, 2 Cart. 617. An indictment for murder need not set out the length, breadth, or depth of the wound: *Lacier v. Comm.*, 10 Gratt. 708.

*767] *There can be no doubt that, where several join in a murder, both the principal in the first and the principal in the second degree may be charged that they feloniously, wilfully, and of their malice aforethought murdered the deceased; and thus the difficulties which arose in first charging the principal in the first degree, and then alleging that the principal in the second degree was present aiding and assisting, may be avoided. And as the 24 & 25 Vict. c. 94, s. 1, (k) has made accessories before the fact liable to be indicted as principals, it is equally clear that an indictment may charge an accessory before the fact and a principal in the same manner in which we have stated that two principals may be charged. And there is this great advantage in adopting each of these courses; that on such an indictment it is quite immaterial which of the prisoners was principal in the first degree in the one case, or whether the party were accessory before the fact or a principal in the other case, and consequently the jury will be relieved from considering these questions. (l)

This clause has made it quite unnecessary to retain in this chapter many cases which were decided on the allegations in the indictments which are rendered unnecessary by it, as well as on the questions which had arisen whether those allegations were supported by the evidence.

This clause has also got rid of the difficulty of proving what the cause of death was, as it is clear that, if the jury are satisfied that the deceased was killed by any means, that is sufficient, although it may be impossible to prove what those means were.

It was always necessary to state, that the act by which the death was occasioned *768] was done feloniously, and especially that it *was done of *malice aforethought*, (m) which, as we have already seen, is the great characteristic of the crime of murder; (n) and it must also be stated, that the prisoner *murdered* the deceased. (o) If the averment respecting *malice aforethought* be omitted, and the indictment only allege that the stroke was given *feloniously*, or that the prisoner *murdered*, &c., or *killed*, or *slew* the deceased, the conviction can only be for manslaughter. (p)

Where an inquisition, after correctly charging the principal in the first degree, alleged that the two other prisoners, at the time of the felony aforesaid “(to wit) on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, were feloniously present, then and there abetting, aiding, and assisting the said N.” &c., it was objected that the word “feloniously” only applied to “present,” and not to “abetting, aiding, and assisting;” and it was held that the inquisition was bad on this ground. (q) And where an indictment for murder, after correctly charging the principal in the first degree, proceeded to allege that “at the time of the felony and murder *was* committed (to wit)” &c., precisely in the same terms as in the preceding case, and, upon demurrer, it was objected that the indictment was bad, and that case was relied upon as in point; Coltman, J., said, that it was a grave authority in support of the objection, but he would reserve the point, as the case was so serious a one: it was further objected that the bad English made the averment insufficient, but Coltman, J., was inclined to think that the word “was” might be rejected, he however would reserve this point also. (r)

Where the grand jury return the bill of indictment only a true bill for manslaughter, and *ignoramus* as to murder, it is stated to have been the usual course to strike out, in the presence of the grand jury, the words “maliciously” and “of malice aforethought,” and “murder,” and to leave only so much as makes the bill to be one for manslaughter; (s) and this appears to be the practice at the present

(k) *Ante*, p. 67.

(l) See *Reg. v. Downing*, 1 Den. C. C. 52, *ante*, p. 707.

(m) 2 Hale 186, 187; *Staud. P. C.* 130; *Bradley v. Banks*, *Yelv.* 205.

(n) *Ante*, p. 667, *et seq.*

(o) 2 Hawk. P. C. c. 23, s. 77; *Anon.*, Dy. 304, *post*, note (p).

(p) 1 East P. C. c. 5, s. 116, p. 345, 346; 2 Hale 186.

(q) *Rex v. Nicholas*, 7 C. & P. 538 (32 E. C. L. R.), *Littledale and Patteson, Js.*

(r) *Reg. v. Phelps*, C. & M. 180 (41 E. C. L. R.), and *MSS., C. S. G.* The principals in the second degree were acquitted, so it became unnecessary to reserve the point. C. S. G.

(s) 2 Hale 162.

upon some of the circuits;(*t*) but it has been thought to be the safer way to sent a new bill to the grand jury for manslaughter.(*u*) And a very learned Judge ordered this to be done where the grand jury have returned manslaughter upon bill for murder, saying he thought it the better course to prefer a new bill, though the usual course on the circuit had been to alter the bill for murder, on the ring of the grand jury.(*v*) Though the same indictment may charge one with murder and another with manslaughter, yet if it charge both with murder the grand jury cannot find it a true bill against one, and manslaughter as to the other; [*769 a finding against one for *murder will be good, and there ought to be a new bill against the other for manslaughter.(*w*) And where the grand jury returned a true bill for murder against one, and for manslaughter against another, the prisoner was tried for murder on that indictment; but a new bill for manslaughter was preferred against the other.(*x*)

If, as is very commonly the case, there be an indictment for murder, and a coroner's inquisition for the same offence against the same person, at the same sessions of gaol delivery, the usual practice appears to be to arraign and try the prisoner upon both, in order to avoid the plea of *autrefois acquit* or *attaint*; and to indorse his acquittal or attainder upon both presentments.(*y*)

And where the coroner's jury have found a verdict of manslaughter, and the grand jury a bill for murder, the prisoner has been arraigned and tried on both the inquisition and indictment at the same time.(*z*) So where the grand jury have returned a bill for manslaughter, and the coroner's jury a verdict of wilful murder.(*a*) where the grand jury have found a bill against more prisoners for murder than the coroner's jury.(*b*)

Where a man has been acquitted generally upon an indictment for murder, *autrefois acquit* is a good plea to an indictment for the manslaughter of the same person; and *à converso* where a man has been acquitted on an indictment for manslaughter, he shall not be indicted for the same death as murder; the fact being the same, and the difference only in the degree.(*c*)¹ And upon similar grounds it should seem, that one who had been convicted upon an indictment for manslaughter, and his clergy allowed, might have pleaded *autrefois convict* to an indictment, charging the same death upon him as a murder.(*d*) And it is clear that *autrefois*

t) *Ex relat.* Mr. Pugh, Clerk of Assize, on the Oxford Circuit, 1816.

u) By Lord Hale (2 Hale 162), on the ground that the words of the indorsement do not make the indictment, but only evidence the assent or dissent of the grand jury, and that the bill itself is the indictment when affirmed. See *Rex v. Ford*, *Yelv.* 99.

v) *Turner's case*, 1 Lew. 176, Parke, B., at Carlisle.

w) 1 East P. C. c. 5, s. 116, p. 347.

x) *Reg. v. Bubbs*, 4 Cox 455, *ante*, p. 682, after consultation between Williams, J., Lord Campbell, C. J., and the Editor. See *Rex v. Cary*, 3 Bulst. 206; 1 Roll. R. 407, as *Rex v. Cary*.

y) 1 East P. C. c. 5, s. 134, p. 371.

z) *Reg. v. Walters*, Hereford Sum. Ass. 1841, Coltman, J., MSS.; C. S. G.; *Reg. v. Wells*, Hereford Sum. Ass., Erskine, J., MSS. C. S. G.

a) *Reg. v. Smith*, 8 C. & P. 160 (34 E. C. L. R.), Bosanquet and Coltman, JJ., and Bold, B.

b) *Reg. v. Dwyers*, Glouc. Sum. Ass. 1842, Erskine, J., MSS. C. S. G.

c) *Rex v. Holcroft*, 4 Co. 46, b; 2 Hale 246.

d) The only objection would be, that he could not have been convicted of murder upon the former indictment; and though this might be said equally where the party has been

There is a strong current of American authorities in favor of treating a conviction for a lesser offence which is an ingredient of a greater crime, as a bar to a subsequent prosecution for the greater: *Wilson v. State*, 24 Conn. 57. After an indictment for murder is returned, and a verdict found for manslaughter, if the prisoner obtains a new trial, he will be tried again for the offence of which he was found guilty: *Brennan v. People*, 15 Ill. 511. A conviction of murder in the second degree acquits of murder in the first degree: *State v. Jones*, 1, 27 Mo. 324; *Jones v. State*, 13 Texas 168; *Minnesota v. Lessing*, 16 Minn. 75. See also *State v. Ross*, 29 Mo. 32; *State v. Twady*, 11 Iowa 350; *People v. Gilmore*, 4 Cal. 376; *Ingston's case*, 14 Gratt. 592; *Bailey v. State*, 26 Geo. 579. Finding a person indicted for murder guilty of manslaughter is an acquittal of the charge of murder; and however contrary to the law and the evidence it may appear to the Court, it cannot order a new trial: *Jordan v. State*, 22 Geo. 545.

convict of manslaughter, and clergy thereupon allowed, was a good bar in an appeal of murder.(e) And *autrefois acquit* or *autrefois attainé*, upon an indictment for murder, was a good plea to an indictment charging the same death as petit treason.(f)

As a final determination in a Court having competent jurisdiction is conclusive in all Courts of concurrent jurisdiction, it has been held that a party who has killed another in a foreign country, and has been there prosecuted, tried and acquitted, may avail himself of such acquittal in answer to any charge against him in this country for the same offence (g)

*770] In a case where the prisoner had been tried for murder, and convicted of manslaughter, and had received the benefit of clergy, and was subsequently tried for murder, and convicted of manslaughter in killing another individual (who died after the first trial) by the same act which caused the death of the first; the Judges were unanimously of opinion, that the former allowance of clergy protected the prisoner against any punishment upon the second verdict; and that if the prisoner were to be called up for judgment, he might rely upon such allowance as a bar.(h)

The evidence in cases of murder, will consist of the proof of particular facts and circumstances which show the killing, and that it was committed by the party accused of malice aforethought. It should be observed, however, that when the fact of killing is proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily shown by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to have been founded in malice until the contrary appears.(i)¹

It has been considered a rule, that no person should be convicted of murder unless the body of the deceased has been found: and a very great judge says, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body be found dead."(k) But this rule, it seems, must be taken with some qualifications; and the circumstances may be sufficiently strong to show the fact of the murder, though the body has never been found. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck, and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards; and that near the

acquitted upon a former indictment for manslaughter, the plea in the latter case is clearly proper, upon the ground that if the party was not guilty even of manslaughter, he cannot be charged with having caused the death with the circumstances of aggravation necessary to constitute murder.

(e) *Rex v. Wiggles*, 4 Co. 45.

(f) 2 Hale 246, 252; *Fost.* 329. As to the general doctrine of these pleas, and that they can only avail where the first indictment was valid. See 1 Chit. Crim. L. 452, *et seq.*; and *Rex v. Clarke*, 1 B. & B. 473 (5 E. C. L. R.), and *Burglary*, p. 829.

(g) *Rex v. Hutchinson*, 3 Kebl. 785, cited in *Beak v. Thyrwhit*, 1 Show. 6; *Bull. N. P.* 245; 3 Mod. 194; 1 Leach 135, note (a). The defendant being apprehended in England, and committed to Newgate, was brought into K. B. by *habeas corpus*, where he produced an exemplification of the record of his acquittal in Portugal; but the King (Car. 2) being willing to have him tried here for the same offence, referred the point to the consideration of the Judges, who all agreed that, as the party had been already acquitted of the charge by the law of Portugal, he could not be tried for it again in England.

(h) *Rex v. Jennings*, East. T. 1819, R. & R. 388. The act which occasioned the death of the two individuals (two children) was one and the same. The general effect of the allowance of clergy, after the 8 Eliz. c. 4, was to discharge all offences precedent within clergy; but not such as were not entitled to the benefit of clergy. But by the 6 Geo. 4, c. 25, s. 4, the allowance of the benefit of clergy to any person who was convicted of any felony, did not render the person to whom such benefit was allowed dispensable for any other felony, by him or her committed, before the time of such allowance.

(i) *Fost.* 255, *ante*, p. 668.

(k) 2 Hale 290. Lord Hale only laid this down as a caution; not as a rule in every case, per Maule, J., in *Reg. v. Burton*, Dears. C. C. 282.

¹ Where a murder is accompanied with robbery, possession of the fruits of the crime is of great weight in establishing the murder: *Williams v. Comm.*, 5 *Casey* 102.

place on the deck where the captain was seen, a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood; the Court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the jury being of that opinion, the prisoner was convicted, and (the *^[771] conviction being unanimously approved of by the Judges) was afterwards executed.^(l)¹

But where upon an indictment against the prisoner for the murder of her bastard child, it appeared that she was seen, with the child in her arms, on the road from the place where she had been at service to the place where her father lived, about six in the evening, and between eight and nine she arrived at her father's, without the child, and the body of a child was found in a tide river, near which she must have passed in her road to her father's, but the body could not be identified as that of the child of the prisoner, but the evidence rather tended to show that it was not the body of such child; it was held that she was entitled to be acquitted; the evidence rendered it probable that the child found was not the child of the prisoner; and with respect to the child, which was really her child, the prisoner could not by law be called upon either to account for it, or to say where it was, unless there were evidence to show that her child was actually dead.^(m)

On a trial for murder, in order to prove the state of the health of the deceased prior to the day of his death, a witness was asked in what state of health the deceased seemed to be when he last saw him, and he began to state a conversation which had then taken place between the deceased and himself on this subject; and Alderson, B., held that what the deceased said to the witness was reasonable evidence to prove his state of health at the time.⁽ⁿ⁾²

Upon an indictment for murder by the explosion of certain grenades, a novel kind of explosive instrument, evidence of other deaths and wounds caused by the explosion at the same time and place is admissible for the purpose of proving the character of the grenades.^(o) Where in the same case a witness was called to prove that he made the grenades, it was held that the name of the person who gave

^(l) Rex v. Hindmarsh, 2 Leach 569. It was urged on the prisoner's behalf at the trial, by Garrow (the late Mr. Baron Garrow), that he was entitled to be acquitted, on the ground that it was not proved that the captain was dead; and that as there were many ships and vessels near the place where the transaction was alleged to have taken place, the probability was that he was taken up by some of them, and was then alive. And the learned counsel mentioned a remarkable case which had happened before Mr. J. Gould, the mother and reputed father of a bastard child were observed to take the child to the margin of the dock at Liverpool, and, after stripping it, cast it into the dock. The body of the infant was not afterwards seen; and, as the tide of the sea flowed and reflowed to and out of the dock, the learned Judge, upon the trial of the father and mother for the murder of their child, observed that it was possible that the tide might have carried it the living infant; and upon this ground the jury, by his direction, acquitted the prisoners. But *quæ* the form of the indictment in this case.

^(m) Reg. v. Hopkins, 8 C. & P. 591 (34 E. C. L. R.), Lord Abinger, C. B.; Reg. v. Leverton, 2 F. & F. 833, Erle, C. J., s. p.

⁽ⁿ⁾ Reg. v. Johnson, 2 C. & K. 354 (61 E. C. L. R.).

^(o) Reg. v. Bernard, 1 F. & F. 240. But surely the evidence was admissible as proof of the single act of the principals effected, just as in a case of arson, if one rick is set on fire and several others burnt, evidence of all is always admitted.

¹ It is not essential to a conviction for murder, that the body of the deceased be found: *Locking v. State*, 7 Ind. 326; *U. S. v. Gilbert*, 2 Sumn. 19. As to the necessity of the proof of the *corpus delicti* generally in other cases as well as homicide, see *Ruloff v. People*, 18 N. Y. 179; *Mass v. State*, 36 Ala. 211; *Nesbit v. State*, 43 Geo. 239; *Smith v. State*, 21 Gratt. 809; *State v. Davidson*, 30 Verm. 377; *State v. Keeler*, 28 Iowa 551; *Stts v. State*, 43 Miss. 472; *Jenkins v. State*, 41 Ibid. 582; *U. S. v. Clifford*, C. C. 5; *State v. Scott*, 39 Mo. 424; *People v. Jones*, 31 Cal. 565; *State v. Williams*, 7 Jones (Law) 6. It is certainly the generally received rule not to convict upon the mere confession of the prisoner without adequate proof of the *corpus delicti*.

² It is competent to prove that deceased after drinking a supposed poison said, "he did not feel comfortable," though the prisoner was not present: *People v. Robinson*, 2 Parker R. 235.

the order for them might be proved, as a fact in the transaction, even though he had not then been shown to be connected with the prisoner. (*p*)

It has already been shown that if A. be indicted as having given the mortal stroke, and B. and C. as present aiding and assisting, and upon the evidence it appeared that B. gave the stroke, and A. and C. were aiding and assisting, or it be not proved which gave the stroke, the charge is proved, for in law it is the *772] *stroke of all. (*q*) So if a prisoner be indicted for strangling the deceased with her own hands, and upon the evidence it turns out that the deceased was strangled by some one else in the presence of the prisoner, who was privy to it, and so near as to be able to assist, that is sufficient. (*r*)

An indictment for murder, stating that the prisoner gave and administered poison, is supported by proof that the prisoner gave the poison to A. to administer as a medicine to the deceased, and that A. neglecting to do so, it was accidentally given to the deceased by a child, the prisoner's intention to murder continuing. Upon an indictment for murder, which alleged that the prisoner feloniously, &c., did administer a large quantity of laudanum to a child, it appeared that the prisoner delivered to one S. Stephens, with whom the child was at nurse, about an ounce of laudanum, telling her it was proper medicine for the child and directing her to administer to the child every night a tea-spoonful thereof, which was quite a sufficient quantity to kill the child; the prisoner's intention in so doing, as shown by the finding of the jury, was to kill the child. Stephens took home the laudanum, and thinking the child did not require medicine, did not intend to administer it at all, and left it on the mantel-piece of her room. A few days afterwards a little boy of the said S. Stephens, during her accidental absence, removed the laudanum from its place and administered a much larger dose than a tea-spoonful to the child, in consequence of which the child died. The jury were directed that if the prisoner delivered the laudanum to Stephens, with intent that she should administer it to the child, and thereby produce its death, the quantity so directed to be administered being sufficient to cause death; and that, if the laudanum was afterwards administered by an unconscious agent, while the prisoner's original intention continued, the death of the child, under such circumstances, was murder by the prisoner, and that if the tea-spoonful was sufficient to produce death, the administration of a much larger quantity by the little boy would make no difference. The jury found the prisoner guilty, and, upon a case reserved for the opinion of the Judges, whether the facts above stated constituted an administering of the poison by the prisoner to the child, they were unanimously of opinion, that the administering of the poison by the child was, under the circumstances of the case, as much, in point of law, an administering by the prisoner, as if she had actually administered it with her own hand. (*s*)

Upon an indictment, alleging that the prisoner did an act which caused the death, it is sufficient to prove that the prisoner caused and procured the act to be done by an innocent agent. An indictment charged that the prisoner, a certain plaster made by the prisoner of certain dangerous ingredients, feloniously did place *773] and fix upon the head of the deceased: the prisoner was *proved to have applied two plasters over the head of the deceased, but a third, which was applied last before the deceased died, was applied by the child's mother, in the absence of the prisoner, it being made with materials, which had been given by the prisoner to the mother for that purpose; it was objected that the indictment was not proved; but it was held that, though indictments often go on to say, that the prisoner "caused and procured" the thing to be done, yet if the plaster was made by the direction of the prisoner, that was enough. (*t*)

There is one important species of evidence occasionally resorted to in cases of

(*p*) Ibid.

(*q*) *Ante*, p. 706; 1 Hale 462.

(*r*) *Rex v. Culkinn*, 5 C. & P. 121 (24 E. C. L. R.), Park, J. A. J., Parke and Bolland, Bs.

(*s*) *Reg. v. Michael*, 2 Moo. C. C. R. 120; s. c., 9 C. & P. 356 (38 E. C. L. R.). "If A. gives poison to B., intending to poison him, and B., ignorant of it, gives it to C., a child, or other near relation of A., against whom he never meant harm, and C. takes it and dies, this is murder in A., and a poisoning by him. Plowd. Com. 474 a.; Dalt. cap. 93, but B., because ignorant, is not guilty." 1 Hale 431. See *ante*, p. 739.

(*t*) *Rex v. Spiller*, 5 C. & P. 333 (24 E. C. L. R.), Bolland, B. and Bosanquet, J.

homicide, namely, the dying declarations of the party killed, which will be considered in a future part of this Treatise.(u)

The jury may, upon an indictment for murder, find the prisoner guilty of the offence charged, or of the lesser offences of manslaughter or excusable homicide;(v) or of an attempt to commit the murder by the 14 & 15 Vict. c. 100, s. 9. Where, however, the facts of the case amount only to excusable homicide, it is usual for the Judge, at the present day, to permit or direct a general verdict of acquittal, unless some considerable blame appears to attach to the conduct of the party.(w) And several persons present at a homicide may be found guilty in different degrees, one of murder, the other only of manslaughter.(x)

We have seen that by the 24 & 25 Vict. c. 100, s. 68,(y) any person may be tried for murder or manslaughter, which has been committed upon the sea, in any county or place in which he shall be apprehended or be in custody, and shall be subject to the same punishment as if he had committed such murder or manslaughter upon land.

In every case where the point turns upon the question, whether the homicide was committed wilfully and maliciously, or under justifying, excusing, or alleviating circumstances, the matter of fact, namely, *whether the facts alleged by way of justification, excuse, or alleviation, are true*, is the proper and only province of the jury. But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the Court; for the construction which the law puts upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the Court.(z) In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circumstances in a *special verdict*. But where the law is clear, the jury, under the direction of the Court in point of law, matters of fact being still left to their determination, may, and if they are well advised, always will, find a general verdict, conformably to such direction.(a) And if the jury bring in a verdict of manslaughter in a case which clearly amounts to murder, the Court should not receive the verdict.(b)

*The 43 Geo. 3, c. 58, which repealed the 21 Jac. 1, c. 27, and the Irish Act 6 Anne, provided that the trials, in England and Ireland, of women charged with the murder of any issue of their bodies, which would by law be bastard, should proceed by the like rules of evidence and presumption as were allowed to take place in respect to other trials for murder; and that the jury, by whose verdict any prisoner charged with such murder as aforesaid should be acquitted, might find, "that the prisoner was delivered of issue of her body, male or female, which, if born alive, would have been bastard; and that she did, by secret marrying, or otherwise, endeavor to conceal the birth thereof."¹

This provision, as it could only be acted upon where the child was a bastard and where the party was charged with murder by an inquisition or an indictment,(c) was open to much objection, and has been repealed by the 9 Geo. 4, c. 31; and the Act by the 24 & 25 Vict. c. 95.

(u) *Post*, Book VI., upon *Evidence*.

(v) 1 Hale 449; 2 Hale 302; Co. Lit. 282 a.

(w) *Post*, chap. on *Excusable Homicide*; Fost. 279, 289.

(x) See *post*, p. 795.

(y) *Ante*, p. 762.

(z) Reg v. Fisher, 8 C. & P. 182 (34 E. C. L. R.).

(a) Fost. 255, 256.

(b) Rex v. Smith, *ante*, p. 749. And see Slaughterford's case, cited Str. 855.

(c) This statute did not make the concealment an offence for which an indictment could be preferred: Rex v. Parkinson, Carlisle Sum. Ass. 1821. MS., Bayley, J. The 49 Geo. c. 14, which repeals the Scotch Act of Parliament, relating to the murder of bastard children, differs from the 43 Geo. 3, c. 58, and does not make the concealment a matter which can only be found by the jury upon the trial of an indictment for murder, but enacts sec. 2) "that if any woman in Scotland shall conceal her being with child during the whole period of her pregnancy, and shall not call for and make use of help or assistance at the birth, and if the child be found dead or be missing, the mother, being lawfully convicted thereof, shall be imprisoned for a period not exceeding two years, in such common gaol or prison as the Court before which she is tried shall direct and appoint."

¹ State v. Kirby. 57 Maine 30.

By the 24 & 25 Vict. c. 100, s. 60, "If any woman shall be delivered of a child, every person who shall, by any *secret disposition* of the dead body of the said child, whether such child died before, at, or after its birth, endeavor to conceal the birth thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor: Provided that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some *secret disposition* of the dead body of such child, endeavor to conceal the birth thereof, and thereupon the Court may pass such sentence as if such person had been convicted upon an indictment for the concealment of the birth."^(d)

Cases had not unfrequently occurred where endeavors had been made to conceal the birth of children, and there was no evidence to prove that the mother participated in those endeavors, though there was sufficient evidence that others did so, and under the former enactments, under such circumstances, all must have been acquitted.^(e) The present clause is so framed as to include every person who uses any such endeavor, and it is quite immaterial under it whether there be any evidence against the mother or not.

Under the former enactments a person assisting the mother in *concealing a birth would only have been indictable as an aider or abettor; but a person so assisting would come within the terms of this clause as a principal.

Under the former enactments the mother alone could be convicted of this offence where she was tried for the murder of her child. Under this clause any person tried for the murder of a child may be convicted of this offence, whether the mother be convicted or not.^(ee)

By the repealed statute of 21 Jac. 1, the concealment of the death of the bastard child by the mother made her guilty of a capital offence, unless she could prove that the child was born dead; and upon this statute it was decided, that if the mother called for help, or confessed herself with child, she was not within its construction; and, upon the same principle, evidence was always allowed of the mother's having made provision for the birth, as a circumstance to show that she did not intend to conceal it.^(f) So upon the 43 Geo. 3, c. 58, it seems that if the woman had made her pregnancy known to persons not implicated with her in the concealment, it would have been an answer to the charge of concealment. Thus where the prisoner threw a bastard child of which she had been delivered into the privy; and it was probable upon the evidence that the child was still-born; Bayley, J., held that this was no answer to the charge of concealment; but he said that if the prisoner had communicated her pregnancy, or, to the knowledge of any other persons, made preparations for her confinement, the case would not have been within the statute.^(g) So since the 9 Geo. 4, c. 31, where the body of a child was found among the feathers of a bed, but it did not appear by whom it had been placed there, and the prisoner had prepared clothes for the child, and sent for a surgeon at the time of her confinement, an acquittal was directed.^(h)

Upon the 21 Jac. 1, the presence even of an accomplice was holden to take a case out of the Act; so that where a woman was indicted for the murder of her bastard child, and the mother of the woman was indicted at the same time for being present aiding and abetting, and there was no other evidence of guilt but the concealment by both the prisoners, they were acquitted.⁽ⁱ⁾ And if from the view of the child it were testified by one witness, by apparent probabilities, that it had not arrived at its *debitum partus tempus*, as if it wanted hair or nails, the case was

^(d) This clause is framed from the 9 Geo. 4, c. 31, s. 14; and 10 Geo. 4, c. 34, s. 17 (1.).

^(e) Reg. v. Waterage, 1 Cox C. C. 338; Reg. v. Skelton, 3 C. & K. 119.

^(ee) As to hard labor, &c., see *ante*, p. 5.

^(f) 1 East P. C. c. 5, s. 15, p. 228.

^(g) Rex v. Southern, Stafford Assizes, 1809, MS., Bayley, J.

^(h) Rex v. Higley, 4 C. & P. 366 (19 E. C. L. R.), Park, J. A. J. See Rex v. Douglas, *infra*, note (o).

⁽ⁱ⁾ Peat's case, Exeter Sum. Assizes, 1793, cor. Heath, J.; 1 East P. C. c. 5, s. 15, p. 229.

considered as not being within that statute, on account of there being presumptive evidence that the child was born dead; but under such circumstances it was left to a jury upon the evidence, as at common law, to say whether the mother was guilty of the death.^(k) But the construction upon the 43 Geo. 3, c. 58, had been different. A woman might be found guilty of concealment, although from appearances it was probable the child was still-born, and although *the birth was probably known to an accomplice. The prisoner and one Diana Thompson [*776] were indicted for the murder of the prisoner's bastard child; it was a seven months' child, and from the state in which it was found the probability was that it was still-born. D. Thompson, when questioned immediately after the child's birth, wholly denied it, though she must have known it. The prisoner threw the child down the privy; and the jury found this an endeavor to conceal the birth; and on a case reserved the Judges were unanimous that this was evidence of an endeavor to conceal a birth.^(l)

The sending for a female to attend at the beginning of the labor, and the fact its being known to the mother of the woman and others that she is pregnant, are a bar to a conviction for concealing the birth, but only evidence for the consideration of the jury. If the dead body of the child be buried, or otherwise disposed of by an accomplice of the mother in her absence, the accomplice acting as her agent in so doing, she may be convicted of endeavoring to conceal the birth. Upon an indictment for the murder of a child, it appeared that the male and female prisoners had been living together for some time, and that she was delivered of the child about six or seven in the morning, in the presence of the man, who was the father of it, and that the man very soon afterwards put the child (which had not been separated from the mother at birth) into a pan, carried it down stairs into the cellar, and threw the whole into the privy, the female remaining in bed upstairs; she had said she knew it was done: the fact of her being with child was some time before her delivery known by her mother, who lived at some distance, and it was apparent to other men: no female was present at the delivery; one had been sent for at the commencement of the labor, about twelve at night, but was so ill she could not attend: there were no clothes prepared, or other provision made, but the parties were in a state of the most abject poverty. The prisoners' counsel contended, upon the authority of *Peat's case*,^(m) and *Rex v. Higley*,⁽ⁿ⁾ that she could not be convicted of concealment: but it being doubted whether those cases would now be considered law, a case was reserved upon the questions, 1st, whether there was evidence to convict her as a principal; and 2d, whether, in point of law, the conviction was good, and the Judges were of opinion that the communication made to other persons was only evidence, but no bar; and that the conviction was good.^(o) Upon an indictment against a woman for endeavoring to conceal the birth of her child, and against a man for aiding her in so doing, it appeared that the woman was delivered of a child, which did not live more than a few minutes; the man, who cohabited with her, took the body almost immediately and buried it in a field, she not leaving her bed. The man had denied her pregnancy, and after the birth had denied that she had had a child. Platt, B., "If the woman concurred with the man in endeavoring to conceal the birth of the child, and, in pursuit *of that object, caused him, by her [*777] persuasion, to bury the body secretly, she is guilty of the endeavor by secret persuasion charged in this indictment, although the burial was effected by the hand of another, and not in her presence; and that being so, if the man, acting under such persuasion, and intending to conceal the birth of the child, buried the body of the child, he is guilty of aiding and abetting in the commission of the offence."^(p) In order to bring a case within the 9 Geo. 4, c. 31, s. 14, the disposal of the body of the child must have been complete. The prisoner was found going across a yard

^(k) 2 Hale 289.

^(l) *Rex v. Cornwall*, MS., Bayley, J., and R. & R. 336.

^(m) *Ante*, note (i).

⁽ⁿ⁾ *Ante*, note (h).

^(o) *Rex v. Douglas*, R. & M. C. C. R. 480; s. c., 7 C. & P. 644 (32 E. C. L. R.). As the offence is a misdemeanor, all taking part in it, although absent, are principals. See note ^(b) *ante*, p. 128. C. S. G.

^(p) *Rex v. Bird*, 2 C. & K. 817 (61 E. C. L. R.)

in the direction towards a privy with a bundle of cloth sewed up, with the body of a child in it, and was stopped; Gurney, B., interposed, and said, that the prisoner could not be convicted, the offence not being complete; "the body must be buried or otherwise disposed of, to bring the case within the Act. Here she was interrupted in the act, probably, of disposing of the body, but the act was incomplete."^(q) So where the dead body of a child was found, on the day of its birth, shut up in a trunk in the same room where the prisoner had been delivered, and which she had not quitted after the delivery, and there was some evidence to show that it was placed there for the purpose of concealment, it was contended that the prisoner could not have intended to let the body remain in the box, but must have meant, if she wished to conceal the birth, to remove it to some other place, and that, if that was the case, she was not guilty of an offence within this clause, and the preceding case was referred to; and Gurney, B., directed the jury to acquit, if they thought the prisoner had not put the body in a trunk, as in a place of ultimate disposal;^(r) and the same doctrine was followed in several subsequent cases.^(s) But these cases were afterwards overruled,^(t) and it was held that any concealment of the body, whether intended to be final or temporary, was within the Act.^(u)

In order to avoid all such questions in future, the words "any secret disposition of the dead body" were substituted for the words of the 9 Geo 4, c. 31, s. 14, "secret burying or otherwise disposing of the dead body;" and consequently the only question upon these words is, whether there was any secret disposition whatever of the dead body, and it is perfectly immaterial whether this disposition be temporary or permanent.

In order to bring a case within the clause, some act of disposal of the body must be done after the death of the child. Where on an indictment for endeavoring to conceal the birth of a child, it appeared that the prisoner was delivered in a privy; that the child dropped from her into the soil, and that there she left it, and the *778] jury thought that she went to the privy for the purpose of *being delivered there, and for the purpose thereby of concealing the birth; upon a case reserved, the Judges thought, upon the wording of the Act, it was necessary something should be done by the prisoner after the birth to bring the case within the Act.^(v) So in a similar case, where the prisoner had denied her pregnancy and the birth, and the body of the child was found in a privy; Patteson, J., told the jury that the offence was not merely the endeavoring to conceal the birth of a child, but the prisoner, to come within the meaning of the Act, must have endeavored to conceal the birth by secret burying, or otherwise disposing of the dead body of the child; and it was essential to the commission of this offence that she should have done some act of disposal of the body after the child was dead. If she had gone to the privy for another purpose, and the child came from her unawares, and fell into the soil and was suffocated, she must be acquitted, notwithstanding her denial of the birth of the child, because she did not come within the provisions of the Act, unless she had done something with the child after it was dead. If there had been evidence that the child was born elsewhere, and was, after it was dead, carried by her to this place, and thrown in, that would be a disposing of the body within the Act.^(w)

(q) *Rex v. Snell*, 2 Moo. & R. 44; *Reg. v. Waterage*, 1 Cox C. C. 338, s. p.

(r) *Reg. v. Watkins*, Monmouth Spr. Ass. 1841, MSS. C. S. G.

(s) *Reg. v. Ash*, 2 M. & Rob. 294; *Reg. v. Bell*, *Ibid.* (c); *Reg. v. Halton*, *Ibid.* (c); *Reg. v. Jones*, *Ibid.* (c).

(t) *Reg. v. Goldthorpe*, 2 M. C. C. R. 244; C. & M. 335 (41 E. C. L. R.).

(u) *Reg. v. Farnham*, 1 Cox C. C. 349; where that is stated by Parke, B., to have been the decision in *Reg. v. Goldthorpe*; and that case was followed in *Reg. v. Perry*, Dears C. C. 471, Pollock, C. B., dissentiente, where the dead body was found under the bolster, and the prisoner's head lying upon it; in *Reg. v. Gogarty*, 7 Cox C. C. 107, this case was acted upon, but in *Reg. v. Opie*, 8 Cox C. C. 332, Martin, B., agreed with Pollock, C. B., in dissenting from *Reg. v. Perry*.

(v) *Rex v. Wilkinson*, M. T. 1829, MSS., Bayley, J.; 3 Burn. J.; D. & W. 348.

(w) *Reg. v. Turner*, 8 C. & P. 755 (34 E. C. L. R.), Patteson, J. And where the evidence strongly tended to show that the child had been born in a privy, and there was no evidence to show any act done to it by the prisoner after its death, Coleridge, J., approved of the preceding case, and the counsel for the prosecution offered no evidence, as the case could not be distinguished from *Reg. v. Turner*: *Reg. v. Nash*, Hereford Spr. Ass. 1841, MSS. C. S. G. *Reg. v. Derham*, 1 Cox C. C. 56, s. p., per Coleridge, J.

It is a question for the jury in such a case whether the prisoner threw the dead body into the privy, or whether it fell from her into it.(x)

On an indictment for murder, it appeared that the child was discovered in an outhouse, alive but concealed from view by four bundles of rick-pegs lying horizontally in front and partly over it, but not touching it: the child was left as it was found, and about an hour afterwards the rick-pegs were found to have been partially removed, and placed on one side of the child, which was dead, and there was evidence to show that the prisoner alone had been in the outhouse during the hour. For the prosecution it was urged that if the prisoner after the death of the child recovered it, that would be a secret disposal of the body. Lord Campbell, C. J., "I have carefully examined the statute, and the facts with reference to the point suggested by the counsel for the prosecution. Any objection that might have arisen, that there was no attempt to conceal the dead body of the child, is, I think, removed in the manner suggested; for there cannot be any reasonable doubt that the prisoner visited the outhouse after the child was dead, and although she did not remove it, any replacing of the clothes or other things by which the body was concealed from view, would, I think, be an endeavor to conceal by a secret disposal of the dead body within the statute."(y)

But where the dead body was found on the floor of an attic, wrapped in bed-sheets which had been removed from the room *below; the head of the child separated from the body, and a knife lying near it, and the body was [779 in the middle of the room, Talfourd, J., held that there was no evidence of an endeavor to conceal.(z)

Where, on an indictment for murder, it appeared that the prisoner had denied that she was in the family way; but in consequence of a stain of blood having been discovered in her bed-room she was questioned, and then said that she had taken the child away, and put it in a sheet of water in a park, and she accompanied the constable thither, and pointed out where she had thrown in the body, and it was found wrapped in a towel and dressed in a cap and shirt; and she afterwards stated that she had put away the body in a box in her room for two days, after which she threw it into the water, and said she should have had it buried in the churchyard, only she was afraid of provoking her father: Coltman, J., told the jury that the offence contemplated by the Act was the endeavor to conceal the birth from the world at large, and not from any individual. The statute did not apply to individuals, but to society in general. If, therefore, the secret disposal of the dead body arose from an endeavor to conceal the birth from some private individual, and not from the world at large, then the offence contemplated by the statute had not been committed; and if the jury believed that the prisoner was really actuated by the dread of provoking her father's displeasure, she was not guilty of this offence.(a)

Where, on an indictment for concealing the birth, a surgeon stated that the remains were those of a child of which the mother must have gone from seven to nine months; Erle, J., told the jury that "this offence cannot be committed unless the child had arrived at that stage of maturity at the time of birth that it might have been a living child. It is not necessary that it should have been born alive, but it must have reached a period when, but for some accidental circumstances, such as disease on the part of itself, or of its mother, it might have been born alive. There is no law which compels a woman to proclaim her own want of chastity; and if she had miscarried at a time when the fœtus was but a few months old, and therefore could have had no chance of life, you could not convict her upon this charge. No specific limit can be assigned to the period when the chance of life begins; but it may, perhaps, be safely assumed that, under seven months, the great probability is that the child would not be born alive."(b)

Where on an indictment for endeavoring to conceal the birth of a child the evidence went to show that the woman had been delivered in the fourth or fifth month of her pregnancy, and that the fœtus was about the length of a man's finger,

(x) Reg. v. Coxhead, 1 C. & K. 623 (47 E. C. L. R.), Platt, B.

(y) Reg. v. Hughes, 4 Cox C. C. 447. *Sed quære.*

(z) Reg. v. Goode, 6 Cox C. C. 318.

(a) Reg. v. Morris, 2 Cox C. C. 489.

(b) Reg. v. Berriman, 6 Cox C. C. 388.

but had the shape of a child, and it was objected on the authority of *Reg v. Berri-man*, 6 Cox C. C. 388, that this fœtus was not within the statute; Martin, B., overruled the objection, stating that he saw nothing in the statute to limit the word "child" to a child likely to live, but that as soon as the fœtus had the outward appearance of a child it was sufficient. (bb)

Where on an indictment for endeavoring to conceal the birth of her child it was proved that, the prisoner appearing ill, her mistress sent for a doctor, who asked the prisoner if she had been confined, and she said she had been; and the doctor asked her what she had done with the child, and she said it was in a box in her bed-room, and he went to the room and found the child in an open box, having the cover lifted; Byles, J., told the jury that "there must be a secret disposition for the purpose of concealing the birth. The concealment must be by a secret disposition of the body, and a disposition could only be secret by placing it where it was not likely to be found. Secrecy was the essence of the offence. Could they say that an open box in the prisoner's bed-room was a secret disposition? It was for them to say, but in his opinion it was not." (cc)

An indictment for concealing the birth of a child must expressly allege the child to be dead, for it is only an offence to conceal the dead body. (c)

An indictment stated that the prisoner endeavored to conceal the birth of her child "by secretly disposing of the dead body;" and it was objected that the mode of disposal ought to be stated to enable the Court to see whether it amounted to the *780] complete disposition contemplated by the statute; one mode was specified in the Act, and any other ought to be stated; and Maule, J., *expressing a strong opinion that the objection was good, the counsel for the prosecution declined to press the case. (d)

An indictment alleging that the prisoner did cast the dead body of her child into the waters and filth in a privy, and "did thereby then and there unlawfully dispose of the dead body of the said child, and endeavor to conceal the birth thereof," is sufficient; for the word "thereby" applies both to the disposal and to the endeavor; and the indictment need not allege that the child died before, at, or after its birth. (e)

Where an indictment for murder was held bad, because it neither named the child nor stated that its name was unknown, it was held that the prisoner could not be convicted of endeavoring to conceal the birth of the child; for the indictment being bad for its professed purpose was bad altogether. (f)

Whether the prisoner were charged with the murder of her bastard child by the coroner's inquisition, or by a bill of indictment returned by the grand jury, she might have been found guilty, under the 43 Geo. 3, of endeavoring to conceal the birth, for the coroner's inquisition is a charge. (g)

Sec. VII.—Of Judgment and Execution.

THE judgment and mode of execution in cases of murder, is now regulated by the 24 & 25 Vict. c. 100.

Sec. 1. "Whosoever shall be convicted of murder shall suffer death as a felon." (h)

(bb) *Reg. v. Colmer*, 9 Cox C. C. 506.

(cc) *Reg. v. Sleep*, 9 Cox C. C. 559.

(c) *Rex v. Ann Davis*, Hereford Spr. Ass. 1829, Parke, J., MSS., C. S. G.; *Perkin's case*, 1 Lew. 44, per Parke, J. J.

(d) *Reg. v. Hounsell*, 2 M. & Rob. 292. But as the present clause has the words "any secret disposition," it should seem that an indictment in this form would be good; for every secret disposition is included. See *Holloway v. Reg.*, 17 Q. B. 317 (79 E. C. L. R.), ante, p. 605, where it was held that a count for aiding an escape was good, though it did not state the means used, because the words of the 4 Geo. 4, c. 64, s. 43, are "shall, by any means whatever, aid."

(e) *Reg. v. Coxhead*, 1 C. & K. 623 (47 E. C. L. R.), Platt, B.

(f) *Reg. v. Hicks*, 2 M. & Rob. 302, Coleridge and Maule, JJ.

(g) *Rex v. Maynard*, Mich. T. 1812, MS., Bayley, J., R. & R. 240; *Cole's case*, 3 Campb. 371; 2 Leach 1095; *Dobson's case*, 1 Lew. 43; *Moylan's case*, Ib. 44, and there seems no doubt that the prisoner might be so convicted under the new statute, for the prisoner is "tried for the murder" as much on the inquisition as on the indictment. C. S. G.

(h) This clause is taken from the 9 Geo. 4, c. 31, s. 3, and 10 Geo. 4, c. 34, s. 4 (1.).

Sec. 2. "Upon every conviction for murder the Court shall pronounce sentence of death, and the same may be carried into execution, and all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced and carried into execution, and all other proceedings thereupon and in respect thereof might have been had and taken, before the passing of this Act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon."

By the 4 Geo. 4, c. 48, s. 1, where any person was convicted of any capital felony, except murder, the Court, instead of pronouncing sentence of death, was empowered to order that sentence to be *recorded. By the 6 & 7 Will. 4, c. 30, s. 2, which applied both to England and Ireland, it was enacted, that "sentence of death may be pronounced after convictions for murder in the same manner, and the Judge shall have the same power in all respects as after convictions for other capital offences." In *Reg. v. Hogg*, (hh) Lord Denman, C. J., held, that under this clause sentence of death might be recorded on a conviction for murder. By the 7 Will. 4 & 1 Vict. c. 77, s. 3, whenever any offender is convicted before the Central Criminal Court of any crime punishable with death, that Court may direct judgment of death to be recorded. This clause clearly included murder. This clause, so far as it relates to murder, and the 6 & 7 Will. 4, c. 30, s. 2, are repealed by the 24 & 25 Vict. c. 95, and the present clause renders it imperative upon the Court to pass sentence of death on every person convicted of murder; it leaves, however, the time of passing the sentence, and all other proceedings, exactly as they were before this Act passed.(i)

Sec. 3. "The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been *last* confined after conviction, and the sentence of the Court shall so direct."(k)

Where two persons had been convicted of a barbarous murder in Pembrokeshire, at the Hereford assizes, being the next English county, and the indictment had been removed by *certiorari* into the Court of King's Bench, in order to argue some exceptions, which were overruled, that Court decided, after some question made whether the prisoners ought not to be sent back to Herefordshire to receive sentence, that they had the same jurisdiction over facts committed in Wales, as if committed in the next adjacent county in England; and the prisoners were therefore sentenced in the King's Bench, and were executed by the marshal.(l) But it seems to have been considered in a late case, that sentence pursuant to the statute 25 Geo. 2, c. 37, may be passed by a judge at *nisi prius* upon an indictment for murder removed by *certiorari* into the Court of King's Bench, and afterwards tried at *nisi prius*, without remitting the transcript of the record to the Court of Queen's Bench.(m)

On the application of the attorney-general, the Court of King's Bench will, as a matter of course, grant a *habeas corpus* to bring up prisoners convicted of murder and sentenced to death at the assizes, and a *certiorari* to remove into the King's Bench the record of the conviction and judgment. The prisoners were convicted of murder at Chester, and sentenced to be executed the next Friday; but a question arose, whether, since the 11 Geo. 4 & 1 Will. 4, c. 70, ss. 13, 14, and 15, the sheriffs of the city or *the sheriff of the county were bound to execute the sentence; and both parties refusing to do it, the prisoners had been from time to time respited. The attorney-general moved for a *certiorari* to remove the record of the conviction and the judgment, and for a *habeas corpus* to bring up the

(AA) 2 M. & Rob. 380.

(i) See further observations on this point, Greaves' Cr. Acts 30, 2d edit.

(k) This clause is founded on the 2 & 3 Will. 4, c. 75, s. 16, and 4 & 5 Will. 4, c. 26, s. 2.

(l) Athos' case (father and son) as cited in note (r): 1 Hale 463, where it is said that the prisoners were executed at Kennington gallows, near Southwark. In Taylor's case, 5 Burr. 2797, the reporter says that he remembers this case; and that the defendants, being in the custody of the marshal, were executed at St. Thomas a Waterings, near the end of Kent Street. And see also the case in 1 Str. 553, and 8 Mod. 136; and see the *Sis-singhurst-house case*, ante, p. 738, note (g).

(m) *Rex v. Thomas*, 4 M. & S. 447.

prisoners, in order that execution might be awarded by the King's Bench, and said he considered himself entitled to the writs as of right: but from respect to the Court, and for his own justification in the course he adopted, he stated the grounds of his application, and cited many cases to show that he was entitled to the writs as of course, and that the Court of King's Bench might direct execution to be done by the sheriff of the county of Chester, or those of the city, by the sheriff of Middlesex, or by the marshal of the King's Bench; and the writs were forthwith granted by the Court.(n)

When the prisoners were brought up and called upon to state if they had anything to say why execution should not be awarded, one of them prayed three days' time to answer; and the Court, in the exercise of its discretion, granted the application as to both.(o) When the prisoners were brought up again, one of them pleaded *ore tenus*,(p) that the King by proclamation in the "Gazette" had promised pardon to any person, except the actual murderer, who should give information, whereby such murderer should be apprehended and convicted; and that he, not being the actual murderer, had given such information, and thereby entitled himself to the pardon. The attorney-general demurred to the plea *ore tenus*, and the Court held that it was bad.(q) The Court in the same case also refused to hear an application from the sheriff of Middlesex, into whose custody the prisoners had been removed, praying that the order to do execution might not be made upon him.(r)

*783]

*CHAPTER THE SECOND.

OF MANSLAUGHTER.

In this species of homicide, malice, which has been shown(a) to be the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution.(b)

In order to make an abettor to a manslaughter a principal in the felony, he must be present aiding and abetting the fact committed.(c) It was formerly considered that there could not be any accessories before the fact in any case of manslaughter, because it was presumed to be altogether sudden, and without premeditation.(d) And it was laid down, that if the indictment be for murder against A., and that B. and C. were counselling and abetting as accessories before only (and not as *present* aiding and abetting, for such are principals), if A. be found guilty only of manslaughter, and acquitted of murder, the accessories before will be thereby discharged.(e) But the position ought to be limited to those cases where the killing is sudden and unpremeditated; for there are cases of manslaughter where there may be accessories.(f) Thus a man may be such an accessory by purchasing poison for a

(n) *Rex v. Garside*, 2 Ad. & E. 266 (29 E. C. L. R.); 4 N. & M. 333. See *Rex v. Astrobus*, 2 Ad. & E. 788.

(o) *Rex v. Garside*, *supra*.

(p) As he may do. See *Dean's case*, 1 Leach 476.

(q) *Rex v. Garside*, *supra*.

(r) *Ibid*. The Court, however, awarded execution to be done by the marshal of the Marshalsea, assisted by the sheriff of Surrey.

(a) *Ante*, p. 667, *et seq.*

(b) *Fost.* 290; 1 *Hale* 466. "Manslaughter is homicide, not under the influence of malice, but where the blood is heated by provocation, and before it has time to cool." Per *Taunton, J.*, *Taylor's case*, 2 *Lew.* 215.

(c) 1 *Hale* 438, 439, and see *ante*, p. 706, *et seq.*, as to what will be a presence, aiding and abetting.

(d) 1 *Hale* 437; 1 *Hawk. P. C.* c. 30, s. 3.

(e) 1 *Hale* 450. This is clearly *Bibithe's case*, 4 *Rep.* 43; *Moor* 461. See the observations on it, *Greaves' Cr. Acts* 43, 2d edit.

(f) *Reg. v. Gaylor, D. & B. C. C.* 288, *ante*, p. 60.

pregnant woman to take in order to procure abortion, and which she takes and thereby causes her death.(g) There may, however, be accessories after the fact in manslaughter.(h) If, therefore, upon an indictment against the principal and an accessory after the fact for murder, the offence of the principal be reduced to manslaughter, the accessory may be convicted as accessory to the manslaughter.(i)

The several instances of manslaughter may be considered in the following order:—

- I. Cases of provocation.
- II. Cases of mutual combat.
- *III. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or [784 to prevent a breach of the peace.
- IV. Cases where the killing takes place in the prosecution of some criminal, unlawful, or wanton act.
- V. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.

Sec. I.—Cases of Provocation.

WHENEVER death ensues from the sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity; and the offence will be manslaughter.(k)¹ It should be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the Court and Jury, unless they arise out of the evidence produced against him; as the presumption of law deems all homicide to be malicious, until the contrary is proved.(l)

It has been shown that the most grievous words of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods, will not free the party killing from the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intention to kill, or to do some great bodily harm, was otherwise manifested.(m) But if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear or strike him with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter.(n)

It is, indeed, said to have been held in one case that words of *menace of bodily harm* are a sufficient provocation to reduce the offence of killing to manslaughter;(o) but it has been considered that such words ought, at least, to be accompanied by some act denoting an immediate intention of following them up by an actual assault.(p)

But, though words of slighting, disdain, or contumely, will not of themselves make such a provocation to lessen the crime into manslaughter; yet, it seems that if

(g) Reg. v. Gaylor, D. & B. C. C. 288, ante, p. 60.

(h) 1 Hale 450; 1 East P. C. c. 5, s. 123, p. 353. This seems to have been doubted before the statute 1 Anne, stat. 2, c. 9, s. 1 (2 Hawk. P. C. c. 29, s. 24); but the effect of that statute seems to have removed the doubt. So much of the 1 Anne as relates to accessories is repealed by the 7 Geo. 4, c. 64.

(i) Rex v. Greenacre, 8 C. & P. 35 (34 E. C. L. R.), Tindal, C. J., Coleridge, and Colman, JJ.

(k) 1 Hale 466; 1 Hawk. P. C. c. 30; Fost. 290; 4 Blac. Com. 191; 1 East P. C. c. 5, s. 19, p. 232.

(l) Ante, p. 668.

(m) Ante, p. 711.

(n) Fost. 291; 1 East P. C. c. 5, s. 20, p. 233.

(o) Lord Morley's case, 1 Hale 455. The same case is mentioned in Kel. 55; but no such position is there stated.

(p) 1 East P. C. c. 5, s. 29, p. 233.

¹ Ex parte Moon, 30 Ind. 197; Perry v. State, 43 Ala. 21; Murphy v. State, 31 Ind. 311; Comm. v. Drum, 8 P. F. Smith 9; Maria v. State, 28 Tex. 698; State v. Anderson, 4 Mo. 265; State v. Massage, 65 N. C. 480; State v. Curry, 1 Jones (Law) 280; Ray v. State, 16 Geo. 223; Colton v. State, 31 Miss. 504; Quarles v. State, 1 Sneed 407; State v. Floyd, 6 Jones (Law) 392; Dennison v. State, 13 Ind. 510; State v. Hargeth, 65 N. C. 669; U. S. v. Mingo, 2 Curt. C. C. 1; Gann v. State, 30 Geo. 67; Creek v. State, 24 Ind. 151; State v. Decklotts, 19 Iowa 447; People v. Sanchez, 24 Cal. 17.

A. give indecent language to B., and B. thereupon strike A., but not mortally, and then A. strike B. again, and then B. kill A., that this is but manslaughter. The stroke by A. was deemed a new provocation, and the conflict a sudden falling out; and on these grounds the killing was considered as only manslaughter.(q)

*785] *Where an *assault* is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation.(r) So if A. be passing along the street, and B. meeting him (there being convenient distance between A. and the wall), take the wall of him and jostle him, and thereupon A. kill B., it is said that such justling would amount to a provocation which would make the killing only manslaughter. And again it appears to have been considered that where A. riding on the road, B. whipped the horse of A. out of the track, and then A. alighted and killed B., it was only manslaughter.(s)

But, in the two last cases, it should seem that the first aggression must have been accompanied with circumstances of great violence or insolence; for it is not every trivial provocation which, in point of law, amounts to an assault, that will of course reduce the crime of the party killing to manslaughter. Even a blow will not be considered as sufficient provocation to extenuate in cases where the revenge is disproportioned to the injury, and outrageous and barbarous in its nature; but, where the blow which gave the provocation has been so violent as reasonably to have caused a sudden transport of passion and heat of blood, the killing which ensued has been regarded as the consequence of human infirmity, and entitled to lenient consideration. Thus, where a woman, after some words of abuse on both sides, gave a soldier a box on the ear, which the soldier returned, by striking her on her breast with the pommel of his sword; and the woman then running away, the soldier pursued, and stabbed her in the back with his sword; Holt, C. J., at first considered it to be murder; but upon its coming out in the progress of the trial, that the woman had struck the soldier with a patten on the face with great force, so that the blood flowed, it was holden clearly to be no more than manslaughter.(t) In this case the smart of the soldier's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact.(u)

Where a man has been injuriously and without proper authority restrained of his liberty, the provocation has been considered sufficient to extenuate: as where a creditor placed a man at the chamber-door of his debtor, with a sword undrawn, to prevent him from escaping, while a bailiff was sent for to arrest him; and the debtor stabbed the creditor who was discoursing with him in the chamber.(v) And the same doctrine was held in a case where a serjeant in the army laid hold of a fifer, and insisted upon carrying him to prison: the fifer resisted; and whilst the serjeant had hold of him to force him, he drew the serjeant's sword, plunged it into his body, and killed him. The serjeant had no right to make the arrest, except *786] under the articles of war; and the articles of war *were not given in evidence. Buller, J., considered it in two lights: first, if the serjeant had authority; and, secondly, if he had not, on account of the coolness, deliberation, and reflection, with which the stab was given. The jury found the prisoner guilty: but the Judges were unanimous, that the articles of war should have been produced; and, for want thereof, held the conviction wrong.(w)

Where a man finds another in the act of adultery with his wife, and kills him or

(q) 1 Hale 455, where it is said, that this was held to be manslaughter, according to the proverb, "the second blow makes the affray;" and Lord Hale says that this was the opinion of himself and some others.

(r) Kel. 135; 4 Blac. Com. 191; 1 East P. C. c. 5, s. 20, p. 233.

(s) 1 Hale 455, Lanure's case.

(t) Stedman's case, Old Bailey, Apr. 1704, MS., Tracy and Denton, 57 Fost. 292; 1 East P. C. c. 5, s. 21, p. 234.

(u) Fost. 292. See the case more fully stated, *ante*, p. 713.

(v) Buckner's case, Sty. 467.

(w) Rex v. Withers, Mich. T. 1784, MS., Bayley, J., and 1 East P. C. c. 5, s. 20, p. 233. This case is also cited as to a point of evidence in Holt's case, 2 Leach 594.

her(x) in the first transport of passion, he is only guilty of manslaughter, and that in the lowest degree : (y) for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion.¹ But it has been already shown that the killing of an adulterer deliberately, and upon revenge would be murder.(z) So it seems that if a father were to see a person in the act of committing an unnatural offence with his son, and were instantly to kill him, it would only be manslaughter; but if he only hear it from others, and go in search of the person afterwards, and kill him, when there had been time for the blood to cool; it would be murder.(a)

Upon an indictment for murder it appeared that the prisoner, a soldier, was cohabiting with the deceased, and that he watched her go to the canteen of the barracks, and there drink with another soldier, upon which the prisoner went to his room in the barracks, and having got a cartridge from a pouch, and loaded his musket, he went to the barrack-yard and there meeting the deceased, he shot her, and she instantly died. In summing up, Rolfe, B., said, "*Primâ facie*, when any man takes away the life of another, the law presumes that he did it of malice aforethought, unless there be evidence to show the contrary. Such are the cases where there has been a quarrel, a fight, or dispute, and in the violence of such quarrel, fight or dispute, death has ensued. Undoubtedly we find other cases stated, and among them the case of adultery. It is said that if a man were to find his wife in the act of committing adultery and kill her, that would be only manslaughter, because he would be supposed to be acting under an impulse so violent that he could not resist it. But I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder: however strongly you may suspect it, it would most unquestionably be murder; and if I were to direct you, or you were to find otherwise, I am bound to tell you, either you or I would be grievously swerving from our duty."(b)

*There are instances, where slight provocations have been considered as [*787 extenuating the guilt of homicide, upon the ground, that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice. But, in cases of this kind, it must appear, that the punishment was not urged with brutal violence, nor greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life.(c) Thus, where A. finding a trespasser on his land, in the first transport of his passion beat him, and unluckily happened to kill him, it was holden to be manslaughter: but it must be understood that he beat him, not with a mischievous intention, but merely to chastise for the trespass, and to deter him from committing it again.(d) And of the case of the keeper of a park, who finding a boy stealing wood in his master's ground, tied him to a horse's tail,

(x) Pearson's case, 2 Lew. 216, Parke, B.

(y) Manning's case, T. Raym. 212; 1 Ventr. 159. And the Court directed the burning in the hand to be inflicted gently, because there could not be a greater provocation.

(z) *Ante*, p. 724.

(a) Reg. v. Fisher, 8 C. & P. 182 (34 E. C. L. R.), Park, J. A. J., Parke, B., and Law Recorder.

(b) Reg. v. Kelly, 2 C. & K. 814 (61 E. C. L. R.). It was not clear in the evidence in this case whether the prisoner loaded the musket immediately after he took the cartridge from his pouch, or whether he left the room and returned to it after taking the cartridge and before loading the musket; but Rolfe, B., observed that he thought it very immaterial as to the length of time that elapsed between the time when the prisoner saw the deceased and the soldier together and the time when he fired the shot; and equally little material whether the prisoner took the cartridge out of the pouch at the same time when he loaded the musket, or left the room between the one and the other, as, in point of law, there was nothing here to reduce the crime to manslaughter.

(c) Fost. 291; 4 Blac. Com. 200.

(d) Fost. 291; 1 Hale 472, *ante*, p. 717.

¹ State v. Samuel 3 Jones (Law) 74; Comm. v. Whitler, 2 Brews. 388. But only the finding of the parties in the act of adultery will reduce the killing to manslaughter: State v. John, 8 Ired. 330; State v. Avers, 64 N. C. 608; State v. Neville, 6 Jones (Law) 423.

and beat him, upon which the horse running away, the boy was killed, (e) it is said, that if the chastisement had been more moderate, it had been but manslaughter; for, between persons nearly connected together by civil and natural ties, the law admits the force of a provocation done to one to be felt by the other. (f) And *à fortiori*, if the master had himself caught the trespasser, and beat him in such a manner as showed a desire only to chastise and prevent a repetition of the offence, but had unfortunately, and against his intent, killed him, it would only have been manslaughter. (g)

Where a person, whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into an adjoining pond, in order to avenge the theft by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter; for, though this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecilities of human nature, where certain provocations are given. (h)

In a case where the prisoner's son, having fought with another boy and been beaten, he ran home to his father all bloody, and the father presently took a cudgel, ran three-quarters of a mile, and struck the other boy upon the head, upon which he died; it was ruled to be manslaughter, because done in sudden heat and passion: (i) but the true grounds of the judgment seem to have been that the accident happened by a single stroke given in heat of blood, with a cudgel, not likely to destroy, and that death did not immediately ensue. (k)

Several other cases are reported, in which the nature of the instrument used led to a lenient consideration of the homicide, on the ground that such instrument was not likely to endanger life. *Thus, where a man, who was sitting drinking in an alehouse, being called by a woman "a son of a whore," took up a broomstaff, and threw it at her from a distance, and killed her; the Judges were not unanimous, and a pardon was advised; and the doubt appears to have arisen upon the ground, that the instrument was not such as could probably, at the given distance, have occasioned death, or great bodily harm. (l) A similar doubt appears to have been entertained in the following case, which was stated in a special verdict. A mother-in-law employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted, threw a four-legged stool at the child, which struck her on the right side of the head, on the temple, and caused her death soon afterwards; the verdict stated, that the stool was of sufficient size and weight to give a mortal blow; but that the mother-in-law did not intend, at the time she threw the stool, to kill the child. (m) And in a case where the prisoner had struck his boy with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the master could not, from the size of the instrument he had made use of, have had any intention to take away the boy's life. (n)

In a case where the prisoner, who was a butcher, had employed a boy to tend some sheep, which were penned, who negligently suffered some of the sheep to escape through the hurdles, upon which the prisoner seeing the sheep get through, ran towards the boy, and taking up a stake that was lying on the ground, threw it at him, and with it hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died; Nares, J., told the jury to consider whether the stake, which, lying on the ground, was the first thing the prisoner saw in the heat

(e) *Halloway's case*, Cro. Car. 131; 1 Hale 453; 1 Hawk. P. C. c. 31, s. 42; *Fost.* 292, *ante*, p. 718.

(f) 1 East P. C. c. 5, s. 22, p. 237.

(g) *Ibid.*

(h) *Ferry's case*, Old Bailey, 1785; 1 Hawk. P. C. c. 31, s. 38; 1 East P. C. c. 5, s. 22, p. 236.

(i) *Rowley's case*, 12 Rep. 87; 1 Hale 453.

(k) *Fost.* 294, 295; Cro. Jac. 296; Godb. 182. See the case, *ante*, p. 717.

(l) 1 Hale 455, 456; 1 East P. C. c. 5, s. 22, p. 236.

(m) *Hazel's case*, 1 Leach 368. The question whether this was murder or manslaughter was considered as of great difficulty, and no opinion was ever delivered by the Judges.

(n) *Turner's case*, cited in Comb. 407, 408; and 1 Lord Raym. 143, 144; 2 Lord Raym. 1498. The clog was a small one; and Holt, C. J., said, that it was an unlikely thing to kill the boy.

of his passion, was, or was not, under the circumstances, and in the particular situation, an improper instrument for the purpose of correcting the negligence of the boy; and that, if they thought the stake was an improper instrument, they should further consider, whether it was probable that it was used with an intent to kill; if they thought it was, that they must find the prisoner guilty of murder; but, on the contrary, if they were persuaded that it was not done with an intent to kill, that the crime would then amount, at most, to manslaughter. The jury found it manslaughter.^(o) So on an indictment for wounding with a tin can, with which the prisoner had struck the prosecutor four times on the head, Alderson, B., directed the jury to consider, "whether the instrument employed was, in its ordinary use, likely to cause death; or, though an instrument unlikely, under ordinary circumstances, to cause death; whether it was used in such an extraordinary manner as to make it likely to cause death, either by continued blows or otherwise? *A tin can, in its ordinary use, was not likely to cause death or grievous bodily harm; but if the prisoner struck the prosecutor repeated blows on the head [*789 with it, you will say, whether he did this merely to hurt the prosecutor, and give him pain, as by giving him a black eye or bloody nose, or whether he did it to do him some substantial grievous bodily harm. When a deadly weapon, such as a knife, a sword, or gun, is used, the intent of the party is manifest; but where an instrument like the present is used, you must consider, whether the mode in which it was used satisfactorily shows that the prisoner intended to inflict some serious or grievous bodily harm with it."^(p)

Upon an indictment for murder, it appeared that a body of persons were committing a riot, and the constables interfering for the purpose of dispersing the crowd, and apprehending the offenders, resistance was made to them by the mob, and one of the constables was beaten severely by the mob; the different prisoners all took part in the violence used; some by beating him with sticks, some by throwing stones, and others by striking him with their fists; of this aggregate violence, the constable afterwards died. Alderson, B., "The principles on which this case will turn, are these:—if a person attacks another without justifiable cause, and from the violence used death ensues, the question which arises is, whether it be murder or manslaughter? If the weapon used were a deadly weapon, it is reasonable to infer that the party intended death; and if he intended death, and death was the consequence of his act, it is murder. If no weapon was used, then the question usually is, was there excessive violence? If the evidence as to this be such as that the jury think there was an intention to kill, it is murder; if not, manslaughter. Thus, if there were merely a blow with a fist, and death ensued, it would not be reasonable to infer that there was an intention to kill; in that case, therefore, it is manslaughter. But if a strong man attacks a weak one, though no weapon be used, or if, after much injury by beating, the violence is still continued, then the question is whether this excess does not show a general brutality, and a purpose to kill, and if so, it is murder. Again, if the weapon used be not deadly, *e. g.* a stick, then the same question as above will arise as to the purpose to kill; and in any case if the nature of the violence, and the continuance of it be such, as that a rational man would conclude that death must follow from the acts done, then it is reasonable for a jury to infer that the party who did them intended to kill, and to find him guilty of murder. Again, it is a principle of law, that if several persons act together in pursuance of a common intent, every act done in furtherance of such intent by each of them is, in law, done by all. The act, however, must be in pursuance of the common intent. Thus, if several were to intend and agree together to frighten a constable, and one were to shoot him through the head, such an act would affect the individual only by whom it was done. Here, therefore, in considering this case, you must determine, whether all these prisoners had the common intent of attacking the constables; if so, each of them is responsible for all the acts of all the others done *for that purpose; and if all the [*790

(o) Wiggs' case, reported in a note to Hazel's case, 1 Leach 378. If, however, the instrument used is so improper, as manifestly to endanger life, it seems that the intention of the party to kill will be implied from that circumstance: *ante*, p. 716.

(p) *Rex v. Howlett*, 7 C. & P. 274 (32 E. C. L. R.), Alderson, B.

acts done by each, if done by one man, would together show such violence, and so long continued, that from them you would infer an intention to kill the constable, it will be murder in them all. If you would not infer such purpose, you ought to find them guilty only of manslaughter."*(q)*

It has been before shown, that the plea of provocation will not avail in any case, where it appears that the provocation was sought for and induced by the act of the party in order to afford him a pretence for wreaking his malice;*(r)* and that even where there may have been previous struggling or blows, such plea cannot be admitted, where there is evidence of express malice.*(s)* It has also been observed, that in every case of homicide upon provocation, how great soever that provocation may have been, if there were sufficient time for passion to subside, and reason to interpose such homicide will be murder:*(t)* and it should always be remembered, that where a party relies upon the plea of provocation, it must appear, that when he did the fact, he acted upon such provocation, and not upon any old grudge.*(u)*

Sec. II.—Cases of Mutual Combat.

INSTANCES of mutual combat, in which, from the deliberate conduct of the parties, from some undue advantage taken by the party killing, or from the violent conduct which the party killing pursued in the first instance, the conclusion of malice has been drawn, and the killing has consequently amounted to murder, have been shown in the preceding chapter.*(v)* We have now to consider those cases where, upon words of reproach, or any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side: for if death happen under such circumstances, the offence of the party killing will amount only to manslaughter.*(w)*

If, therefore, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into a field and fight, and one of them be killed, it will be but manslaughter, because it may be presumed that the blood never cooled.*(x)* And it must be observed, with regard to sudden rencounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not heard: therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence.*(y)*

If two draw their swords upon a sudden quarrel, and one kills *the other, *791] it is only manslaughter. Sir Charles Pym with one party, and Mr. Walters with another party, dined at a tavern; and on coming out Sir Charles P. and Mr. W. quarrelled and drew their swords, and Mr. W. ran Sir Charles P. through the body, and he died. There was no evidence of any unfair advantage taken by Mr. W.; nor could the witnesses say more than that they heard them quarrelling, saw their swords drawn, and the sword through Sir Charles P.'s body; and it appeared that the parties did not know each other before. When Sir Charles P. fell, Mr. W. took him by the nape of the neck, dashed his head upon the ground, and said, "Damn you, you are dead!" Jenner, B., told the jury that this was only manslaughter: the jury, however, were disposed to find it murder, because of the dashing the head against the ground, &c.: but Allibone, J., repeated to them that it was manslaughter only, and they found accordingly.*(z)*

Lord Byron and Mr. Chaworth differed at a club as to the best means of procuring game. Mr. C. mentioned Sir C. Sedley's manors; Lord B. asked which they were; Mr. C. named Nuttall and another; Lord B. repeated his question: Mr. C. said, "Surely you will allow Nuttall to be Sir C. Sedley's: but if you have anything more to say, you will find Sir C. Sedley in Dean Street, and me in Berkeley Row."

(q) Macklin's case, 2 Lew. 225, Alderson, B.

(s) *Ante*, p. 718.

(u) 1 Hale 451; 1 East P. C. c. 5, s. 23, p. 239. See Mason's case, *ante*, p. 718, *et seq.*

(v) *Ante*, p. 727, *et seq.*

(z) 1 Hale 453; 1 Hawk. P. C. c. 31, s. 29; 3 Inst. 51.

(y) Fost. 138, 296.

(z) Rex v. Walters, 12 St. Tr. 113.

(r) *Ante*, p. 719.

(t) *Ante*, p. 724; Fost. 296.

(w) Fost. 295.

The conversation then dropped, and they stayed together at least half an hour; and Lord B. during that time conversed with a gentleman who sat next him: Mr. C. settled the bill, but made a mistake in marking the club-room, which might arise from agitation; he marked Lord B. as absent, though he was there. Mr. C. then went out, and a Mr. Donston followed him, of whom Mr. C. asked if he had been short with Lord B. in what he said last to him; to which Mr. Donston answered "No," and was returning into the room, when he met Lord B. coming out. Lord B. said to Mr. C., "I want to speak to you;" upon which they both called the waiter, and were shown into a small room, and the waiter left a candle in the room. Lord B. asked Mr. C. if he meant the conversation upon game to Sir C. Sedley or to him; upon which Mr. C. said, "If you have anything to say we had better shut the door, or we shall be heard," and he shut the door. On turning from the door he saw Lord B.'s sword half drawn, and Lord B. said, "Draw, draw!" Mr. C. drew, and thrust at Lord B.; and after one or two thrusts, Mr. C. received a mortal wound, of which he died. An indictment was preferred for murder; but upon the trial the peers (123) were unanimous that it was manslaughter only.^(a)

In a case where there had been mutual blows, and then, upon one of the parties being pushed down on the ground, the other stamped upon his stomach and belly with great force, and thereby killed him, it was considered to be only manslaughter. The deceased, who was a French prisoner, had stolen a tobacco-box from one of a party of French prisoners who were gambling, and was chastised by some of the party for his conduct, and a clamor was raised against him. As he passed the prisoner, who was sitting at a table and much intoxicated, the prisoner got up, and with great force pushed the deceased backwards upon the ground. The deceased got up again and struck the prisoner two or three blows with his [792] doubled fist in the face, and one blow in the eye; upon which the prisoner pushed the deceased backwards again in the same manner, and gave him, as he lay on his back upon the ground, two or three stamps with great force with his right foot on the stomach and belly; and afterwards, when the deceased arose on his seat and was sitting, gave him a strong kick in the face; the blood came out of the mouth and nose of the deceased, and he fell backwards, and died on the next day. The stamps upon the stomach and belly were the cause of his death. The prisoner was convicted of murder, on the ground that the violence which caused the death was not excused by heat of blood: but the learned Judge by whom the prisoner was tried, thinking that the case required further consideration, reserved it for that purpose, and the Judges were of opinion that it was only a case of manslaughter.^(b)

A. uses provoking language or behavior towards B., and B. strikes him, upon which a combat ensues, in which A. is killed, this is holden to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow.^(c) But it would be otherwise, if the terms were not equal, and if the party killing sought or took undue advantage; as if B., in the foregoing case, had drawn his sword, and made a pass at A., the sword of A. being then undrawn, and thereupon A. had drawn, and a combat had ensued, in which A. had been killed; for this would have been murder, inasmuch as B., by making the pass, his adversary's sword being undrawn, showed that he sought his blood.^(d) And A.'s endeavor to defend himself, which he had a right to do, will not excuse B.; but if B. had first drawn, and forborne till his adversary had drawn too, it had been no more than manslaughter.^(e)

And such an indulgence is shown to the frailty of human nature, that where two persons, who have formerly fought on malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appear by the whole circumstances of the case.^(f)¹

(a) *Rex v. Lord Byron*, 11 St. Tr. 1177.

(b) *Rex v. Ayes*, MS., Bayley, J., and R. & R. 166. (c) *Fost.* 295; 1 *Hale* 456.

(d) 1 *Hawk. P. C. c.* 31, s. 27; *Fost.* 295. And see *ante*, p. 731.

(e) 1 *Hawk. P. C. c.* 31, s. 28; *Fost.* 295.

(f) 1 *Hawk. P. C. c.* 31, s. 30; 1 *Hale* 452.

¹ If a prisoner, upon meeting her adversary unexpectedly, who had interrupted her upon lawful road and in her lawful pursuit, accepted the fight, when she might have avoided

Though, from the preceding cases, it appears that not only the occasion must be sudden, but that the party assaulted must be put upon an equal footing in point of defence at the onset, to save the party making the first assault and killing from the guilt of murder; yet if, on any sudden quarrel, blows pass without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it will only amount to manslaughter.^(g) But we have seen that the conclusion would be *793] *different if there were any previous intention or preparation to use such a weapon in the course of the affray.^(h)

John Taylor, a Scotch soldier, and two other Scotchmen, were drinking together in an alehouse, when some servants to the owner of the house, who were also drinking in another box abused the Scotch nation, and used several provoking expressions towards Taylor and his company, on which Taylor struck one of the servants with a small rattan cane, not bigger than a man's little finger, and another of the Scotchmen struck the same servant with his fist; the servant who was struck went out of the room into the yard, to fetch his fellow-servants to turn Taylor and his company out of the room; and, in the meantime, an altercation ensued between Taylor and the deceased, who was the owner of the house, but not the occupier, and who had come into the room after the servant went into the yard. He insisted that Taylor should pay for his liquor, and go out of the house; and Taylor, after some further altercation was going away, when the deceased laid hold of him by the collar, and said, "he should not go away till he had paid for the liquor;" and then threw him down against a settle. Taylor then paid for the liquor; whereupon the deceased laid hold of him again by the collar, and shoved him out of the room into the passage; and Taylor then said, "that he did not mind killing an Englishman more than eating a mess of crowdy." The servant who had been originally struck with the cane, then came and assisted the deceased, who had hold of Taylor's collar; and together they violently pushed him out of the door of the alehouse; whereupon Taylor instantly turned round, drew his sword, and gave the deceased the mortal wound. This was adjudged manslaughter.⁽ⁱ⁾

The prisoner, a shoemaker, lived near the deceased. One afternoon the prisoner, very much intoxicated by liquor, passed accidentally by the house of the deceased's mother, while the deceased was thatching an adjacent barn. They entered into conversation; but on the prisoner's abusing the mother and sister of the deceased, very high words arose on both sides, and they placed themselves in a posture to fight. The mother of the deceased, hearing them quarrel, came out of her house, threw water over the prisoner, hit him in the face with her hand, and prevented them from boxing. The prisoner went into his own house; and in a few minutes came out again, and sat himself down upon a bench before his garden gate, at a small distance from the door of his house, with a shoemaker's knife in his hand, with which he was cutting the heel of a shoe. The deceased having finished his thatching, was returning, in his way home, by the prisoner's house; and on passing the prisoner, as he sat on the bench, the deceased called out to him, "Are you not an aggravating rascal?" The prisoner replied, "What will you be, when you are got from your master's feet?" On which the deceased seized the prisoner by the collar, and dragging him off the bench, they both rolled down into the cartway. While they were struggling and fighting, the prisoner underneath, and the deceased upon him, the deceased cried out, "You rogue, what do you do with that knife in your *794] *hand?" and made an attempt to secure it; but the prisoner kept striking about with one hand, and held the deceased so hard with the other hand, that the deceased could not disengage himself. He made, however, a vigorous effort, and by that means drew the prisoner from the ground; and during this struggle the prisoner gave a blow, on which the deceased immediately exclaimed, "The rogue has

(g) 1 East P. C. c. 5, s. 26, p. 243.

(h) *Ante*, p. 731.

(i) *Rex v. Taylor*, 5 Burr. 2793; 1 Hawk. P. C. c. 31, s. 39,

it by passing on; the provocation being sudden and unexpected, the law will not presume the killing to have been upon the ancient grudge, but upon the insult given by stopping her on the way, and it would be manslaughter: *Copeland v. State*, 7 Humph. 479.

bbled me to the heart; I am a dead man;" and expired. Upon inspection, it appeared that he had received three wounds, one very small on the right breast; other on the left thigh, two inches deep, and half an inch wide; and the mortal wound on the left breast. After great argument and consideration, the Judges determined that the offence was only manslaughter.^(k)

It appears that the Judges thought in this case, that there was not sufficient evidence that the prisoner lay in wait for the deceased, with a malicious design to provoke him, and under that color, to revenge his former quarrel, by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by, neither provoked him by word or gesture. The deceased began first by ill language, and afterwards by collaring and dragging him from his seat and rolling him in the road. The knife was used openly before the deceased came by, and not concealed from the bystanders; though the deceased in his passion did not perceive it till they were laid down. And though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very sudden, the Judges thought that the offence only amounted to manslaughter; and the prisoner was recommended for a pardon.^(l)

Upon an indictment for maliciously cutting, it appeared that the prisoner and the prosecutor, both being intoxicated, a quarrel ensued; the prosecutor struck the first blow, and they fought for a few minutes, when the prisoner ran back a short distance, till the prosecutor pursued, and overtook him, on which the prisoner, who had taken out his knife in his retreat, gave the prosecutor a cut across the abdomen. *Per* J. A. J., "The question I shall leave to the jury is this, whether the prisoner ran back with a malicious intention of getting out his knife to inflict an injury on the prosecutor, and so to gain an advantage in the conflict? for if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, I am of opinion that if death had ensued, the crime would have been murder; or whether the prisoner, *bonâ fide*, ran away from the prosecutor with intention to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself? as in this latter case, if the prosecutor had been killed, the crime would have been manslaughter only."^(m)

On an indictment for manslaughter it appeared that the prisoner, a blind man, and the deceased were at a public house, and a dispute arose between them about a bet. The prisoner said he had won, and the deceased refused to pay; [795] the prisoner went to lay hold of him, and the deceased pushed him away; the prisoner went again to lay hold of the deceased, and was again pushed away; they then got hold of each other and there was a struggle, and they pushed about from side to side; no blows were struck, but there were three falls, and the deceased fell undermost each time, and the third time the prisoner's knees came upon the lower part of the stomach of the deceased, and ruptured the intestines, which rupture caused the death. Patten, J., told the jury that "all struggles in anger, whether by fighting, or wrestling, or any other mode—all kinds of contests in anger, are unlawful. And if you think the deceased's death was occasioned by an act of the prisoner in a struggle of that kind, I cannot tell you that it does not amount to manslaughter. If the prisoner was struggling, but did not attempt to throw him, I could tell you it is not a case of manslaughter; but it is for you to say whether it is the fact or not. If the prisoner laid hold of the deceased in anger, and grappled with him and threw him, then it is a case of manslaughter. If you can collect from the circumstances that the prisoner was pulled down against his will, and in consequence, fell upon the deceased, then he will not be guilty. But there does not seem anything in the evidence to show that the prisoner evinced any disposition to give up the contest; on the contrary, it appears that the contest was continued till the fall, which occasioned the death. You have been told by the counsel for the prisoner that you must be satisfied that the death was occasioned by the

^(k) *Rex v. Snow*, 1 Leach 151.

^(l) 1 East P. C. c. 5, s. 26, p. 245, who cites Sergeant Foster's MS.

^(m) *Rex v. Kessal*, 1 C. & P. 437 (12 E. C. L. R.); *Rex v. Taylor*, *supra*, note (i), and *v. Snow*, *supra* (^k), had been cited for the prisoner.

wilful act of the prisoner. In one sense of the word 'wilful' I agree with him. I take it for granted he does not mean by it malicious or intending to do injury, but that it must be an act of the will, and that it must be shown that the prisoner attempted to throw the deceased. They had no right to struggle in this way; if it had been an amicable contest in wrestling, to see who was the best man, that would be quite a different matter."⁽ⁿ⁾

It is said, that he shall be adjudged guilty of manslaughter, who, seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other.^(o) And it seems clear that if a master, maliciously intending to kill another, take his servants with him without acquainting them with his purpose, and meet his adversary, and fight with him, and the servants, seeing their master engaged, take part with him, and kill the other, they would be guilty of manslaughter only, but the master of murder.^(p) From this it follows, *a fortiori*, that if a man's servant or friend, or even a stranger, coming suddenly, and seeing him fighting with another man, side with him, and kill the other man, or seeing his sword broken send him another, wherewith he kills the other man, such servant, friend, or stranger, will be only guilty of manslaughter.^(q) But *796] this supposes that the person interfering does not know that the fighting is upon malice; for though if A. and B. fight upon malice, and C., the friend or servant of A., not being acquainted therewith, come in and take part against B., and kill him, this (though murder in A.) is only manslaughter in C.; yet it would be otherwise, if C. had known that the fighting was upon malice, for then it would be murder in both. If A., having been assaulted, retreats as far as he can, and then his servant kills the assailant, it will be only homicide *se defendendo*; but if the servant had killed him before the master had retreated as far as he could, it would have been manslaughter in the servant. And the law is the same in the case of the master killing the other in defence of the servant.^(r)

Where Ferdinando Cary and Oseband were in a field fighting upon a quarrel, and Sir M. Cary casually riding by, and seeing them in fight, and his kinsman one of them, rode in, drew his sword, thrust Oseband through and killed him; Coke, C. J., and the rest of the Court agreed that this is clearly but manslaughter in him, and murder in the other; for the one may have malice and the other not; he may come in by chance, and so kill the other.^(s)

If two persons be fighting, and another interfere with intent to part them, but do not signify such intent, and he be killed by one of the combatants, this is but manslaughter.^(t) And if a third person should take up the cause of one who has been worsted in mutual combat, and should attack the conqueror, and be killed by him, the killing would, it seems, be manslaughter. A. and B. were walking together in Fleet Street, and B. gave some provoking language to A., who, thereupon, gave B. a box on the ear, upon which they closed, and B. was thrown down, and his arm broken. Presently B. ran to his brother's house, which was hard by; and C., his brother, taking the alarm, came out with his sword drawn, and made towards A., who retreated ten or twelve yards; and C. pursuing him, A. drew his sword, made a pass at C., and killed him. A. being indicted for murder, the Court directed the jury to find it manslaughter, not murder, because it was upon a sudden falling out, not *se defendendo*, partly because A. made the first breach of the peace by striking B.; and partly because, unless he had fled as far as might be, it could not be said to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C., than to avoid him; and accordingly, at last, it was found manslaughter.^(u)

(n) Reg. v. Caniff, 9 C. & P. 359 (38 E. C. L. R.).

(o) 1 Hawk. P. C. c. 31, s. 35.

(p) 1 Hawk. P. C. c. 31, s. 55; 1 Hale 438; Plow Com. 100 b, Rex v. Salisbury.

(q) 1 Hawk. P. C. c. 31, s. 56; 1 East P. C. c. 5, s. 58, p. 290.

(r) 1 East P. C. c. 5, s. 58, p. 292, and the authorities there cited; 1 Hale 484. So Tremain says that a servant may kill a man to save the life of his master, if he cannot otherwise escape: 21 H. 7, c. 39; Plow. Com. 100; 1 MS. Sum.

(s) Rex v. Cary, 3 Bulst. 206; s. c., 1 Rolle R. 407, as Rex v. Carew.

(t) 1 East P. C. c. 5, s. 59, p. 292; Kel. 66.

(u) 1 Hale 482, 483. A case at Newgate, 1671.

Where upon an indictment for wounding under the 9 Geo. 4, c. 31, it appeared that the prisoner and the prosecutor's brother were fighting, and the prosecutor laid hold of the prisoner in order to prevent him from beating his brother, and held him down on a locker, but did not strike him, and the prisoner then stabbed him; [*797 the jury were directed, that if they were of opinion that the prosecutor did nothing more than was necessary to prevent the prisoner from beating his brother, the crime, if death had ensued, would have been murder; but if they thought that the prosecutor did more than was necessary to prevent the prisoner from beating the brother, or that he struck any blows, then it would have been manslaughter.(v)

A party of men were playing at bowls, when two of them fell out and quarrelled; and a third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died; and this was held manslaughter, because it happened upon a sudden motion in revenge of his friend.(w) But it must be intended that the two men who fell out were actually fighting together at the time; for if words only had passed between them, it would have been murder; nothing but an open affray or striving being such a provocation to one person to meddle with an injury done to another as will lessen the offence to manslaughter, if a man be killed by the person so meddling.(x)

Though Lord Hale and others appear sometimes to intimate a distinction between the interference of servants and friends, and that of a mere stranger, yet the limits between them do not appear to be anywhere actually defined. And it has been observed, that the nearer or more remote connection of the parties with each other seems to be more a matter of observation to the jury as to the probable force of the provocation, and the motive which induced the interference, than as furnishing any precise rule of law grounded on such a distinction.(y)

As a blow aimed with malice at one individual, and by mistake or accident falling upon another and killing him, will amount to murder;(z) so if a blow intended against A. and lighting on B. arose from such a sudden transport of passion as, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it should happen to kill B.(a)

A widow finding that one of her sons had not prepared her dinner as she had directed him to do, began to scold him, upon which he made her some very impertinent answers, which put her in a passion, and she took up a small piece of iron used as a poker, intending to frighten him, and seeing she was very angry he ran towards the door of the room, when she threw the poker at him, and it happened that the deceased was just coming in at the moment, and the iron struck him on the head, and caused his death; Park, J. A. J., told the jury, "No doubt this poor woman had no more intention of injuring this particular child than I have, but that makes no difference in law. If a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful, and an improper mode of correction—and strikes another and kills him, it is manslaughter, and there is no doubt, if the child at whom the blow was aimed had been struck, and died, it would *have been manslaughter- [*798 ter, and so it is under the present circumstances."(b)

A quarrel arose between some soldiers and a number of keelmen at Sandgate; and a violent affray ensuing, one of the soldiers was stripped, and a party of five or six came up and beat him cruelly. A woman called out from a window, "You rogues, you will murder the man!" The prisoner, who was a soldier, had before driven part of the mob down the street with his sword in the scabbard; and on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying, he would sweep the street; and, on their pressing on him, he struck at them with the flat side of the sword several times; upon which they fled, and he pursued them. The soldier who was stripped got up, and ran into a passage to save himself.

(v) *Rex v. Bourne*, 5 C. & P. 120 (24 E. C. L. R.), Park, J. A. J.

(w) 12 Rep. 87.

(x) See the opinion of the Judges in *Rex v. Huggett*, Kel. 59, and 1 East P. C. c. 5, s. 89, pp. 328, 329.

(y) 1 East P. C. c. 5, s. 58, p. 292.

(z) *Ante*, p. 739.

(a) *Fost.* 262.

(b) *Rex v. Conner*, 7 C. & P. 438 (32 E. C. L. R.), Park, J. A. J., and Gaselee, J.

The prisoner returned, and asked if they had murdered his comrade; and the people came back, and assaulted him several times, and then ran from him. He sometimes brandished his sword; and then struck fire with the blade of it upon the stones of the street, calling out to the people to keep off. At this time the deceased, who had a blue jacket on, and might be mistaken for a keelman, was going along about five yards from the soldier; but, before he passed, the soldier went to him, and struck him on the head with his sword, of which blow he almost immediately expired. It was the opinion of two witnesses that if the soldier had not drawn his sword, they would both of them have been murdered. The Judges were clearly of opinion that this was only manslaughter.(c)

Sec. III.—Cases of Resistance to Officers of Justice; to Persons acting in their Aid; and to Private Persons lawfully interfering to apprehend Felons, or to prevent a Breach of the Peace.

It has been before mentioned as a general rule, that where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance.(d) But this protection of the law is extended only to persons who have proper authority, and who use that authority in a proper manner;(e) wherefore questions of nicety and difficulty have frequently arisen upon the points of authority, legality of process, notice, and regularity of proceeding; and as the consequence of defects in any of these particulars is in general that the offence of killing the person resisted, is extenuated to manslaughter, it will be proper in this place to consider some of those questions which have met with judicial decision.¹

*799] A special constable, duly appointed under the 1 & 2 Will. 4, c. 41, remains a constable until his services are either determined *or suspended under sec. 9. Upon an indictment for the murder of J. Nutt, it appeared that Nutt was appointed on the 9th of February, 1832, by two justices, in writing, and under their hands, "to act as a special constable for the parish of St. George, until he received notice that his service is suspended or determined." Nutt was killed in conveying a prisoner to the station-house on the 16th of August, 1840; it was objected that Nutt did not continue a special constable till that time; but it was held that the appointment was indefinite in point of time, and remained valid and in force till it was either suspended or determined under sec. 9, and as Nutt's appointment was not shown to have been determined, he continued to be a special constable under the Act on the 16th of August, 1840, and had then, under sec. 5, all the ordinary powers of a common constable.(f)

The authority to arrest and imprison is greater in cases of felony than in matters of mere misdemeanor; and lest of all in civil suits.

If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors to prevent an escape; and in such cases, if fresh suit be made, and *a fortiori*, if hue and cry be levied, all who join in aid of those, who began the pursuit, will be under the same protection of the law; and the same rule holds, if a felon, after arrest, break away as he is being carried to gaol, and his pursuers cannot retake him without killing him.(g) Thus, where upon a robbery committed by several, the party robbed raised hue and

(c) Brown's case, 1 Leach 148; 1 East P. C. c. 5, s. 27, pp. 243, 246.

(d) *Ante*, p. 732.

(e) Fost 319.

(f) Reg. v. Porter, 9 C. & P. 778 (38 E. C. L. R.), Coleridge, J.

(g) 1 Hale 489, 490; 1 Hawk. P. C. c. 28, s. 11; Fost. 309; 1 East P. C. c. 5, s. 67, p. 298.

¹ Where one man is unlawfully restrained of his liberty, and kills the aggressor, the offence is only manslaughter, unless attended with circumstances of great cruelty and barbarity. But when the restraint is upon one man by another, so far as to prevent the former from doing what the latter may lawfully resist his doing, and the person restrained in that manner and for that cause kill the other, it is murder: *State v. Craton*, 6 Fred. 164. See also *Comm. v. Drew*, 4 Mass. 391; *Boyd v. State*, 17 Geo. 194; *Brooks v. Comm.* 11 P. F. Smith 352; *Comm. v. Casey*, 12 Cush. 246; *Comm. v. McLaughlin*, *Ibid.* 618.

cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry levied, are authorized by law to pursue and apprehend the malefactors; and that, although there were no warrant of a justice of the peace, to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons; and that, therefore, the killing of any of the pursuers was murder.^(h)

But where private persons use their endeavors to bring felons to justice, some cautions ought to be observed. In the first place, it should be ascertained that a felony has actually been committed, or that an actual attempt to commit a felony is being made by the party arrested; for if that be not the case, no suspicion, however well grounded, will bring the person so interposing within the protection, which the law extends to persons acting with proper authority.⁽ⁱ⁾ If it is clear that a felony has been committed, the next consideration will be, whether it was committed by the person intended to be pursued or arrested; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavoring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he should kill: or, on the other hand, [*800 to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter; the one not having used due diligence to be apprised of the truth of the fact, the other not having submitted and rendered himself to justice.^(k)

Upon an indictment for wounding it appeared that the prisoner had asked leave to take a basket of ashes from the prosecutor's ashpit, which he was permitted to do. As he was carrying away the ashes the prosecutor's apprentice saw the spout of a new tea-kettle which had stood on a shelf near the ashpit, among the ashes, and having given the alarm, the prosecutor seized the prisoner to detain him while a constable was sent for; the prisoner resisted, and in the struggle both fell, and the prisoner cut the prosecutor with a knife; a rattle of copper had been heard while the prisoner was at the ash-pit; it was objected that the prosecutor had no right to detain the prisoner. Alderson, B., "That will depend on whether the jury are satisfied that the prisoner had in fact stolen the tea-kettle. If he had stolen the tea-kettle, the prosecutor had a right to detain him, and this wounding will be felony."^(l)

Where Headley, being called up in the night by one of his servants, found that his stable had been attempted, and the door cut in such a manner that the bolt was exposed, and found the prisoner and another person concealed in the yard; and a steel instrument was also found, by which the door of the stable appeared to have been cut, and some housebreaking instruments were also found near the spot where the prisoner and his companion were concealed, and under these circumstances they had been apprehended and detained by Headley and his servant, and during such detention, and in the course of the same night, the prisoner had cut Headley's servant with a knife, a point was made that such cutting was not within the 43 Geo. 3, c. 58, on the ground that the prisoner was not lawfully in custody, there being no warrant, and an attempt to commit a felony being only a misdemeanor. But the Judges held that the prisoner being detected in the night attempting to commit a felony, might be lawfully detained without a warrant, until he could be carried before a magistrate.^(m)

These distinctions between officers and private persons proceed upon the principle

(h) Jackson's case, 1 Hale 464, ante, p. 736.

(i) 2 Inst. 52, 172; Fost. 318; Samuel v. Payne, Dougl. 359. And in Cox v. Worrall, 2 Bro. Jac. 193, it was holden that, without a fact, suspicion is no cause of arrest; and 8 Ed. 4, 3, 5 Hen. 7, 5, 7 Hen. 4, 35, are cited.

(k) 1 Hale 490; Fost. 318.

(l) Reg. v. Price, 8 C. & P. 282 (34 E. C. L. R.), Alderson, B.

(m) Rex v. Hunt, R. & M. C. C. 93, post, Book III., chap. x. See Rex v. Howarth, R. & M. C. C. R. 207, post, p. 816, particularly. In Ex parte Krans, 1 B. & C. 261 (8 E. C. L. R.) Abbott, C. J., said, "it is lawful for any person to take into custody a man charged with felony, and keep him until he can be taken before a magistrate."

of discouraging persons from proceeding to extremities upon their own private suspicion or authority. And upon this principle, it appears to have been considered, that a private person is not bound to arrest any one standing *indicted* for felony against whom no warrant can be produced at the time; and, therefore, the law does not hold out the same indemnity to such person, as it does to constables and other peace officers, who are *ex officio*, not merely permitted, but enjoined by law, to *801] arrest the parties, as well on probable suspicion of felony, as in case of *felony actually committed; and who may therefore well arrest upon the finding of the fact by the grand inquest on oath, which is suspicion grounded on high authority.(n) In this case, however, it might perhaps be well contended, that a person arresting another with the knowledge of the indictment having been found, cannot be properly considered as acting upon his own private suspicion or authority; and ought, therefore to have the same protection as the officer of justice. And it seems agreed that the indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon;(o) but it is said, that, if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out; otherwise, they will be guilty of manslaughter.(p)

Even in the case of a constable, it was formerly supposed to be necessary that there should have been a felony committed in fact, which the constable must have ascertained at his peril; but it has since been determined, that a peace officer may justify an arrest on a charge of felony, on reasonable cause of suspicion, without a warrant; although it should afterwards appear that no felony had been committed.(q) And where a private person suspecting another of felony, has laid his grounds of suspicion before a constable, and required his assistance to take him, the constable may justify killing the party, if he fly, and cannot otherwise be taken, though in truth he were innocent. But in such case, where no hue and cry is levied, the party suspecting ought to be present, as the justification must be that the constable did aid him in taking the party suspected; and the constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it.(r) "There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities."(s)

A magistrate has no authority to detain a person known to him till some other person makes a charge against him; before he detains a person known, he ought to have a charge actually made. Upon an indictment for false imprisonment of one Smyth, it appeared that Smyth went to a police office, where two magistrates were *802] sitting, to make a complaint, which was dismissed, and he *was retiring, when one of the magistrates said, "Stop him, shut the door, don't let that man escape. Where is the person that has got the information to lay against him for tampering with the due course of justice?" On which he was detained. For the defendants it was opened, that the magistrates were informed that an officer had a complaint to make against Smyth for having tampered with the due course of

(n) 2 Hale 84, 85, 87, 91, 93, *sed vide*; 1 Hale 489, 490. Hawkins, in alluding to the power of arrest by officers in this case, gives as a reason that there is a charge against the party on record: 1 Hawk. P. C. c. 28, s. 12. But upon this it is remarked that it does not readily occur why officers only can take notice of the charge on record: 1 East P. C. c. 5, s. 68, p. 300.

(o) Dalt. c. 170, s. 5; 1 East P. C. c. 5, s. 68, p. 301.

(p) 2 Hale 83, 92; and see 1 East P. C. c. 5, s. 68, p. 301, where it is said, that if the fact of the guilt of the party be necessary for their complete justification, it is conceived that the bill of indictment found by the grand jury would, for that purpose, be *prima facie* evidence of the fact. Certainly not. C. S. G. See *Rex v. Turner, R. & M. C. C. R. 347, ante*, p. 77.

(q) *Samuel v. Payne*, Dougl. 359.

(r) 2 Hale 79, 80, 91, 92, 93; 3 Inst. 221; 1 East P. C. c. 5, s. 69, p. 301.

(s) Per Lord Tenterden, C. J., *Beckwith v. Philby*, 6 B. & C. 638 (13 E. C. L. R.).

justice; and that the officer not being then at the office, Smyth was detained till he was sent for; and it was contended that, if a magistrate has a person before him charged with either felony or misdemeanor, he may either go into the case immediately, or detain the party to await his pleasure.^(t) Lord Tenterden, C. J.: "I am of opinion that the justices could not detain a person known to them till some other person should make a charge; I think, before they detain a known person, they should have a charge actually made."^(u)

Killing an officer will amount to murder, though he has no warrant, and was not present when any felony was committed, but takes the party upon a charge only; and though such charge does not in terms specify all the particulars necessary to constitute the felony. And it appears that it will be no excuse for killing an officer that such officer was proceeding to handcuff the party who was in his custody upon a charge of felony. The prisoner had produced a forged bank note; and from his conduct at the time, which justified a suspicion that he knew it to be forged, he was apprehended and taken to a constable, and delivered with the note to the constable; and the charge to the constable was, "because he had a forged note in his possession." After he had been in custody at the constable's some hours, the constable was handcuffing him to another man, when he pulled out a pistol and shot the constable. The constable was not killed, but the prisoner was indicted upon the 43 Geo. 3, c. 58; and it was urged on his behalf that the charge imported no legal offence, for unless he knew the note to be forged he was no felon; and if the charge was insufficient, the arrest was illegal; and killing the officer (if that had taken place) would have been only manslaughter. But the Judges were all of opinion that this defect in the charge was immaterial; that it was not necessary for such a charge to contain the same accurate description of the offence as would be required in an indictment; and that the charge in question must have been considered as imputing to the prisoner a guilty possession.^(w)

Where on an indictment for wounding with intent to prevent the lawful apprehension of the prisoner; the evidence was that the prosecutor, a police constable, went with a brother officer, both being in plain clothes, and with two other policemen in uniform, to a public-house, and told the prisoner that he wanted him on a charge of a highway robbery; he had no warrant, but from information he had received he thought it his duty to apprehend the prisoner. The prisoner asked him for further information relative to the charge, which he refused to give, and the prisoner then told *him that he would not go to the station-house unless he was told why, or [803 by what authority, he was apprehended, and he wounded the officer on his proceeding to apprehend him; it was objected that the prisoner must be aware at the time that the apprehension was lawful, and there was nothing here to show that that was the fact. Talfourd, J., held, that to support this charge it was enough that the prisoner was lawfully apprehended. If the apprehension was in fact lawful, the question whether or not the prisoner believed it to be lawful, could not be permitted to be considered. The prisoner was not to erect a tribunal in his mind to decide whether he was legally accused or not. He was taken into custody by an officer of the law, and it was his duty to obey the law.^(x)

Where an arrest by a constable would have been clearly illegal, an attempt to make it under the circumstances was held to be such a provocation as would have reduced the case to manslaughter if death had ensued.¹ On an indictment for stabbing with intent to murder, upon the 43 Geo. 3, c. 58, it appeared that the prisoner, a journeyman shoemaker, applied to his master for some money, which was refused until he should have finished his work; he applied again subsequently,

^(t) Broughton v. Mulshoe, Moor 408, was cited for this position. See Edwards v. Ferris, 7 C. & P. 542 (32 E. C. L. R.).

^(u) Rex v. Birnie, 5 C. & P. 206 (24 E. C. L. R.); 1 M. & Rob. 160, s. c., Lord Tenterden, C. J. The charge against Smith was only a misdemeanor, *quod nota*. C. S. G.

^(w) Rex v. Ford, MS., Bayley, J., and R. & R. 329.

^(x) Reg. v. Bentley, 4 Cox C. C. 406.

¹ A homicide, in resisting an illegal arrest, is manslaughter in the absence of proof of express malice: Roberts v. State, 14 Mo. 138; Ibid. 409.

was again refused, and became abusive, upon which his master threatened to send for a constable. The prisoner then refused to finish his work; and said that he would go up stairs and pack up his tools, and that no constable should stop him. He went up stairs, came down again with his tools, and drawing from the sleeve of his coat a naked knife, said he would do for the first bloody constable that offered to stop him; he was ready to die, and would have a life before he lost his own. He then made a flourishing motion with the knife, put it up his sleeve again, and left the shop. The master then applied to a constable to take the prisoner into custody: making no charge further than saying that he suspected the prisoner had tools of his, and was leaving his work undone. The constable said he would take him if the master would give charge of him; and they proceeded together to the yard of an inn, where they found the prisoner in a public privy, as if he had occasion there; the privy had no door to it. The master said, "That is the man, and I give you in charge of him;" upon which the constable said to the prisoner, "My good fellow, your master gives me charge of you, you must go with me." The prisoner, without saying anything, presented the knife, and stabbed the constable under the left breast, and attempted to make several other blows, which the constable parried off with his staff. The prisoner having been found guilty, upon a case reserved, the majority of the Judges^(y) held, that as an actual arrest would have been illegal, the attempt to make it when the prisoner was in such a situation that he could not get away, and when the waiting to give notice might have enabled the constable to complete the arrest, was such a provocation as, if death had ensued, would have made the case manslaughter only; and that therefore the conviction was wrong.^(z)

*804] *Killing an officer who attempts to arrest a man will be murder, though the officer had no warrant, and though the man has done nothing, for which he was liable to be arrested, if the officer has a charge against him for felony, and the man knows the individual to be an officer, though the officer do not notify to him that he has such a charge. Upon an indictment for maliciously wounding under the 9 Geo. 4, c. 31, it appeared that the prisoners had attempted to push a man into a ditch, upon which a scuffle ensued. The prisoners walked on, and the man complained to Harrison, a watchman, that they had attempted to rob him, desired him to arrest them, followed them till Harrison came up to them, and then said, sufficiently loud for them to hear, "That's them." There was no evidence of any attempt by the prisoners to rob the man, and the only person who saw the transaction negatived it. When Harrison came up to the prisoners, all he said to them was, "You must go back and come along with me." He did not explain why, nor was any charge against the prisoners stated. He was dressed in a watchman's coat, and had his lantern. W., one of the prisoners, said, "Keep off," and drew a sharp instrument from his side; the watchman said, "It's of no use, you must go back." A third man put himself in a position as if to strike the watchman, and W. made a spring at him, and caught one of the skirts of his coat; the watchman pulled out his staff, and turned at the prisoners, and they came at him. The watchman struck at W., and hit him on the thick part of the arm with his staff; W. immediately stabbed the watchman, and another of the prisoners followed the watchman, and made another blow at him with another knife. The place where the prisoners attempted to push the man into the ditch was within the limits of the hamlet, for which Harrison was watchman, but the place where he overtook the prisoners did not appear to be within those limits. The jury found that the prisoners knew Harrison to be a watchman. Bayley, B., doubted whether, as no felony had been committed, and there had been no breach of the peace in Harrison's presence, he could legally arrest, at least without first stating to the prisoners why he purposed to arrest, and he also doubted his power out of the limits of his hamlet; and he reserved the case for the opinion of the Judges, nine of whom held that the watchman could legally arrest the prisoners without saying that he had a charge of robbery against them, though the prisoners had in fact done nothing to warrant the

(y) Abbott, C. J., Graham, B., Bayley, J., Park, J., Garrow, B., Hullock, B., Littledale, J., and Gaselee, J.

(z) Holroyd, J., and Burrough, J., thought otherwise. *Rex v. Thompson*, 1 R. & M. C. C. 86.

rest; and that, had death ensued, it would have been murder. Four of the judges^(a) were of a contrary opinion.^(b)

A constable, or other known conservator of the peace, may lawfully interpose upon his own view to prevent a breach of the peace, and to quiet an affray; and if he or any of his assistants, whether commanded or not, be killed, it will be murder in all who take part in the resistance; there being either implied or express notification of the character in which he interposed.^(c) *It has, however, often been questioned, how far a constable or other peace officer is authorized to arrest a person upon a charge by another of a mere breach of the peace, after the fray is ended, and peace restored, without a warrant from a magistrate;^(d) and it is now settled that he has no such authority.

If a constable take a man without a warrant, upon a charge of ill-using a person, which ill-usage was not in the presence of the constable, and therefore gives him no authority to do so, and the prisoner runs away, and is pursued by J. S., who was with the constable all the time, and charged by him to assist, and the man kill J. S. to prevent his retaking him, it will not be murder, but manslaughter only; because the arrest was illegal, and J. S. ought to have known it was, and then his attempt to retake was illegal also: and that though the prisoner, while in custody of the constable, struck the man by whom the charge was given; because a blow whilst he was under the influence of the provocation from the illegal arrest caused by such man, would not justify the constable in detaining him: at least it will make no difference if the blow was not likely to be followed with dangerous consequences, nor make a new and distinct ground of detainer. Upon an indictment for maliciously attacking Walby, it appeared that a man travelling upon the highway told the constable that a man coming along the road had been ill-using him, and charged the constable, in the prisoner's hearing, to take the prisoner before a magistrate for so mistreating him; on which the constable, meeting the prisoner passing along the highway, ordered him to stop for insulting a man on the road, laid hold of him, tapped him on the shoulder, said he was his prisoner, and that he should take him to a magistrate, and ordered Walby to assist him, which W. did, and to which the prisoner submitted. No particulars of what the supposed ill-usage or insult consisted of appeared in evidence, *nor did they pass in the constable's view or hearing*, and therefore the apprehension and detainer appeared clearly thus far to have been unlawful. Afterwards, and whilst the prisoner was thus in custody, and before they found a magistrate, the prisoner struck the man, in the constable's presence, who had made the charge against him, and the constable then also told the prisoner he should take him before a magistrate; and some time afterwards, as they were proceeding along the magistrate's, the prisoner ran away, and attempted to escape, but was pursued by W. by the constable's order; and being overtaken by him, refused to stop, asking W. where his authority was, who said it was in his hand, alluding to a stick, which W. then had in his hand, and which the prisoner had given up to him at the commencement of the detainer; and without further information, when W. was going to take hold of him, the prisoner told him if he would not let him go he would stab him, and then gave him the cut in the face, for which he was indicted. Holroyd, J., doubted whether the effect of the first illegal custody might not operate upon the circumstances that subsequently took place, as a defence against the present indictment, either in rendering even the subsequent imprison-

(a) Bayley, B., Park, J., Littledale, J., and Bosanquet, J.

(b) *Rex v. Woolmer*, R. & M. C. C. R. 334. Lord Lyndhurst, and Taunton, J., were absent.

(c) 1 Hale 463; 1 Hawk. P. C. c. 31, s. 54; Fost. 310, 311; 1 East, P. C. c. 5, s. 71, p. 303.

(d) 1 East P. C. c. 5, s. 72, p. 305, who cites 2 Inst. 52; 2 Hawk. P. C. c. 12, s. 20, and 13, s. 8; 2 Lord Raym. 1301; *Strickland v. Pell*, Dalt. c. 1, s. 7; and says that there can be no such authority for the purpose of imprisoning or compelling the party to find sureties; though Lord Coke says (4 Inst. 265) that a constable may take surety of the peace by obligation. Lord Hale and some later authorities have holden that such officer may arrest the party upon the charge of another, though the affray be over, for the purpose of bringing him before a justice, to find sureties of the peace, or for appearance: 2 Hale 90; *Hancock v. Sandham* and others, 1785, and *Williams v. Dempsey*, 1787, cited in 1 East P. C., Id. 306. But see *ante*, p. 410.

ment tortious, or depriving the prisoner's conduct of the necessary legal ingredient of malice; and he reserved the case for the opinion of the Judges, who held that the original arrest was illegal, and that the recaption would have been illegal, and therefore the case would not have been murder if death had ensued.^(e)

Upon the trial of an action for an assault, it appeared that about midnight there was a disturbance, and ringing and knocking at many doors; that the disturbance continued about three hours, and about three o'clock in the morning the high constable asked the plaintiff to assist him in taking the parties into custody, and that the plaintiff went into the street, and that one White desired the defendant to go home, and the defendant replied, "If you do not leave me alone, I will knock your brains out, or give you a good ducking;" whereupon the plaintiff and White laid hold of the defendant to convey him to the cage; and when near the cage door, all three fell down; and it was imputed that at this time the defendant kicked the plaintiff on the leg, which was the injury for which the action was brought. Alderson, B., told the jury, "The questions for your consideration in this case are, whether the defendant was engaged in the affray; whether the constable had view of the affray while he was so engaged in it; and whether the affray was continuing at the time that he ordered the plaintiff to apprehend the defendant. If you are satisfied that all these points are made out, then, if the defendant assaulted the plaintiff while the plaintiff was endeavoring to apprehend him, such assault is unjustifiable, and the verdict ought to be for the plaintiff. If, however, there had been an affray, and that affray were over, then the constable had not, and ought not, to have the power of apprehending the persons engaged in it: for the power is given by law to prevent a breach of the peace; and where a breach of the peace had been committed, and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate. You must, therefore, before you find for the plaintiff, be satisfied that the defendant was a party to the affray, and that the affray was continuing at the time of his apprehension. The right of the plaintiff to apprehend the defendant is a serious question, involving the power of constables, and a wrong decision upon it would materially affect the liberty of the subject. The words used by the defendant would be no justification for his apprehension, unless he was a party to the affray; and you think that those words showed that the affray was still continuing. If the apprehension of the defendant were unlawful, he had, unquestionably, a right to struggle to get away; but, if the apprehension was lawful, he had no right to do so, and is answerable for all the consequences."^(f)

*807] Upon an indictment for maliciously stabbing with intent to murder, it appeared that the prisoner, about half-past ten at night, went to a house and demanded to see the servant girl. He was desired to quit the house, which he refused to do, and the prosecutor, who was a constable, was sent for. Before the prosecutor came, the prisoner left the house and went into the garden. In about twenty minutes the prosecutor came. The prisoner did nothing in his presence; but upon the prisoner saying, "If a light appear at the windows, I will break every one of them," the prosecutor took him into custody, and he afterwards cut the prosecutor with a knife; it was submitted that the arresting the prisoner was illegal, as nothing had been done by him in breach of the peace in the presence of the constable. Park, J., "I think that the detention of the prisoner by the prosecutor was illegal. There was no breach of the peace when the prisoner was taken into custody."^(g)

Upon an indictment for assaulting the prosecutor, an officer in the police, in the execution of his duty, it appeared that the prosecutor was informed that a disturbance was going on in Patfield, and went thither, and found the prisoner's wife sitting crying under a hedge opposite their cottage, and he went with her into the cottage, and found the prisoner intoxicated, but sufficiently sober to know what he was doing. In his hearing, the wife stated to the prosecutor that the prisoner had knocked her down and beaten her shamefully. One Cook was present, and stated that he had seen the prisoner knock his wife down and jump upon her, and Cook

(e) *Rex v. Curvan*, R. & M. C. C. R. 132.

(f) *Cook v. Nethercote*, 6 C. & P. 741 (25 E. C. L. R.).

(g) *Rex v. Bright*, 4 C. & P. 387 (19 E. C. L. R.).

had, in fact, seen this done a short time previously. The prisoner said nothing on hearing these statements. Prosecutor left the cottage, and the prisoner and his wife in it. The prisoner then closed the shutters, and locked the door. The prosecutor heard the prisoner using threatening language to his wife, and saw her run out of the cottage. The prisoner said he would lock her out all night, and thereupon she returned into the cottage. The prosecutor heard the prisoner again use very violent language, and opened the shutters, and saw the prisoner take up a shovel and hold it in a threatening attitude over his wife's head, and heard him say, "If it was not for the bloody policeman outside I would split your head open, for 'tis you that sent for the policeman." The prisoner was near enough to have struck his wife when he raised the shovel. Shortly afterwards he desired her to go to bed, and she replied, "I can't go up stairs in this state; I don't know one hour from another when I might be murdered." Prisoner said with an oath, "I'll leave you altogether," and went out. This was about twenty minutes after he had raised the shovel. He went on the highway towards his father's house, and when he had walked about seventy yards from his cottage the prosecutor took him into custody. He had no warrant. Cook had been with the prosecutor all the time these things occurred, and insisted on his taking the prisoner into custody, because he thought it would not be safe to let him go back to his wife that night. The prisoner, on being taken into custody, assaulted the prosecutor. And, upon a case reserved, it was held that the prosecutor was in the execution of his duty *when he was assaulted. It is not necessary that a policeman should arrest a man at the very moment he sees an assault committed; it is quite sufficient if he arrests recently after the right to do so arises. It cannot be said, that because the prisoner was going away from the house, the constable was bound to come to the conclusion that the danger was over. As a conservator of the peace, he had authority to take the prisoner into custody, he having so recently witnessed the commission of an assault. Here there was a continuing danger and a continuing pursuit, and it was the duty of the policeman to exercise his authority in this case, in order to prevent a further breach of the peace, and also that the prisoner might be dealt with according to law in respect of the assault he had so recently committed. (h)

There is no distinction as to the power to apprehend between one kind of misdemeanor and another, as between a breach of the peace and fraud, but the rule is general, that in all cases of misdemeanor there is no power to apprehend after the misdemeanor has been committed. To trespass for false imprisonment, the defendant pleaded that an evil-disposed person, to him unknown, had obtained goods from him by false pretences; that the plaintiff afterwards passed by the defendant's shop, and was pointed out to him by his servant as the person who had so obtained the goods, whereupon the defendant, vehemently suspecting that the plaintiff was the person who had committed the offence, gave charge of him to a police officer to be taken before a magistrate; and upon this plea the defendant had a verdict. It was contended, in showing cause against a rule for judgment *non obstante veredicto*, that offences partaking of the nature of a felony, as a fraud, which borders on a theft, might come under a different rule from misdemeanors, which merely constituted a breach of the peace. [Lord Tenterden, C. J.: "The distinction between felony and misdemeanor is well known and recognized, but is there any authority for distinguishing between one kind of misdemeanor and another?"] It was admitted that there was no direct authority, but 2 Hawk. P. C. c. 12, s. 20, and 2 Hale 88, 89, were relied upon. Lord Tenterden, C. J.: "The instances in Hawkins are where the party is caught in the fact, and the observation there added assumes that the party was guilty. Here the case is only of suspicion. The instances in Hale, of arrest on suspicion after the fact is over, relate to felony. In cases of misdemeanor, it is much better that the parties should apply to a justice of peace for a warrant than take the law into their own hands, which they are too apt to do. The rule must be made absolute." (i)

Nor does the London Police Act, 2 & 3 Vict. c. 94, s. 8, empower a constable of

(h) Reg. v. Light, D. & B. C. C. 332.

(i) Fox v. Gaunt, 3 B. & Ad. 798 (23 E. C. L. R.).

the city of London to apprehend a person without a warrant, on suspicion that he had previously committed a misdemeanor. *(k)*

*809] *If one menace another to kill him, and complaint be made thereof to the constable forthwith, such constable may, in order to avoid the present danger, arrest the party, and detain him till he can conveniently bring him to a justice of the peace. *(l)*

It has been said, that if peace officers meet with *night-walkers* or persons unduly armed, who will not yield themselves, but resist or fly before they are apprehended, and who are upon necessity slain, because they cannot otherwise be overtaken, it is no felony in the officers or their assistants, though the parties killed were innocent. *(m)* But it is doubted whether, at this day, so great a degree of severity would be either justifiable or necessary (especially in the case of bare flight), unless there were a reasonable suspicion of felony. *(n)* And it has been considered that the taking up of a person in the night as a night-walker and disorderly person, though by a lawful officer, would be illegal, if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer. *(o)* Where a private Act authorized watchmen to apprehend night-walkers, malefactors, and suspicious persons, and a watchman apprehended a gentleman returning from a party for uttering some words in a street at night, it was held that the apprehension was illegal, for by night-walkers is meant such persons as are in the habit of being out at night for some wicked purpose. *(p)* So the words "suspected person or reputed thief" in the 3 Geo. 4, c. 55, s. 21 (the former London Police Act), were directed against persons of *general* *suspicious character, and frequenting places where they might be reasonably suspected of resorting for felonious purposes. *(q)*

(k) Bowditch v. Balchin, 5 Exch. R. 378. The misdemeanor was perjury. The section empowers "any person belonging to the said police force to take into custody, without warrant, all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or intending to commit any felony, misdemeanor, or breach of the peace," &c.; and the Court held that the words "loose, idle, and disorderly persons," overrode the whole clause.

(l) 2 Hale 88. This power seems to be grounded on the duty of the officer to prevent a probable felony, and must be governed by the same rules which apply to that case; though Dalton (ch. 116, s. 3) extends it even to the prevention of a battery. Vide 1 East P. C. c. 5, s. 72, p. 306.

(m) 2 Hale 89, 97. The statute 2 Edw. 3, c. 3, and 5 Edw. 3, c. 14, relate to the apprehension of night-walkers, and persons unduly armed. But the latter Act is repealed by the 19 & 20 Vict. c. 64. And see Lawrence v. Hedger, 3 Taunt. 14.

(n) 1 East P. C. c. 5, s. 70, p. 303. Both the statutes mentioned in the last note were levelled against particular descriptions of offenders who roved about the country in bodies, in a daring manner. See Reg. v. Dadson, 2 Den. C. C. 35, *post*.

(o) Tooley's case, 2 Lord Raym 1296. There is a MS. note of this case given by the editor of Lord Hale (2 Hale 89), which states Lord Holt to have said that of late constables had made a practice of taking up people only for walking the streets: but that he knew not whence they had such authority. But see Lawrence v. Hedger, 3 Taunt. 14, where it was holden that watchmen and beadles have authority, at common law, to arrest and detain in prison, for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of felony having been committed. And it has been said by Hawkins and others, that every private person may, by the common law, arrest any suspicious night-walker, and detain him till he give a good account of himself: 2 Hawk. P. C. c. 13, s. 6, c. 12, s. 20; and it has been held that a person may be indicted for being a common night-walker, as for a misdemeanor: 2 Hawk. P. C. c. 12, s. 20; Latch. 473; Poph. 208. By the Vagrant Act, 5 Geo. 4, c. 83, s. 6, it is made lawful for any person whatsoever to apprehend any person who shall be found offending against that Act, and forthwith to take and convey him or her before some justice of the peace, to be dealt with in such manner as is thereinbefore directed, or to deliver him or her to any constable or other peace officer of the place where he or she shall have been apprehended, to be so taken and conveyed as aforesaid: and it further enacts, that in case any constable or other peace officer shall refuse, or wilfully neglect, to take such offender into custody, and to take and convey him or her before some justice of the peace, or shall not use his best endeavors to apprehend and to convey before some justice of the peace, any person that he shall find offending against the Act, it shall be deemed a neglect of duty in such constable or other peace officer, and he shall, on conviction, be punished in such a manner as is thereinafter directed.

(p) Watson v. Carr, 1 Lewin 6, Bayley, J.

(q) Cowles v. Dunbar, Moo. & M. 37, Lord Tenterden, C. J.

Questions not unfrequently arise as to the authority of constables and other officers to interfere with persons in inns or beer-houses.^(r) It is no part of a policeman's duty to turn a person out of an inn, although he may be conducting himself improperly there, unless his conduct tends to a breach of the peace. The plaintiff was using abusive language in an inn to one of the persons there, on which the owner of the inn sent for a policeman, who by his direction, took the plaintiff to the station-house. Pattenon, J.: "The landlord of an inn or public-house, or the occupier of a private house, whenever a person conducts himself as the plaintiff did, is justified in telling him to leave the house, and, if he will not do so, he is justified in putting him out by force, and may call in his servants to assist in so doing. He might also authorize a policeman to do it, but it would be no part of a policeman's duty as such, unless the party had committed some offence punishable by law; but although it would be no part of the policeman's duty to do this, it might be better in many cases that a policeman should assist the owner of the house in a matter of this kind, as he would probably get the person out of the house with less disturbance, than the owner himself could do."^(s) Neither is it the duty of a policeman to prevent a person from going into a room in a public-house, unless a breach of the peace was likely to be committed by such person in that room. Upon an indictment for assaulting a policeman in the execution of his duty, it appeared that the policeman was called into a public-house to put an end to a disturbance which the defendant was making; he and the landlady were at high words; W. L. interfered, and the defendant was in the act of squaring at him when the policeman desired the defendant not to make a disturbance; the defendant, who was at the side of the bar, then attempted to go into the parlor in which a person was sitting: as the defendant attempted to get into the parlor, the policeman collared him, and prevented his going in; he then struck the policeman; neither the landlord nor landlady had desired the policeman to turn the defendant out of the house. Parke, B.: "The policeman had a right to be in the house without being called upon either by the landlord or landlady to interfere, but under the circumstances he had no authority to lay hold of the defendant, unless you are satisfied that a breach of the peace was likely to be committed by the defendant on the person in the parlor; and if you think it was not, it was no part of the policeman's duty to prevent the defendant from going into the parlor."^(t)

But if a person make such a noise and disturbance in a public-house as would create alarm and disquiet the neighborhood, this would be such a breach of the peace as would justify a policeman in taking the party into custody, provided it took place in the presence of the policeman. To trespass for false imprisonment [811 the defendant pleaded that he was possessed of a public-house, and that the plaintiff was in the house, and conducted himself in a riotous, quarrelsome, disorderly, and uncivil manner, and committed a breach of the peace therein; that the plaintiff was requested to depart, and refused, whereupon the defendant gently laid his hands on the plaintiff to remove him, and because the plaintiff violently and forcibly resisted the said removal, the defendant gave him in charge to a watchman, who saw the said breach of the peace: it appeared that a watchman, who was on duty, in consequence of hearing a noise, went into the defendant's public-house, where he found the plaintiff and five or six other young men making a disturbance; he led the plaintiff out of the house, and about fifteen yards along the street, and then let him go; he said he would go back and have his revenge, and went towards the public-house; the watchman went round his beat, and on his return he heard a person at the door of defendant's house cry "Watch," and he in consequence went in and found the plaintiff sitting down, he then sprung his rattle, and the defendant tried to put the plaintiff out of the house, the plaintiff having hold of the defendant's collar to resist being put out, on which the watchman took the plaintiff into custody,

(r) The 18 & 19 Vict. c. 118, s. 4, makes it lawful for "any constable at any time to enter into any house or place of public resort in England or Wales for the sale of beer, wine, spirits, or other fermented or distilled liquor," and imposes a penalty on persons refusing to admit such constable.

(s) *Wheeler v. Whiting*, 9 C. & P. 262 (38 E. C. L. R.), Pattenon, J.

(t) *Reg. v. Mabel*, 9 C. & P. 574 (38 E. C. L. R.), Park, B.

and took him to the watchhouse. Parke, B.: "There is no doubt that a landlord may turn out a person who is making a disturbance in a public-house, though such disturbance does not amount to a breach of the peace. To do this the landlord may lay hands on him, and in so doing the landlord is not guilty of any breach of the peace. But if the person resists, and lays hands on the landlord, that is an unjustifiable assault upon the landlord; and, if the watchman in this case saw such assault committed, that would make out the plea. There might, it is true, be a sufficient breach of the peace to justify the defendant, as the landlord of the house, in giving the plaintiff into custody without this assault; and even if there was no assault at all. For if the plaintiff made such a noise and disturbance as would create alarm and would disquiet the neighborhood, and the persons passing along the adjacent street, that would be such a breach of the peace as would not only authorize the landlord to turn the plaintiff out of the house, but it would also give the landlord a right to have the plaintiff taken into custody, if this occurred in the view of the watchman: the watchman has said he saw the piece of work the first time he went into the house. Now, if the plaintiff and others were then conducting themselves in a manner calculated to disturb the neighborhood, this would justify the watchman in turning the plaintiff out, and in taking him into custody, if on his going to the house the second time he found the plaintiff still there."^(u) Where on an indictment for assaulting a constable in the execution of his duty it appeared that some persons were drinking at a late hour of the night in a barn attached to a public-house, and the landlord desired the constable to clear them out, and while he was doing so the prisoners assaulted him; Bramwell, B., said: "The people were doing nothing illegal nor contrary to any Act of Parliament, and therefore the constable was not acting in the execution of his *duty* as such, although what he did *812] may have been very *laudable and proper. It would have been otherwise had there been a disturbance of the public peace, or any danger of a breach of the peace."^(v)

Where in an action for assaulting the plaintiff and giving him into custody, the defendant justified having done so, and his witnesses stated that the plaintiff, who was the butler of the defendant, was making a great noise in the defendant's house, and had quarrelled with the coachman, and that when the defendant came down stairs the plaintiff was abusive to him and violent in his manner, and making a great noise, and laid hold of him, and they struggled together; Lord Campbell, C. J., directed the jury, that if a person came into a house, or was in it, and made a noise and disturbed the peace of the family, although no assault had been committed, the master of the house might turn him out or call a policeman to do so; and if the plaintiff had assaulted his master and misconducted himself in the manner described by the defendant's witnesses, the defendant would be justified in giving the plaintiff in charge to the policeman, to be dealt with according to law.^(w)

It has sometimes happened that peace officers have taken opposite parties in an affray, and the death of one of them has ensued; as in the case put by Lord Hale, where A. and B., being constables of the vill of C.; and a riot or quarrel happening between several persons, A. joined with one party, and commanded the adverse party to keep the peace, and B. joined with the other party, and in like manner commanded the adverse party to keep the peace, and the assistants and party of A. in the tumult killed B.^(x) This, Lord Hale says, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and each had as much authority as the other: ^(y) but upon this it has been remarked, that perhaps it had been better expressed to have said, that inasmuch as they acted not so much with a view to keep the peace, as in the nature of partisans to the different parties, they acted altogether out of the scope of their characters as peace officers, and without any authority whatever.^(z) And in another case, Lord Hale says, that if the sheriff have a writ of possession against the house and lands of A., and A., pretending it to be a riot upon him, gain the constable of the vill to assist him, and to

^(u) Howell v. Jackson, 6 C. & P. 723 (25 E. C. L. R.), Parke B.

^(v) Reg. v. Preble, 1 F. & F. 325. The defendants were convicted of a common assault.

^(w) Shaw v. Chairitie, 3 C. & K. 21.

^(x) 1 Hale 460.

^(y) Id. Ibid.

^(z) 1 East P. C. c. 5, s. 71, p. 304.

suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the King's writ.(a)

There is a late case, which appears to have been ruled upon the foregoing principles. Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected and endeavored by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs having been violently assaulted, struck one of the assailants, a *woman, and, as it [*813 was thought for some time, had killed her: whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which, he proceeded to take them into custody upon the charge of murder; and at first, offered to take care also of their prisoner, but the latter was soon rescued from them by the surrounding mob. The woman having recovered, the bailiffs were released by the constable the next morning. Upon an indictment for an assault and rescue, Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly.(b)

Where private persons interpose in the case of sudden affrays to part the combatants, and prevent mischief, and give express notice of their friendly intent, it will be murder in either of the persons making the affray, who shall kill the party so interposing: but it will not be murder in the other affrayer, unless he also strike the party.(c)

Some late statutes(d) give authority not only to constables but also to private persons to apprehend persons "*found committing*" certain offences specified in such statutes; in these cases it is requisite that the authority to apprehend should be strictly pursued. Thus where upon an indictment for maliciously cutting a farmer's servant, it appeared that the farmer had directed the servant to apprehend the prisoner for stealing turnips, and the servant very soon after this found the prisoner in a field adjoining his master's turnip field, with a quantity of turnips in his possession, and took him into custody, and proceeded with him first to his master's house, and thence to the house of the constable; but on their way there the prisoner said he would go no farther, and drew a knife and wounded the servant: it was contended that the servant had a right to apprehend the prisoner under the 7 & 8 Geo. 4, c. 29, s. 63; but it was held that by that section the owner of the property or his servants were only empowered to apprehend persons *found committing* offences against the Act, and to take them *forthwith* before a justice of the peace. That in this case the prisoner was not found committing the offence, but was in the next field; which brought the case neither within the letter nor the spirit of the enactment. Again, by this enactment, the owner or servant who apprehends must take the offender forthwith before a justice. Now the prisoner was actually taken to the master's, and was about to be taken to the constable's, all which was clearly wrong.(e)

So where on an indictment for the murder of a person, who was assisting a policeman to take a prisoner to the station-house, it appeared that the policeman apprehended the prisoner at night, and that he had concealed on his person new potatoes, fresh dug *out of the ground, and with moist earth upon them, [*814 and which did not appear to have been dug out of the ground more than half an hour, and the policeman stated that he had been informed that gardens had been robbed, and that he apprehended the man on suspicion of stealing the potatoes out

(a) 1 Hale 460.

(b) Anon., Exeter Sum. Ass. 1793; 1 East P. C. c. 5, s. 71, p. 395.

(c) 1 Hawk. P. C. c. 31, ss. 48, 54; Fost. 272, 311; 1 East P. C. c. 5, s. 71, p. 304. *Ante*, p. 408.

(d) 24 & 25 Vict. c. 96, s. 103; c. 97, s. 61; c. 99, s. 31; 5 Geo. 4, c. 83, s. 6; 9 Geo. 4, c. 69, s. 2, &c.

(e) Rex v. Curran, 3 C. & P. 397 (14 E. C. L. R.), Vaughan, B.

of a garden: but there was no evidence either to show that any garden had been robbed, or that the prisoner had been in or near any garden; it was objected that the policeman had no authority to apprehend the prisoner; for at common law stealing growing potatoes out of a garden was neither a felony nor misdemeanor, and therefore a policeman had no right at common law to apprehend for it; and under the 7 & 8 Geo. 4. c. 29, s. 63, an offender could only be apprehended if he were "found committing" the offence, and the preceding case was relied upon; it was held that the objection was valid, and consequently that the case was one of manslaughter only.^(f)

But the words "found committing" must not be taken so strictly as to defeat the reasonable operation of such clauses. The plaintiff, a pedlar, went to the house of Mr. B. and a small dog of Mr. B.'s ran out at the plaintiff, who with a stick gave the dog a blow, which knocked out one of its eyes. The plaintiff then went away, and Mrs. B. immediately sent a boy to fetch a constable, the boy returned with the constable, and Mrs. B. directed them to go after the plaintiff and apprehend him for the injury done to the dog. They went in pursuit of the plaintiff, and found him at a public-house about a mile from Mr. B.'s, and the constable apprehended him and took him before a magistrate. Tindal, C. J. (in summing up): the jury will have to consider, first, whether the plaintiff had committed a wilful injury to the dog; and secondly, whether he was found committing that offence and immediately apprehended: "with respect to the second question, the words of the 7 & 8 Geo. 4, certainly differ materially from those of 1 Geo. 4, c. 56, and were obviously meant to restrict the powers given by that Act. The object of the Legislature seems to have been to allow the immediate apprehension of a party taken in the commission of a crime of this nature because otherwise such offences would frequently be committed by persons passing through or having no fixed domicile in the place, and they would therefore entirely escape, if the party injured were obliged to wait for the formalities of a charge before a magistrate, or a warrant. Where the offender is fixed in the country, so that he can be found and apprehended at a subsequent time, there is no reason why that apprehension should not be after a regular proceeding; and the statute therefore differs from the 1 Geo. 4, c. 56, and does not allow a stale apprehension on an old charge, without a warrant. Still the words of the present statute must not be taken so strictly as to defeat its reasonable operation. Suppose a party seen in *815] the act of committing the crime were to run away, and immediate and fresh pursuit to be made: I think that would be sufficient. So, in this case, the party is actually seen in the commission of the act complained of: as soon as possible an officer is sent for, and he is taken as soon as possible. No greater diligence could be required; and that being the case, I think it must be treated as an 'immediate apprehension' for an offence which the plaintiff, supposing under the circumstances that it was an offence at all, was 'found committing'."^(g)

Where a policeman found the prisoner in a garden at night, stooping down close to the ground, and the prisoner jumped up and ran away, and the policeman ran after him and caught him; and it appeared that the prisoner was cutting or plucking some picketees and carnations in the garden, and the jury found that the prisoner had wilfully and maliciously plucked and cut flowers from plants or roots in the garden with intent to steal them, and that he was found by the policeman committing that offence, but that the policeman did not inform the prisoner by word of

(f) *Reg. v. Phelps*, C. & M. 180; and *MSS. C. S. G.* Neither in this case nor in *Rex v. Curran*, was the party seen in the act of committing the offence; but it seems that if the party be seen in the commission of the offence by one person, he may be apprehended by another who did not see him in the commission of the offence. See *Rex v. Howarth*, *infra*, p. 816, note (k), and *Hanway v. Boulton*, *infra*, note (g); *Ballinger v. Ferris*, 1 M. & W. 628; *Reed v. Cowmeadow*, 6 Ad. & E. 661 (33 E. C. L. R.); 7 C. & P. 821 (32 E. C. L. R.); and *Beechey v. Sides*, 9 B. & C. 806 (17 E. C. L. R.), cases of actions for illegal apprehension under the 7 & 8 Geo. 4, c. 30, may also be referred to. C. S. G.

(g) *Hanway v. Boulton*, 1 Moo. & Rob. 14; s. c., 4 C. & P. 350 (19 E. C. L. R.). The words of the 1 Geo. 4, c. 56, s. 3 (which was repealed by the 7 & 8 Geo. 4, c. 27), were "any person or persons who shall have actually committed, or be in the act of committing any offence." The words of the 7 & 8 Geo. 4, c. 30, s. 28, on which this case turned, are the same as those in the 7 & 8 Geo. 4, c. 29, s. 63.

mouth that he belonged to the police force; it was held, on a case reserved, that the policeman had authority to apprehend the prisoner. (*h*)

A person may be apprehended without a warrant under the 5 Geo. 4, c. 83, s. 6, as a person found in a dwelling-house, &c., with intent to commit a felony, if he is seen in a dwelling-house, &c., but gets out of it and is taken on fresh pursuit, and it makes no difference that he was not seen getting out of the house, and was found concealing himself to prevent being apprehended upon other premises near. To make such an arrest legal, it is not necessary that the person should have at the time he is apprehended a continuing purpose to commit the felony; he may be apprehended though that purpose is wholly ended. Upon an indictment for maliciously wounding, it appeared that near midnight two men were seen near a board-house belonging to Oxley; on two persons going up to the board-house, they heard a noise there, and they found the door of the board-house half open, and saw the prisoner inside the board-house, and heard a noise among the boards, and the prisoner said "bring the board;" the two persons then went to Oxley's house to call him up; one of them then went to the bottom of the road, which was about one hundred yards from the board-house, and in a quarter of an hour Oxley came up, with a carving-knife in his hand, and having also got another person to assist him, they went to the board-house, the door of which was then closed; the hasp was over the staple, and the padlock was in the staple, but not locked; nobody was in the board-house; they went in, and Oxley found two planks removed from the place, where he had seen them four days before, to another part of the board-house, nearer the door; they then *went on from the board-house, and after searching in several places, [*816 found the prisoner in the garden of another person, crouched down under a tree, and with a drawn sword in his hand; the prisoner was asked twice what he did there; he made no answer, and then he started off; one of the witnesses ran and caught hold of him, but the prisoner compelled him to leave hold of him; the prisoner fell over something, and then the other witnesses came up; the prisoner struck Oxley on the side with his sword, but did not cut him; then the prisoner again attempted to get away, but was prevented by some paling; the prisoner then turned round and struck Oxley with his sword, cut through Oxley's hat into his head, and produced a slight wound on his head; up to that time Oxley had not struck the prisoner any blow; the jury negatived the felony in removing the boards from one part of the board-house to another; and it was objected that the prosecutor had no right to apprehend either at common law or under the Vagrant Act (5 Geo. 4, c. 83, s. 6); for at common law the power to arrest for offences inferior to felony was confined to the time of committing the offence, and it was the same under the Vagrant Act; that the prisoner was not found by the prosecutor committing the offence, but, on the contrary, had ceased from the attempt and abandoned the intention, which distinguished this case from *Rex v. Hunt*; (*i*) but the Judges, on a case reserved, held that he might lawfully be apprehended, for as he was seen in the board-house, and was taken on fresh pursuit before he had left the neighborhood, it was the same as if he had been taken in the outhouse, or in running away from it. (*k*)

(*h*) *Rex v. Fraser*, R. & M. C. C. R. 419. See this case more at full, *post*.

(*i*) R. & M. C. C. R. 93, *ante*, p. 800.

(*k*) *Rex v. Howarth*, R. & M. C. C. R. 207. *Rex v. Hunt* was relied upon as showing a right to apprehend at common law, independently of the 5 Geo. 4, c. 83, s. 6, which enacts, "that it shall be lawful for any person whatsoever to apprehend any person who shall be found offending against this Act;" and by sec. 4, "every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any inclosed yard, garden, or area, for any unlawful purpose, shall be deemed a rogue and vagabond." In the prisoner's house, on the following day, were found some oak boards of Oxley's, which had been seen in the board-house four days before; but Littledale, J., told the jury, that he thought they could not take into consideration any felony committed in respect of them, as they had been taken at a time previous to the night in question, and it was not for that transaction that the prisoner was endeavored to be apprehended. It was contended for the prisoner that the arms in the hands of Oxley were such as justified the prisoner in what he did, but the learned judge did not think that they did, and did not draw the attention of the jury to them. See the remarks of Lord Denman, C. J., in *Baynes v. Brewster*, 2 Q. B. 375 (42 E. C. L. R.), on this case.

But if several hours elapse between the time when the offence is committed and the apprehension, the apprehension is not warranted by the Vagrant Act, although the constable who apprehends saw the party committing the offence. Upon an indictment for maliciously wounding, it appeared that the prisoner, with several other persons, were found with Jones, a constable, playing at thimblery and betting with the people at a fair, between two and four o'clock in the afternoon. Jones having received verbal instructions from the magistrates to apprehend such offenders, tried, with the assistance of another person, to apprehend the prisoner and his companions, and succeeded in taking one, but the prisoner and two others of his company fell *817] upon Jones, rescued their companion, and got away themselves. *About nine o'clock in the evening Jones not having been able to find the prisoner before, saw him with several of his companions in a public-house, and said to him, "You are my prisoner." The prisoner asked "For what?" and Jones replied, for what he had been doing in the fair; the prisoner resisted, and a scuffle ensued; the prisoner escaped and concealed himself in a privy in the garden. Jones called another constable to his assistance, and they together broke open the privy door and endeavored to take the prisoner, upon which he took a knife out of his pocket and stabbed the other constable. The jury found that the prisoner knew that the constable was endeavoring to take him for the offence (against the Vagrant Act) committed at the fair; and upon a case reserved, the Judges held that the attempt to apprehend was not lawful under the Vagrant Act, as it was not made on fresh pursuit. (l)

Where on an indictment for wounding with intent to disable, it appeared that the prosecutor was a sergeant of police and the prisoner a constable under him, and that the prosecutor went, as it was his duty, to the house of the prisoner to see that he was correct in the discharge of his duty, and the prisoner had some altercation with him, and the prosecutor left the house, the prisoner followed and struck him, and fell when attempting to strike him a second time, and the prosecutor then went away for assistance, and returned to the prisoner's house with two police constables, when the prisoner was not at home: they returned again in two hours and saw him, and the prosecutor told him that he must go with him to the station; the prisoner said he would not stir an inch that night; the prosecutor attempted to take hold of him, whereupon the prisoner inflicted a severe wound upon him; and the jury found him guilty of wounding with intent to prevent his apprehension. It was held, upon a case reserved, that the apprehension was not lawful; for the assault was committed at another time, and there was no probability of its being renewed. (m)

Under the 9 Geo. 4, c. 69, s. 2, (n) a keeper may apprehend poachers, though there are three or more found armed; for though sec. 2 only authorizes apprehending for offences under sec. 1, yet the offences punishable under sec. 9 are also offences under sec. 1; and if the keeper be killed in the attempt to apprehend, the offender will be guilty of murder, though the keeper had previously struck the offender or one of his party, if he struck in self-defence only, and to diminish the violence illegally used against him, and not vindictively to punish. Upon an indictment for maliciously shooting, it appeared that the prisoner and twenty-one other persons were found armed with long poles and guns in a coppice, which belonged to Mr. P., in the night, by the keepers of Mr. P. and four of his men: they came up to the keepers, who warned them off; they asked the keepers whether they meant to take them, for that they could shoot as well as the keepers; one of the keepers said, *818] that the first man that broke the peace he *would shoot, and one of the keeper's men said he would do the best he could towards taking them; the prisoner and his party then turned to go away, and walked between four and five hundred yards over some fields of Mr. P.'s, turning once upon the keeper and his men, and then got over the hedge into a turnpike road: the keeper and his men followed them pretty closely all the way, and got over the hedge after them; the

(l) *Rex v. Gardener*, R. & M. C. C. R. 390. By 5 Geo. 4, c. 83, s. 4, "every person playing or betting in any street, road, highway, or other open and public place, at or with any table or instrument of gaming, at any game, or pretended game of chance," "shall be deemed a rogue and vagabond." See sec. 6, note (k), *supra*, p. 816.

(m) *Reg. v. Walker*, Dears C. C. 358.

(n) See the section, *ante*, pp. 642, 643.

prisoner and his party then formed three deep upon the road, and said the keepers should not go any farther; the keeper again repeated that the first man that broke the peace he would shoot; the prisoner and his party rushed upon the keeper and his men, and some others who had joined them; *one of the prisoner's party* struck the keeper on the head with a pole, and the keeper knocked him down; another man struck at the keeper with another pole, and the keeper parried off the pole, and knocked him down; one of the prisoner's party fired a gun, which wounded one of the keeper's men; another man then struck the keeper on the head, and the keeper knocked him down, immediately after which one of the prisoner's party fired the shot in question, which wounded the prosecutor. It was insisted on the part of the prisoner that the 9 Geo. 4, c. 69, s. 2, gave a power of apprehending for offences within the first clause only, and that the offence was an offence upon sec. 9, and not upon sec. 1; but Bayley, B., thought that the offence was an offence within the first section: it was further insisted that, as the keeper had knocked down three of the men before the shot in question was fired, it would not have been murder if death had ensued; but Bayley, B., was of opinion that, if the keeper struck not vindictively, or by way of punishment, or for the purpose of offence, but in self-defence only, and to diminish the violence which was illegally brought into operation against him, it would have been murder had death ensued: and he told the jury that he thought the keeper and his men, even if they had no right to apprehend, had full right to follow the prisoner and his party, in order to discover who they were, and that the prisoner and his party were not warranted in attempting to prevent them; and that if they had attempted to apprehend them, which however they did not, they would have been warranted by the statute in so doing: and the learned Baron left it to the jury whether the keeper did more than was necessary for his own defence, and to diminish the violence and force which was illegally brought against him, as well as the questions of intent; the jury found the prisoner guilty with intent to prevent the lawful apprehension of himself and others, and for that purpose to do grievous bodily harm; and upon a case reserved, the Judges unanimously held that the keeper had power to apprehend, inasmuch as the prisoner was guilty of an offence under the first section as well as the ninth; and notwithstanding the blows given by the keeper, that it would have been murder had the keeper's man died. (o)

If a keeper, attempting lawfully to apprehend a poacher, be *met with violence, and in opposition to such violence, and in self-defence, strike the [819 poacher, and then is killed by the poacher, it is murder. Upon a similar indictment, it appeared that some keepers found the prisoners and from six to nine men more shooting in a wood at night: the prisoners and their party immediately attacked the keeper and his party with the butt ends of their guns, and knocked one of his men down, and struck the keeper many blows, but there was no blow that broke the skin and made a wound until after the keeper had knocked down one of the opposing party. Bayley, B., left this case to the jury, as he did the preceding one, and they found the prisoners guilty with intent to do grievous bodily harm, and at the same meeting as the last case this was also considered, and the Judges affirmed the conviction on the same ground as in the preceding case. (p)

If a poacher be found committing an offence upon a manor, and being pursued run off the manor, and then return on it again, he may be apprehended under sec. 2. Upon an indictment for attempting to discharge loaded arms with intent to murder, it appeared that the prosecutor found the prisoner and two others by night in a wood in a manor belonging to Lord C.; he pursued them out of that wood into a field not within the manor, and of which Lord C. was neither the owner nor the occupier; and that being hard pressed, the prisoner returned back into Lord C.'s manor; and being still pursued, he levelled his gun and snapped it at the prosecutor; it was objected that the authority to apprehend ceased the moment that the prisoner

(o) *Rex v. Ball*, R. & M. C. C. R. 330. The 9 Geo. 4, c. 69, s. 2, differs from the other Acts authorizing the apprehension of parties found committing offences, in authorizing the apprehension not only upon the land where the offence is committed, but also "in case of pursuit being made in any other place to which the offender may have escaped." See the section, *ante*, p. 642. See *Rex v. Payne*, R. & M. C. C. R. 378, *post*, p. 836.

(p) *Rex v. Ball*, R. & M. C. C. R. 333.

was out of Lord C.'s manor; but it was held, that as the prisoner returned again upon the manor it was the same as if he had never been off the manor.(g)

It was held in the same case that a person, who was not a regularly appointed gamekeeper, but who was employed as a watcher to watch for poachers, had authority to apprehend poachers, and that it was not necessary that he should have any written authority.(r)

In order to justify the apprehension of a person for night poaching, it must be proved that he was in pursuit of game between the expiration of the first hour after sunset, and the beginning of the last hour before sunrise. Upon an indictment for maliciously shooting, it appeared that the prosecutor on the 17th of December heard a shot fired in a plantation, and saw the prisoner there; he dropped a hen pheasant; the prosecutor went towards him, and he fired at the prosecutor; the prosecutor was not sure that it was before eight o'clock in the morning that this occurred; it was objected that, as the prisoner was not shown to have been in pursuit of game an hour before sunrise, the prosecutor had no right to apprehend him, and the objection was allowed.(s)

A keeper has no right to apprehend poachers under the 9 Geo. 4, c. 69, s. 2, *820] unless they are found committing an offence upon land *which belongs to his master, or is within his master's manor.(t) If, therefore, a keeper endeavor to apprehend a poacher in a place where he is not authorized by that statute, and the poacher kill him in order to prevent his apprehension, it is only manslaughter. Upon an indictment for murder, it appeared that a party of poachers were in a wood by night in pursuit of game; and that the deceased, who was an assistant gamekeeper of Mr. Clive, and others pursued them, and tried to apprehend them; upon which one of the poachers turned round and shot the deceased: the wood was neither the property nor in the occupation of Mr. Clive, nor was it within any manor that belonged to him, Mr. Clive only having the permission of the owner to preserve game there: it was held that the deceased had no authority to apprehend the poachers in the wood, and consequently that the shooting of the keeper was only manslaughter.(u) So where a servant of Sir T. W. found poachers by night in a covert of Colonel C.; they ran away and he pursued them, and was then shot by one of them in the side. Parke, B., said: "This was not on Sir T. W.'s land. If a person who was out poaching saw a man running after him, he might fairly presume that the person meant to apprehend him; and if the person had no authority to do so, he would not be guilty of murder in using the gun he had in his hand." Unless the prosecutor had authority from Colonel C. to arrest poachers, it would only have been manslaughter if death had ensued: he was attempting an illegal arrest, and the pursuit was a sufficient attempt: he was not the servant of Colonel C., but of Sir T. W.: if Sir T. W. was lord of a manor, including his own land and Colonel C.'s, he might be justified in apprehending.(v) But in any case, where three or more poachers are out by night within the 9 Geo. 4, c. 69, s. 9, any person may now apprehend the offenders by the 14 & 15 Vict. c. 19, s. 11.(w)

But the interference by a gamekeeper with persons found armed in the pursuit of game by night on the lands of an adjoining proprietor, without any attempt to forcibly apprehend, is not a sufficient provocation to reduce a malicious wounding and killing to manslaughter. The prosecutor, being out on duty at night as gamekeeper with his assistant on his master's manor, heard shots towards a wood not belonging to his master, and shortly afterwards saw the prisoners coming along a road in the direction from the wood; the prisoners were armed with a gun, gun-barrel, and bludgeons; they stopped when they saw the prosecutor and his assistant;

(g) *Rex v. Price*, 7 C. & P. 178 (32 E. C. L. R.), Park, J. A. J., and Coleridge, J. It seems that the terms of sec. 2 were not adverted to in this case; they seem clearly to give authority to apprehend "in any other place" to which the offender escapes, without reference to its being within the manor or the property of the person, on whose land the poachers were found. C. S. G.

(r) *Rex v. Price*, *supra*, note (g).

(s) *Rex v. Tomlinson*, 7 C. & P. 183 (32 E. C. L. R.), Coleridge, J.

(t) Admitted in *Rex v. Warner*, R. & M. C. C. R. 380, *post*, p. 821.

(u) *Rex v. Addis*, 6 C. & P. 388 (25 E. C. L. R.), Patteson, J.

(v) *Rex v. Davis*, 7 C. & P. 785 (32 E. C. L. R.), Parke, B.

(w) See the section, *ante*, p. 648.

the prosecutor and his assistant advanced towards the prisoners, when the prosecutor said, "So you have been knocking them down; you are a pretty set of people to be it so late at night;" they were then about three yards off; the prosecutor said to his assistant, sufficiently loud for the prisoners to hear, "Mind him with the gun;" the assistant took hold of the gun gently, one hand on the stock the other on the barrel, and took off the cap gently; there was no struggle; the man did not seem angry at the assistant's holding the gun; the prosecutor saw one of the prisoners, and advanced to look at the faces of the other two, but they bounded off. The prosecutor then turned back towards his assistant and the man who had the gun, and called out as loud as he could, "Forward, Giggles." Giggles was the keeper of the manor in which the wood was situate, but he was not there. Three of the men ran in upon the prosecutor, knocked him down, and stunned him; when he recovered himself he saw all the men coming by him, and one said, "Damn 'em, we have done 'em both;" they had got two or three paces beyond him, and one of them turned back and struck the prosecutor a violent blow on the left leg with what he thought was a stick, which wounded him in the leg; the prosecutor had committed no assault on either of the four men. The assistant took hold of the man to prevent the man's running away, but did not tell him so; he took hold of it to let the keeper see if he knew the men; the manor, in which the wood was, extended more than 200 yards beyond where the prisoners were seen; it was objected at the prisoners were on the high road, and the prosecutor and his assistants had no right to obstruct them; but the jury having found the prisoners guilty, the judges, upon a case reserved, held the conviction right. (x)

Where on an indictment for assaulting J. Smith it appeared that the prisoner got to an empty third-class carriage proceeding from Manchester to Stoke-upon-Trent, and got out on the wrong side at North Road Station, and being asked by the guard for his ticket, he said he had none, and had intended to get out at the station for New Junction. No other demand was made on the prisoner; but the guard ordered him to get into a second-class carriage, and locked the doors. The train then proceeded to Stoke, a distance of several miles. The prisoner, on getting out, was asked for his ticket; and on his not producing it, the second-class fare from Manchester to Stoke was demanded. It not being paid, the policeman at the station ill-treated the prisoner, who gave him a blow and got away. He was pursued and taken, when he cut the policeman's hand. The reason alleged for bringing the prisoner to Stoke was, that it was the head-quarters of the railway authorities, and there was no mode of dealing with the prisoner at the North Road Station. Wightman, J., told the jury (after stating the facts that occurred at the North Road Station), "the guard, instead of then taking him on the specific charge of going so far without his ticket, which perhaps he might have done, takes him in a second-class carriage to Stoke, several miles out of the way. A ticket from Manchester to Stoke is there demanded, and afterwards the full fare. It seems to me that this is early beyond the law, and that the railway authorities had no right to demand the fare from North Road to Stoke. I do not give any opinion as to the right to convey a person refusing to produce his ticket at one station on to another, on the charge of not paying his fare for that part of the journey which the prisoner had voluntarily and fraudulently performed; but whatever might have been the situation of the parties, if, on demand and refusal of the ticket or fare at North Road, the charge was there made, and he had been conveyed to Stoke for the purpose of dealing with it; here, the arrest being for non-payment of the fare to Stoke, the apprehension was illegal, and the prisoner had a right to resist it." (y)

It has been shown that though, even in *civil* cases, an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to

(x) *Rex v. Warner*, R. & M. C. C. R. 380; s. c., 5 C. & P. 525 (24 E. C. L. R.). It was so objected that the blow on the leg was the act of one alone, and there was no evidence which of the prisoners inflicted it; and as one of the prisoners, before the blow was given, said, "We've done 'em," it must be taken that it was supposed both men were dead, and therefore there could be no intent to murder, &c. Bolland, B., told the jury that if they thought the prisoners were acting in concert they were all equally guilty.

(y) *Reg. v. Mann*, 6 Cox C. C. 461.

the last extremity in cases of reasonable necessity;(z) yet if the party against whom the process has issued fly from the officer endeavoring to arrest him, or if he fly after an arrest actually made, or out of custody, in execution for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means.(a)

The authority of an officer, in civil cases, must be regulated and limited by the writ or process which he is empowered to execute, and by the extent of the district in which he is privileged to act. It is only in the character of officer that he can proceed to arrest or imprison, as no private person can of his own authority arrest in civil suits.(b)

A press-warrant extends in terms to "seamen, seafaring men, and others, whose occupations and callings are to work in vessels and boats upon rivers;"(c) and persons of this description may be impressed to serve on board his Majesty's ships of war, by those who have proper authority delegated to them for that purpose.(d) A proceeding which has been sometimes considered as hardly consistent with the temper and genius of a free government, but which may be defended on the ground of its necessity for the safety of the state; in order that the government may be enabled, in time of need, thus peremptorily to call for the services of persons who have freely chosen a seafaring life, and whose education and habits have fitted them for the employment.

But as this is a power of an extraordinary nature, it is highly requisite that no persons should assume it without being duly qualified for that purpose; as the special protection which the law affords to its officers will not be extended to those who venture to act without proper authority. Thus, where the execution of a press-warrant is directed by the terms of the warrant (as is now always the case) not to be intrusted to any person but a commissioned officer, the execution of it by another person will be illegal. As in a case where the lieutenant of a press-gang, to whom the execution of a warrant was properly deputed, remained in King Road, in the port of Bristol, while his boat's crew went some leagues down the channel, by his directions, to press seamen; this was illegal; and when, in the furtherance of that service, one of the press-gang was killed by a mariner in a vessel which they *823] had boarded with intent to press such persons as they could meet *with, it was ruled to be only manslaughter, though no personal violence had been offered by the press-gang.(e) And upon the same principles, where the mate of a ship and a party of sailors, without either the captain who had the press-warrant, or the lieutenant who was regularly deputed to execute it, impressed a man, and upon his making some resistance, one of the party struck him a violent blow with a large stick, of which he died some days after, it was adjudged murder.(f) And, in another case, the delegation of the power of impressing by a lieutenant (to whom the warrant had been directed) to a petty officer and several others, to whom he had given verbal orders to impress certain seafaring men, of whom he had received intelligence, was decided to be clearly bad; though it was found to be the constant usage and invariable custom of the navy for all commissioned officers, having in their custody such press-warrants, to give verbal orders to such petty officers whom they might think fit to employ upon the impress service, and that such petty officers usually acted without any other authority than such verbal orders.(g)

If a ship's sentinel shoot a man, because he persists in approaching the ship when

(z) *Ante*, p. 735.

(a) 1 Hale 481; Fost. 271.

(b) 1 Hawk. P. C. c. 28, s. 19.

(c) Softly, *ex parte*, 1 East R. 466; 1 East P. C. c. 5, s. 75, p. 307. The same terms occur also in the warrant in Broadfoot's case, Fost. 156.

(d) Broadfoot's case, 18 St. Trials (by Howell) 1323; Fost. 154; where see an elaborate argument delivered by Mr. J. Foster, as recorder of Bristol, in support of the legality of impressing seamen.

(e) Broadfoot's case, Fost. 154. But if a warrant be directed to several, one of them may execute it: 1 Hale 459.

(f) Dixon's case, 1 East P. C. c. 5, s. 80, p. 313; and see also Browning's case, 1 East P. C. c. 5, s. 80, p. 312.

(g) Borthwick's case, Dougl. 207. The warrant enjoined all mayors, &c., to aid and assist the officer to whom it was directed, and those employed by him in the execution thereof.

he has been ordered not to do so, it will be murder, unless such an act was necessary for the ship's safety. And it will be murder, though the sentinel had orders to prevent the approach of any boats; had ammunition given to him when he was put upon guard; and acted under the mistaken impression that it was his duty. The prisoner was sentinel on board the *Achille*, when she was paying off. The orders to him from the preceding sentinel were, to keep off all boats, unless they had officers with uniforms in them, or unless the officer on deck allowed them to approach; and he received a musket, three blank cartridges, and three balls. The boats pressed; upon which he called repeatedly to them to keep off; but one of them persisted and came close under the ship; and he then fired at a man who was in the boat, and killed him. It was put to the jury to find, whether the sentinel did not fire under the mistaken impression that it was his duty; and they found that he did. But a case being reserved, the Judges were unanimous that it was, nevertheless, murder. They thought it, however, a proper case for a pardon; and further, they were of opinion, that if the act had been necessary for the preservation of a ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified. (h)

The party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant; and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special *protection of the law; and therefore, if a struggle ensue with the party injured, and such officer be killed, the crime will be only manslaughter. (i) And it has been ruled, that homicide committed upon a bailiff, attempting to execute a writ within an exclusive liberty, such writ not having a *non-omittas* clause, will not amount to murder. (k) It has been held, that if the constable of the vill of A. came into the vill of B. to suppress some disorder, and in the tumult the constable be killed in the vill of B., this will be only manslaughter, because he had no authority in B. as constable. (l) But it was considered, that if the constable of the vill of A. had a particular precept from a justice of peace directed to him by name, or by his name of office as constable of A., to suppress a riot in the vill of B., or to apprehend a person in the vill of B., for some misdemeanor within the jurisdiction and conusance of the justice of the peace, and in pursuance of that warrant he went to arrest the party in B., and in executing his warrant was killed in B., this amounted to murder. (m) Where a warrant was directed "to C. S., one of the collectors of the parish of W., the constables of the said parish, and all others his Majesty's officers," to levy a distress, it was held that the constable of W. had no authority to execute it out of the parish of W.; the rule of law being, that where a warrant is directed to officers, as individuals, or to individuals who are not officers, they may execute it anywhere within the extent of the magistrate's jurisdiction; but where it is directed to men by the name of their office, it is confined to the districts, in which they are officers. (n) But the law as to the latter point was altered by the 5 Geo. 4, c. 18, which was repealed by the 11 & 12 Vict. c. 43, s. 36, but re-enacted by sec. 3 of that Act and the 11 & 12 Vict. c. 42, s. 10, by which warrants to apprehend may be directed either to any constable or other person by name, or generally to the constable of the parish or other district within which the same is to be executed without naming him, or to such constable and all other constables or peace officers in the county or other district within which the justice or justices issuing such warrant has or have jurisdiction, or generally to all the constables or peace officers within such last-men-

(h) *Rex v. Thomas*, East. T. 1816, MS., Bayley, J. The prisoner was tried at Nisi Prius, 4 M. & S. 441.

(i) 1 Hale 457, 458, 459; 1 East P. C. c. 5, s. 80, pp. 312, 314.

(k) *Rex v. Mead* and another, 2 Stark C. 205 (3 E. C. L. R.).

(l) 1 Hale 459.

(m) 1 Hale 459; 2 Hawk. P. C. c. 13, ss. 27, 30. It may be here mentioned, that by 24 Geo. 2, c. 44, s. 6, if a warrant is irregular in the frame of it, the officer executing it ministerially is indemnified against any action for damages by the party injured, though the magistrate by whom it was issued exceeded his jurisdiction.

(n) *Rex v. Weir*, 1 B. & C. 288 (8 E. C. L. R.); 2 D. & R. 444. See per Lord Holt in *Rex v. Chandler*, 1 Lord Raym. 545.

tioned county or district, and such warrant may be executed by apprehending the offender or defendant at any place within the county, riding, division, liberty, city, borough, or place within which the justice or justices issuing the same shall have jurisdiction, or in case of fresh pursuit at any place in the next adjoining county or place and within seven miles of the border of such first-mentioned county, riding, division, liberty, city, borough or place, without having such warrant backed; and in all cases where such warrant shall be directed to all constables or other peace *825] officers within the county or other *district within which the justice or justices issuing the same shall have jurisdiction, it shall be lawful for any constable, head-borough, tithingman, borseholder or other peace officer for any parish, township, hamlet, or place within such county or district, to execute the said warrant within any parish, township, hamlet, or place situate within the jurisdiction for which such justice or justices shall have acted when he or they granted such warrant, in like manner as if such warrant were directed specially to such constable by name, and notwithstanding the place in which such warrant shall be executed, shall not be within the parish, township, hamlet, or place, for which he shall be such constable, tithingman, borscholder, or other peace officer.(o)

Where, since these acts, a search warrant was directed "to the constable of Dauntsey," and headed "Wilts (to wit)"; but, instead of being delivered to that constable, it was delivered to a county police-constable appointed under the 2 & 3 Vict. c. 98, s. 3, who was attached to the district in which Dauntsey was situated, and executed by him in Dauntsey; it was held that the execution of the warrant was illegal, as it could only be executed by a constable of Dauntsey.(p)

The 11 & 12 Vict. c. 42, s. 11, provides for the indorsement of warrants in cases of indictable offences, and enacts that the "indorsement shall be sufficient authority to the person bringing such warrant, and to all other persons to whom the same was originally directed; and also to all constables and other peace officers of the county or place where such warrant shall be so indorsed to execute the same in such other county or place." And the 11 and 12 Vict. c. 43, s. 3, extends this provision to all warrants and commitments issued under the Act.(q)

The 5 Geo. 4, c. 18, did not extend to the warrant of a Judge of the King's Bench, but only to the warrants of persons having authority as justices of the peace within the limited jurisdictions therein expressed,(r) and it is clear the new clauses are not more extensive. It may be observed, that if a warrant be directed to several persons, any of them may execute it.(s)

A warrant must be executed by the party named in it, or by some one assisting such party, and in his presence, either actual or constructive. Upon an indictment under the 9 Geo. 4, c. 31, for maliciously stabbing, it appeared that a constable having a warrant to apprehend the prisoner, gave it to his son, who went in pursuit of the prisoner, in company with his brother; the father stayed behind; the brothers found the prisoner lying under a hedge; and when they came up he had a knife in his hand, running it into the ground; he got up from the ground to run away; one *826] of them laid hold of him, and he stabbed him with the *knife; the father was in sight at about a quarter of a mile off. Parke, B.: "The arrest was illegal, as the father was too far off to be assisting in it." (t) So where upon a similar indictment, it appeared that a warrant issued by commissioners of bankrupt was directed to "J. Adams and W. Smith our messengers and their assistants;" and that the prosecutor, who was the assistant of Smith, having obtained the warrant from him, went in pursuit of the prisoner, who, on the prosecutor overtaking him,

(o) This statement is framed from the 11 & 12 Vict. c. 42, s. 10, and 11 & 12 Vict. c. 43, s. 3, which vary in terms, but agree in substance. It was decided that the 5 Geo. 4, c. 18, only empowered constables to execute warrants out of their proper parishes, and did not compel them so to do: *Gimbert v. Coney*, Macl. & Y. 469; and that decision is equally applicable to the new clauses, as in them also the terms are, "it shall be lawful," &c.

(p) *Freegard v. Barnes*, 7 Exc. R. 827.

(q) It was decided that the repealed statute only authorized constables to execute the warrants therein mentioned out of their own parishes, &c., but did not compel them to do so: *Gimbert v. Coney* and another, Exch. Trin. T. 1825, Macl. & Y. 469.

(r) *Gladwell v. Blake*, 5 Tyrw. 186.

(s) 1 Hale 459.

(t) *Rex v. Patience*, 7 C. & P. 775 (32 E. C. L. R.). See this case, *post*, p. 835.

and saying he had the warrant, wounded the prosecutor with a stone; neither Smith nor Adams being present at the time, nor anywhere near the place, where the attempt to arrest occurred: it was objected that the prosecutor was not authorized by the warrant to arrest the prisoner except in the presence, actual or constructive, of either Adams or Smith, and that the word "assistants" only extended to persons who went with Adams and Smith to assist in taking the prisoner. Williams, J., said, "I think it is not sufficient that the prosecutor should have been deputed to act on the warrant by the messenger; and I think, also, that to authorize him to act, he must derive his authority direct from the commissioners themselves. It appears to me that the term 'assistant' would apply to any person whom Adams or Smith directed to go in aid of them. It therefore remained uncertain who those assistants might be, till either Smith or Adams had named them; and I think that is not a legal execution of the warrant, unless it be executed in the presence, actual or constructive, of either Adams or Smith, who are named in it."^(u)

Where a warrant to arrest one Galliard for disobedience to a bastardy order was directed "to the constable of the township of Nantwich, in the county of Chester, and all her Majesty's officers of the peace in and for the said county," and was given to the superintendent of police, and by him given to the police at Coppenhall, and it had been for a time in the possession of police-constable Dyson, and he and Sharman, being on duty in uniform as constables in Coppenhall, arrested Galliard under the warrant, but they had not the warrant in their possession at the time, it being at the station-house at Coppenhall, in the possession of their superior officer; it was held that this arrest was illegal, as the officers were bound to have the warrant ready to be produced, if required.^(v)

In the preceding case, as no point seemed to have been raised upon any omission of the police to inform Galliard of the nature of the charge, the Court said, "It may be presumed that they did tell him, not only that they arrested him under the warrant, but what the charge was. As they were obviously police-constables, we think that they were not bound in the first instance to produce the warrant at the time they made the arrest; but that, as this was not the charge of a felony, but rather in the nature of a civil than of a criminal proceeding, the warrant ought to have been produced, *if required, and that an arrest without such production would [*827 have been illegal."^(w)

The prisoner was indicted for maliciously wounding the prosecutor with intent to resist his apprehension for assaulting one W. P. The prosecutor having received a warrant, whereby he was commanded "to apprehend the prisoner and to bring him before me to answer unto the said complaint (assaulting W. P.) and to be further dealt with according to law," went in search of the prisoner, and brought him before the magistrate who granted the warrant, and another magistrate; he was ordered to find bail; he said he would not; upon which he was ordered to be committed; whilst the commitment was making out he made his escape; the prosecutor was ordered to go after him; there was no authority in writing; but in consequence of the verbal directions of the magistrates to the clerk, who was making out the commitment, the latter ordered the prosecutor to go after the prisoner: the prosecutor accordingly did so, and in attempting to apprehend the prisoner was cut by him with a knife; it was objected on the part of the prisoner that the count was not proved, for that the party having been taken before the magistrate, the warrant was *functus officio*; and the second taking was for having made his escape from the office; secondly, that the count was bad, as it did not follow that the assaulting W. P. was an offence for which the prisoner was liable to be apprehended: but Gaslee, J., thought the warrant continued in force, and that the second objection was upon the face of the record; and the jury having found the prisoner guilty, upon a case reserved, the conviction was held good.^(x)

^(u) *Rex v. Whalley*, 7 C. & P. 245 (32 E. C. L. R.). See *Blatch v. Archer*, Cowp. 63, where Aston, J., said, "it is not necessary that the bailiff should be actually in sight, but he must be so near as to be near at hand, and acting in the arrest."

^(v) *Gillaird v. Laxton*, 2 B. & S. 363 (110 E. C. L. R.). The Court erroneously treated the 5 Geo. 4, c. 18, as not repealed.

^(w) *Ibid.*

^(x) *Rex v. Williams*, R. & M. C. C. R. 387. As no time is usually prescribed for the

Where an officer endeavoring to execute process is resisted and killed, the crime will not amount to murder, unless the *process is legal*; but by this is to be understood only that the process, whether by writ or warrant, must not be defective in the frame of it, and must issue in the ordinary course of justice from a Court or magistrate having jurisdiction in the case.(y) Therefore, though there may have been error or irregularity in the proceeding previous to the issuing of the process, it will be murder if the sheriff or other officer should be killed in the execution of it; for the officer to whom it is directed must, at his peril, pay obedience to it.(z) And for this reason, if a *copias ad satisfaciendum, fieri facias*, writ of assistance, or any other writ of the like kind issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without showing the judgment or decree.(a) But it *828] seems that the writ, as well as the sheriff's *warrant to the bailiff, must be produced.(b) So where upon an indictment for assaulting J. Evans in the execution of his office of sub-bailiff of a County Court, it appeared that the prisoner was arrested by Evans under a warrant, which was in the form authorized by the 19 & 20 Vict. c. 108, s. 61, for not having satisfied a judgment and costs; but the previous proceedings authorizing the warrant were not proved; on a case reserved, it was held that these proceedings need not be proved; for the process of the County Court was as much a justification to the officer by virtue of the Act, as is a writ of execution out of a superior Court to a sheriff, and it is clear that the production of such a writ would be sufficient in a proceeding of this description for assaulting the sheriff or a bailiff without proof of the judgment.(c) So, where the defendants were indicted for an assault, and it appeared that Messrs. Jones and Oakes, ironmasters, became bankrupts, and Bodle, a messenger of the District Court of Bankruptcy, in consequence of information that certain ironstone belonging to the bankrupts was lying in a boat, obtained a warrant from two justices to search for the property of Jones and Oakes, and went with this warrant to search the boat, whereupon the assault was committed. It was submitted that the bankruptcy and the proceedings under it must be proved; but Erle, J., held that the 6 Geo. 4, c. 16, s. 29,(d) rendered it unnecessary to show the validity of the proceedings prior to obtaining the magistrate's warrant.(e) So, though the warrant of a justice of peace be not in strictness lawful, as if it do not express the cause with sufficient particularity; yet, if the matter be within his jurisdiction, the killing of the officer executing the warrant will be murder; for it is not in the power of the officer to dispute the validity of the warrant, if it be under the seal of the justice.(f) It may be observed also, that in all kinds of process, both civil and criminal, the falsity of the charge contained in such process will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice:(g) and therefore, in the case of an escape warrant, the person executing it was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it.(h) So where a borough rate is good on the face of it, a distress war-

execution of a warrant, it continues in force till fully executed, though it be seven years after its date, provided the magistrate so long lives: *Dickenson v. Brown*, Peake, N. P. 344, Lord Kenyon, C. J.

(y) *Fost.* 311. An attachment issued, and signed by the county clerk in his own cause, is legal process: for it was held, that in issuing it the county clerk acted merely in a ministerial capacity, and not as judge in his own cause: *Baker's case*, 1 *Leach* 112. He was the only officer who signed such process, and the process was in the name and under the seal of his superior, and it was process against the goods only.

(z) *Fost.* 311; 1 *Hale* 457.

(a) *Rogers' case*, *Cromwell Sum. Ass.* 1735, ruled by Lord Hardwicke; *Fost.* 311, 312.

(b) *Rex v. Mead*, 2 *Stark. C.* 205 (3 E. C. L. R.), an arrest upon mesne process.

(c) *Reg. v. Davis*, 1 L. & C. 64, Williams, J., doubted on the ground that the statute seemed confined to civil cases.

(d) Repealed by the 12 & 13 Vict. c. 106. (e) *Reg. v. Roberts*, 4 *Cox C. C.* 145.

(f) 1 *Hale* 459, 460. It is said, however, that this must be understood of a warrant containing all the essential requisites of one: 1 *East P. C. c.* 5, s. 78, p. 310; and see *Rex v. Hood*, *post*, p. 830, note (n).

(g) 1 *East P. C. c.* 5, s. 8, p. 310.

(h) *Curtis's case*, *Fost.* 135. And see *Fost.* 312.

ant issued upon it is valid, although the rate may have been made in part for by-one expenses.(i)

A serjeant at mace in the city of London having authority, according to the custom of the city, by entry in the porter's book at one of the counters, to arrest one Murray for debt, arrested him between five and six in the evening of the 8th November, saying at the same time, "I arrest you in the King's name, at he *suit of Master Radford;" but he did not produce his mace: Murray re- [*829 isted, and one of his companions killed the officer. Upon a special verdict it was urged that the arrest in the night was illegal, that the serjeant should have shown his mace, and that a custom stated in the verdict to arrest without process first against the goods was illegal: but the objections were overruled.(k)

But if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person on whom it is to be executed; or if the name of the officer or the party be inserted without authority, and after the issuing of the process, and the officer endeavoring to execute it be killed, this will amount to no more than manslaughter in the person whose liberty is so invaded.(l)¹

Every warrant ought to specify the offence charged; the authority under which the arrest is to be made; the person who is to execute it; and the person to be arrested.(m) A warrant, therefore, leaving a blank for the Christian name of the person to be apprehended, and giving no reason for the omission, but describing him only as — H., the son of S. H., and stating the charge to be for assaulting A. B. in the execution of his duty, without particularizing the time, place, or any other circumstances of the assault, is too general and unspecific, and therefore a resistance to an arrest thereon, and killing the person attempting to execute it, will not be murder. Upon an indictment for maliciously wounding, it appeared that George Hood having assaulted Brown, a sheriff's officer, who was endeavoring to arrest his father, Samuel Hood, under a *copias ad respondendum*, Brown applied to a magistrate for a warrant to apprehend George Hood for an assault, but not being at that time acquainted with his Christian name, the warrant, so far as it related to the name and description of the person committing the assault, was in the following terms, viz., "to take the body of — Hood (leaving a blank for the Christian name) of, &c., by whatsoever name he may be called or known, the son of Samuel Hood, to answer, &c., on the oath of Francis Brown, an officer of the sheriff of the county of Wilts, for assaulting him in the execution of his duty." This warrant was delivered to the tithing-man to execute, and he went to S. Hood's house, with Brown and others, to execute it; and Brown pointed out G. Hood to the tithing-man as the person on whom the warrant was to be executed, and upon attempting to apprehend him, he stabbed a person whom the tithing-man had charged to aid and assist. S. Hood had four sons who resided with him. It was objected that as the Christian name of George Hood was omitted, the warrant was illegal, and would not authorize his apprehension; and, upon a case reserved, the Judges were unanimously of opinion that the warrant was bad, because it omitted the Christian name; it should have assigned some reason for the omission, and have given some particulars of *George Hood, by which he might be distinguished from his [*830 brothers.(n)

(i) Jones v. Johnson, 5 Exch. R. 862.

(k) Mackally's case, 9 Co. 65 b.

(l) 1 Hale 457; 1 Hawk. P. C. c. 31, s. 64; Fost. 312; 1 East P. c. 5, s. 78, p. 310. Sir Henry Ferrers' case, Cro. Car. 371.

(m) Per Coleridge, *arguendo*, Rex v. Hood, *infra*.

(n) Rex v. Hood, R. & M. C. C. R. 281. See per Tindal, C. J., in Hoye v. Bush, *infra*, note (o). The decision seems to have proceeded on the omission of the Christian name alone, but the marginal note adverts to the insufficiency of the statement of the offence for which the warrant was granted, and it seems that the warrant was bad on that ground also, as it did not state where the assault was committed, and therefore did not show that it was within the jurisdiction of the magistrate who granted the warrant. C. S. G. See the observations of Coleridge, J.: Howard v. Gossett, 10 Q. B. 387 (59 E. C. L. R.), *et seq.*

¹ If a warrant commanding the arrest of an individual in the name of the State have no seal, it is void. If an officer attempt to arrest the party named upon such authority, he proceeds at his peril, and is a wrong-doer; and if he be killed in the attempt by the party, the slayer is guilty of manslaughter, and not murder: Tackett v. State, 3 Yerg. 392.

It is of the essence of a warrant that it should be so framed that the officer should know whom he is to take, and that the party upon whom it is executed should know whether he is bound to submit to the arrest. If, therefore, a constable, having a warrant directing him to apprehend A. B., arrest C. B. under the warrant, such arrest is illegal, although C. B. were the person against whom the magistrate intended to issue the warrant, and although the person who made the charge before the magistrate pointed out C. B. as the man against whom the warrant was issued. A magistrate for the county of Herts issued his warrant, directing a constable to take John H., charged with stealing a mare. Armed with this warrant, the constable went to Smithfield, and there arrested Richard H., who was the party against whom information had been given, and against whom the magistrate intended to issue his warrant, and who was supposed to be called John H.; his name, however, was really Richard H., John H. being the name of his father. There was no proof that a felony had been committed. The person who made the charge before the magistrate pointed out Richard H. as the man who had stolen the mare, and a person present said that his name was John H., and there was clearly evidence to go to the jury that Richard H. was the man intended to be taken up. Coltman, J., told the jury that the law would not justify the constable's act, the warrant being against John and not against Richard, although Richard was the party intended to be taken; that a person cannot be lawfully taken under a warrant in which he is described by a name that does not belong to him, unless he has called himself by the wrong name; that a constable may, in many cases, take up a person on a charge of felony by virtue of his office of constable, and without any warrant from a magistrate; but that he can only do so within the district for which he is chosen constable. The jury having found a verdict against the constable, the Court held that the direction was right. That in civil process, the taking a person by the name mentioned in a warrant, his real name being different, cannot be justified, and that no distinction could be made between civil and criminal process. In either case, the object of the warrant is to identify the party intended to be arrested.^(o)

*831] ^{Where a warrant commanded the constable to apprehend a prisoner, and bring him before a justice "to answer to all such matters and things as on Her Majesty's behalf shall be objected against him on oath by M. A. W. for an assault committed on her;" it was held bad, for it did not state any information on oath that any assault had been committed.^(p) And where a warrant of a Judge of the Court of Queen's Bench directed certain officers to apprehend a person "and him safely keep, to the end that he may become bound and find sufficient sureties to answer" an indictment for a conspiracy, "and to be further dealt with according to law;" it was held that the warrant was bad for not directing that the party should be taken before some Judge or justice for the purpose of finding sureties.^(q)}

Where a warrant to distrain for a borough rate was signed and sealed by two justices, and delivered to the town clerk for the purpose of having the corporate seal affixed thereto, and he altered the date of it from the 10th to the 14th of August, with the assent and direction of the justices, and the same was afterwards re-signed and re-sealed, and the corporate seal affixed thereto, it was held that the warrant

(o) *Hoye v. Bush*, 1 M. & Gr. 775 (39 E. C. L. R.). As there was no authority to apprehend Richard H. under the warrant, and the constable was out of his district, he was in the same situation as a private individual, and therefore could only have defended himself by proving that a felony had been committed by Richard H. See *ante*, p. 735, and per Tindal, C. J.; 1 M. & Gr. 780. "If he were the guilty person, the officer would not want the warrant, supposing a felony to have been committed." If the constable had been within his district the facts of this case seem to have been sufficient to have justified his apprehending Richard H.; as in such a case, although no felony had been committed, yet if there were reasonable ground to suspect Richard H. of having committed a felony, that would justify the constable in apprehending him. See *Beckwith v. Philby*, 6 B. & C. 638 (13 E. C. L. R.), *ante*, p. 801, note (s). *Quære*, whether it ought not in this case to have been left to the jury to say whether or not the party was as well known by the name of John as Richard. If he were as well known by the one as the other, as an indictment describing him by either name would be good (*ante*, p. 763), so it is conceived would a warrant. C. S. G.

(p) *Caudle v. Seymour*, 1 Q. B. 889 (41 E. C. L. R.).

(q) *Reg. v. Downey*, 7 Q. B. 281 (53 E. C. L. R.).

was good; for the date was altered whilst it was in the possession of the justices before it was issued, and they were clearly at liberty to alter it at that time.^(r) Where in the body of a warrant of distress the justices were described as "two of Her Majesty's justices of the peace for the said borough and city, and one of us being the mayor of the said borough and city," and the warrant was signed by the two; it was objected that it did not appear in the body of the warrant that one of them was mayor at the time the warrant issued; but the objection was overruled; for there was no authority for saying that the signature might not be looked at and considered as part of the warrant.^(s) It was objected on error, that as under the signatures were the words "justices of the said city and borough," the warrant was signed by the mayor as a justice, and he could not afterwards sign it as mayor; but it was held that he might act in both characters, and that the warrant was not less the warrant of the mayor because it was also that of the justice.^(t) Where a distress warrant had in the margin "Borough and City of Lichfield," and described the justices as "justices of the peace for the said city and borough," it was objected that the warrant did not show that they were acting within their jurisdiction, as it did not use the ordinary words "in and for;" but it was held that it did appear to have been issued within their jurisdiction; for the venue in the margin might be taken as constituting the place of making the warrant.^(u) Where a warrant of distress ran, "if within the space of five days next after such distress" the money be not paid, "that then you do sell the said goods;" it was objected that it was bad for not limiting any time within which the goods were to be sold pursuant to the 27 Geo. 3, c. 20, s. 1; but the warrant was held good; for the obvious [*832 meaning of that section is to fix the time within which the party distrained on may save his goods by tendering the amount due with the costs, and here the warrant did specify five days as the time allowed for payment, and then the officer is directed to sell."^(v)

There is a grand distinction between the warrants of magistrates and others who act by special statutory authority, and out of the course of the common law, and such warrants as are to be regarded as the mandate of a superior court acting according to the course of the common law. In the case of special authorities given by statute to justices or others acting out of the ordinary course of the common law, the instruments by which they act, whether warrants to arrest, commitments, or orders, or convictions, or inquisitions, ought to show their authority on the face of them by direct averment or reasonable intendment. Not so the process of superior courts acting by the authority of the common law. The rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so, and nothing shall be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged.^(w)

It appears to have been formerly a very common practice to issue *blank warrants*, notwithstanding their illegality. The prisoner *Stockley*, about Lady-day 1753, had been arrested by Welch, the deceased, at the suit of one Bourn, but was rescued; and he afterwards declared, that if Welch offered to arrest him again, he would shoot him. A writ of rescue was made out at the suit of Bourn, and carried to the office of a Mr. Deacle (who acted for the under-sheriff of Staffordshire) to have warrants made out upon such writ. The custom of the under-sheriff was to deliver to Deacle sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion required. Deacle made out a warrant against Stockley upon one of these blank pieces of paper, and delivered it to Welch, who inserted therein the names of Thomas Clewes and William Davil, on the 12th of July, 1753. On the 19th of September following, Welch, Davil, Clewes, and one Howard, the person to whom Stockley had declared he would shoot Welch, went to arrest Stockley on this warrant. Clewes and Davil, having the warrant, went into Stockley's house first, and called for refreshment; but, an alarm being

(r) *Jones v. Johnson*, 5 Exch. 862.

(t) s. c. 7 Exch. R. 452.

(s) *Ibid.*

(u) *Ibid.*

(v) *Ibid.*

(w) Framed from the judgment of Parke, B., *Howard v. Gossett*, 10 Q. B. 452 (59 E. C. L. R.), and cases there cited.

given that Welch was coming, the door was locked; upon which Clewes arrested Stockley on this illegal warrant, who thereupon fell upon Clewes, and thrust him out of doors, but kept Davil within, and beat him very dangerously, he crying out murder. On hearing this, Welch and Howard endeavored to get into the house; and Welch broke open the window, and had got one leg in, when Stockley shot and killed him. Stockley was tried for murder, when the jury expressly found that the deceased attempted to get into the house to assist in the arrest of Stockley. Howard, Clewes, and Davil, being dead, their depositions before the coroner were read, *833] and minutes were taken of the above facts for a special verdict: but, to save *expense, the case was referred to the Judges of the King's Bench, who certified that the offence amounted, in point of law, only to manslaughter.(x)

This practice of issuing blank warrants was reprobated in a more recent case, where the sheriff having directed a warrant to A. by name, and all his other officers, the name of another of the sheriff's officers, B., was inserted after the warrant was signed and sealed by the sheriff; and, therefore, an arrest by B. was holden illegal.(y) And in another case it was considered that the arrest was illegal, where the warrant was filled up after it had been sealed.(z) But if the name of the officer be inserted before the warrant is sent out of the sheriff's office, it seems that the arrest will not be illegal, on the ground that the warrant was sealed before the name of the officer was inserted. Banks and Powell had a warrant from the sheriff of Salop upon a writ of possession against the prisoner's house; and their names were interlined after the warrant was sealed, but before it was sent out of the office. The prisoner refused them admittance; and, on their bursting open the door, shot at Banks, and wounded him severely. Upon an indictment for wilfully shooting, upon the 43 Geo. 3, c. 58, objection was taken that the warrant gave Banks and Powell no authority, because their names were inserted after it was sealed. But the prisoner having been convicted, upon a case reserved, the Judges held that the conviction was right.(a) So where a magistrate who kept by him a number of blank warrants ready signed, on being applied to, filled up one of them, and delivered it to the officer, who, in endeavoring to arrest the party, was killed; it was held that this was murder in the person killing the officer (b)

It may be proper to remark a circumstance in the preceding case of Stockley, which has been thought to deserve consideration,(c) namely, that he had before deliberately resolved upon shooting Welch in case he offered to arrest him again, which in all probability it might be his duty to do. It certainly resembles a former case, where, upon some officers breaking open a shop-door to execute an escape warrant, the prisoner, who had previously sworn that the first man that entered should be a dead man, killed one of them immediately by a blow with an axe. A few of the Judges to whom this case was referred, were of opinion that this would have been murder, though the warrant had not been legal, and though the officers could not have justified the breaking open the door, upon the grounds of the brutal cruelty of the act, and of the deliberation manifested by the prisoner, who, looking out of a window with the axe in his hand, had sworn, before any attempt to enter the shop, that the first man that did enter should be a dead man.(d) But in another case, prior to either of these, where the cruelty and the deliberation were of a similar kind, *834] the crime was considered as extenuated by the illegality of the *officers proceeding. A bailiff having a warrant to arrest a person upon a *capias ad satisfaciendum*, came to his house, and gave him notice; upon which the person menaced to shoot him if he did not depart: the bailiff did not depart, but broke open the window to make the arrest, and the person shot him, and killed him. It was

(x) Stockley's case, 1772, Serjeant Forster's MS.; 1 East P. C. c. 5, s. 78, pp. 310, 311. The case was so decided without argument.

(y) Housin v. Barrow, 6 T. R. 122. And see a case referred to by Lord Kenyon, 6 T. R. 123.

(z) Stevenson's case, 19 St. Tr. 846.

(a) Rex v. Harris, East. T. 1801, MS., Bayley, J. See *ante*, p. 831.

(b) Per Lord Kenyon, in Rex v. The inhabitants of Winwick, 8 T. R. 454, who there mentions it as a case determined by the Judges some years before.

(c) 1 East P. C. c. 5, s. 78, p. 311.

(d) Curtis's case, 1756, Fost. 135.

holden that this was not murder, because the officer had no right to break the house but that it was manslaughter, because the party knew the officer to be a bailiff.^(e)

*Upon an indictment for maliciously wounding under the 9 Geo. 4, c. 31, [835 it appeared that a constable having a warrant to apprehend the prisoner, gave

(e) Cook's case, 1 Hale 458; Cro. Car. 537; W. Jones 429. Upon these cases the following very sensible observations are made in Roscoe's Cr. Ev. 707, 708: "These decisions would appear to countenance the position, that where an officer attempts to execute an illegal warrant, and is in the first instance resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death, a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced to manslaughter. In Thompson's case, 1 R. & M. C. C. R. 80, where the officer was about to make an arrest on an insufficient charge, the Judges adverted to the fact that the prisoner was in such a situation that he could not get away. In these cases it would seem to be the duty of the party whose liberty is endangered to resist the officer with as little violence as possible, and that if he uses great and unnecessary violence, unsuited both to the provocation given and to the accomplishment of a successful resistance, it will be evidence of malice sufficient to support a charge of murder. So also where, as in Stockley's case, *supra*, note (x), and Curtis's case, *supra*, note (d), the party appears to have acted from motives of express malice, there seems to be no reason for withdrawing such a case from the operation of the general rule, that provocation will not justify the party killing, or prevent his offence from amounting to murder, where it is proved that he acted at the time from express malice. And of this opinion appears to be Mr. East, who says, "it may be worthy of consideration whether the illegality of an arrest does not place the officer attempting it exactly on the same footing as any other wrong-doer." 1 East P. C. 328. It may be remarked that this question is fully decided in the Scotch law, the rule being as follows:—In resisting irregular or defective warrants, or warrants executed in an irregular way, or upon the wrong person, it is murder, if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained: Alison's Princ. Cr. Law of Scotland, 25. If, says Baron Hume, instead of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake to stab or shoot the officer, when no great struggle has yet ensued, and no previous harm of body has been sustained, certainly he cannot be found guilty of any lower crime than murder: 1 Hume 250. The distinction appears to be, says Mr. Alison, that the Scotch law reprobates the *immediate* assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of them, the more especially if the informality or error was not known to the party resisting; whereas the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only." Alison's Princ. Cr. Law of Scotland 28. In such cases it seems to me that it may be well deserving of consideration whether the first inquiry ought not to be whether or no the act done was caused by the illegal apprehension. If the act done arose from other causes, and had no reference to the illegal arrest, as if it arose from previous ill will, it should seem that the illegality of the arrest ought not to be taken into consideration, because it was not the cause of the act, and therefore could not be truly said to have afforded any provocation for it. Such a case would be like the cases where blows have been given by the deceased, but the fatal blow has been inflicted in consequence of previous ill will. (See *Rex v. Thomas*, *ante*, p. 720; *Reg. v. Kirkham*, *ante* p. 721.) From the observations of Parke, B., in *Rex v. Patience*, *infra*, note (f), I infer that the very learned Baron was of opinion that if there were previous malice, the illegal arrest would not reduce the crime to manslaughter; because the previous malice was the cause of the act and not the illegality of the arrest. In such an inquiry the fact that the prisoner was ignorant at the time that the arrest was illegal would be most material, because it would almost conclusively show that the act did not arise from that cause. It should also be observed, that if "one has a legal and illegal warrant, and arrests by virtue of the illegal warrant, yet he may justify by virtue of the legal one; for it is not what he declares, but the authority which he has in his justification:" per Holt, C. J.; *Greenville v. The College of Physicians*, 12 Mod. 386, and see *Crowther v. Ramsbottom*, 7 T. R. 654; *The Governors of Bristol Poor v. Wait*, 1 Ad. & E. 264 (28 E. C. L. R.), so it might be contended that if the party apprehended had committed a felony, as he might be apprehended by any individual without a warrant, the apprehension by a constable under a defective warrant would not be illegal, as he might justify the arrest as a private individual. See per Tindal, C. J., in *Hoye v. Bash*, 1 M. & Gr. 775 (39 E. C. L. R.), *ante*, p. 830, note (o). See also as a constable has authority to apprehend any person within his district, whom he has reasonable ground to suspect of having committed a felony [*Beckwith v. Philby*, *ante*, p. 801, note (s)]; in such a case also it might be contended that he might justify the arrest, although in fact he did apprehend under an illegal warrant. C. S. G.

it to his son, who went in pursuit of the prisoner in company with his brother; the father stayed behind; they found the prisoner lying under a hedge, and when they first saw him he had a knife in his hand running the blade of it into the ground; he got up from the ground to run away, and the son laid hold of him, and he stabbed the son with the knife; the father was in sight at about a quarter of a mile off. Parke, B., "The arrest was illegal, as the father was too far off to be assisting in it; and there is no evidence that the prisoner had prepared the knife beforehand to resist illegal violence. If a person receives illegal violence, and he resists that violence with anything he happens to have in his hand, and death ensues, that would be manslaughter. If the prisoner had taken out this knife on seeing the young man come up, it might be evidence of previous malice, but that is not so, as we find that the knife was in his hand when the young man first came in sight." (*f*)

The parties whose liberty is interfered with must have due notice of the officer's business; or their resistance and killing of such officer will amount only to manslaughter. (*g*) Thus, where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning, in order to arrest him, but did not tell his business, nor use words of arrest, and the party not knowing that the other was an officer, in the first surprise snatched down a sword, which hung in his room and killed the bailiff; it was ruled to be manslaughter. (*h*) But it will be otherwise, if the officer and his business be known; (*i*) as where a man said to a bailiff who came to arrest him, "Stand off, I know you well enough, come at your peril," and, upon the bailiff taking hold of him, ran the bailiff through the body and killed him, it was held to be murder. (*k*) This will apply as well to a special bailiff as to a known officer; but where the party does not show by his conduct that he is acquainted with the officer and his business, material distinctions arise as to notice of a known officer, and one whose authority is only special.

Where a party is apprehended in the commission of an offence, or upon fresh pursuit afterwards, notice is not necessary, because he must know the reason why he is apprehended. Upon an indictment for maliciously wounding it appeared that two persons *heard a noise in a board-house, near midnight, and saw the prisoner *836] inside the board-house, and heard a noise among the boards, and heard the prisoner say, "Bring that board:" on which the persons went for the owner, who came in a quarter of an hour, when no one was found in the board-house, but two planks had been removed to a part of the board-house nearer the door, and after searching in several places they found the prisoner in the garden of another person, crouched down under a tree, with a drawn sword in his hand, and being asked twice what he did there, he made no answer, and then started off, but was pursued and caught hold of by one of the persons, whom he compelled to leave his hold; he then fell over something, and the others came up, and he then attempted to get away, but was prevented by some paling, and he then turned round and wounded the owner of the boards; it was held, on a case reserved, that the circumstances of the case told him why he was apprehended, and that it was not necessary to tell him what he must have known. (*l*) So where upon an indictment for maliciously wounding, it appeared that the assistant to the head keeper of Sir R. S. went with five or six assistants towards a covert of Sir R. S., where they heard guns; they then went towards the place, and rushed in at the poachers to take them; the prosecutor saw six persons in the wood, and he ran after them; they got into a field about six yards off; they then ranged themselves in a row, the prosecutor being five or six yards from them, on the edge of the plantation, and he heard one of them say, "The first man that comes out I'll be d——d if I don't shoot him;" upon which the prosecutor drew his pistol, cocked it, and ran out; they all ran away together; the prosecutor followed them, and when they had run about fifty yards they stood; they had all turned round;

(*f*) *Rex v. Patience*, 7 C. & P. 775 (32 E. C. L. R.). See this case, *ante*, p. 826.

(*g*) 1 Hale 458, *et seq.*; 1 Hawk. P. C. c. 31, ss. 49, 50; Fost. 310.

(*h*) 1 Hale 470, case at Newgate, 1657. And see Kel. 136.

(*i*) Mackally's case, 9 Co. 69.

(*k*) *Pew's case*, Cro. Car. 183; 1 Hale 458.

(*l*) *Rex v. Howarth*, R. & M. C. C. R. 207, *ante*, p. 816. See *Rex v. Woolmer*, R. & M. C. C. R. 334, *ante*, p. 804.

one of them shot at the prosecutor, who was running to him; the prosecutor was wounded; the men said nothing to the prosecutor before he was shot, nor he to them; it was objected, that, inasmuch as the prosecutor's authority to apprehend them was derived from the act creating the offence, it was incumbent upon him to give notice to them: the objection was overruled: and, upon a case reserved, the Judges were of opinion that the circumstances constituted sufficient notice.^(m) So where a servant of Sir T. W. was out with his gamekeeper at night, and they heard two guns fired, and went towards the place, and got into a covert, and saw some men there who ran away, and the servant pursued them, and got close up to one of them, and made a catch at his legs, and was immediately shot through the side; Parke, B., said, "Where parties find poachers in a wood, they need not give any intimation by words that they are gamekeepers, or that they come to apprehend; the circumstances are sufficient notice. What can a person poaching in a wood suppose when he sees another at his heels?"⁽ⁿ⁾

With regard to private persons interfering, as they may do, in *case of sudden affrays, in order to part the combatants, and prevent bloodshed, it is [*837 quite necessary that they should give express notice of their friendly intent; otherwise the persons engaged may, in the heat and bustle of the affray, imagine that they came to act as parties^(o)

With regard to such ministers of justice as, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties engaged should have some notice of the intent with which they interpose; for the reason which was mentioned in relation to private persons; lest the parties engaged should, in the heat and bustle of an affray, imagine that they come to take a part in it.^(p) But, in these cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer, in any other manner, declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged, to bear the office he assumes, the law will presume that the party killing had due notice of his intent; especially if it be in the daytime.^(q) In the night some further notification is necessary; and commanding the peace, or using words of like import, notifying his business, will be sufficient.^(r) Killing a watchman in the execution of his office is not the less murder for being done in the night; and the killing an officer who arrests on civil process may be murder, though the arrest be made in the night; and in the case of an affray in the night where the constable, or any other person who comes to aid him to keep the peace, is killed, after the constable has commanded in the King's name to the keeping of the peace, such killing will be murder; for though the parties could not discern or know him to be a constable, yet if it were said at the time that he was such officer, resistance was at their peril.^(s) Therefore though the saying of a learned Judge, "That a constable's staff will not make a constable," is admitted to be true; yet if a minister of justice be present at a riot or affray within his district, and in order to keep the peace produce his staff of office, or any other known ensign of authority, in the daytime when it can be seen, it is conceived that this will be a sufficient notification of the intent with which he interposes; and that, if resistance be made after this notification, and he or any of his assistants killed, it will be murder in every one who joined in such resistance.^(t) For it seems that

(m) *Rex v. Payne*, R. & M. C. C. R. 378. See *Rex v. Fraser*, R. & M. C. C. R. 419, *ante*, p. 815, note (h).

(n) *Rex v. Davis*, 7 C. & P. 785, Parke, B. See *Rex v. Taylor*, 7 C. & P. 266 (32 E. C. L. R.), Vaughan, J.

(o) *Fost.* 310, 311.

(p) *Fost.* 310; *Kel.* 68, 115.

(q) 1 Hale 460, 461; *Fost.* 310, 311. So in the *Sissinghurst-house* case, 1 Hale 462, 463, it was resolved that there was sufficient notice that it was the constable before the man was killed:—1. Because he was constable of the same vill. 2. Because he notified his business at the door before the assault, viz., that he came with the justice's warrant. 3. Because, after his retreat, and before the man slain, he commanded the peace; and, notwithstanding, the rioters fell on and killed the party. See the case fully stated, *ante* p. 737, *et seq.*

(r) 1 Hale 461; *Fost.* 311.

(s) 9 Co. 66 a.

(t) *Fost.* 311.

in the case of a public bailiff, a bailiff *juratus et cognitus*, acting in his own district, his authority is considered as a matter of notoriety; and, upon this ground, though *838] the warrant by which he was constituted bailiff be demanded, he need not *show it; (u) and it is sufficient if he notify that he is the constable, and arrest in the King's name. (v) And this kind of notification by implication of law will hold also in cases where public officers, having warrants, directed to them as such, to execute, are resisted, and killed in the attempt. (w) Thus, where a warrant had been granted against the prisoner by a justice of peace for an assault, and directed to the constable of *Pattishal*, and delivered by the person who had obtained it to the deceased, to execute, as constable of the parish, and it appeared that the deceased went to the prisoner's house in the daytime to execute the warrant, had his constable's staff with him, and gave notice of his business, and further, that he had before acted as constable of the parish, and was generally known as such: it was determined that this was sufficient evidence and notification of the deceased being constable, although there were no proof of his appointment, or of his being sworn into the office. (x)

It is laid down in one case, that if, upon an affray, the constable, or others in his assistance come to suppress it, and preserve the peace, and be killed in executing their office, it is murder in law, although the murderer knew not the party killed, and though the affray were sudden; because he set himself against the justice of the realm. (y) It is said, however, that in order to reconcile this with other authorities, it seems that the party killing must have had *implied notice* of the character in which the peace officer and his assistants interfered, though not a personal knowledge of them. (z) For it is elsewhere laid down, that if there be a sudden affray, and the constable come in, and, endeavoring to appease it, be killed by one of the company who knew him, it is murder in the party killing, and in such of the others as knew the constable, and abetted the party in the fact; but only manslaughter in those who knew not the constable; (a) and that others continuing in the affray, neither knowing the constable, nor abetting to his death, would not be guilty even of manslaughter. (b) But these positions do not apply to an affray deliberately engaged in by parties determined to make common cause, and to maintain it by force. (c)

*839] It is however agreed, that if a bailiff or other officer be resisted *in the regular discharge of his duty in executing process against a party, and a third person, even the servant or friend of the party resisting, come in and take part against the officer, and kill him, it will be murder, though he knew him not. (d) But it is suggested, that in this case, in order to make it murder in the servant or friend, the party whom they came in to assist must have had due notice of the officer's authority; and that if the offence would not have been murder in the party himself resisting for want of such notice, neither would it in the servant or friend

(u) 1 Hale 458, 461, 583; *Mackally's case*, 9 Co. 69 a. But it is otherwise as to the writ or process against the party. Both a public and private bailiff, where the party submits to the arrest and demands it, are bound to show at whose suit, for what cause, and out of what court the process issues, and where returnable: 6 Co. 54 a; 9 Co. 69 a; but it will be no excuse that he did not tell the party, if the party resisted so as not to give time for telling: 9 Co. 69 a. And in no case is the bailiff required to part with the possession of the warrant; neither is a constable, whether acting within or without his jurisdiction: 1 MS. Sum. 250; 1 East P. C. c. 5, s. 84, p. 319. By a known bailiff is meant one who is commonly known to be so; it is not necessary that he should be known to the party to be arrested: 9 Co. 69 b.

(v) 1 Hale 583.

(w) 1 East P. C. c. 5, s. 81, p. 315.

(x) *Rex v. Gordon*, Northampton Spr. Ass. 1789, *cor.* Thomson, B., afterwards considered at a conference of all the Judges, 26th June, 1789. See 1 East P. C. c. 5, s. 81, p. 315.

(y) *Young's case*, 4 Co. 40 b; 3 Inst. 52.

(z) 1 East P. C. c. 5, s. 82, p. 316.

(a) 1 Hale 438, 446, 461; Kel. 115, 116.

(b) 1 Hale 446. Lord Hale adds, *quod tamen quere*, but (as it is said, 1 East P. C. c. 5, s. 82, p. 316) perhaps over cautiously, if in truth there were no abetment.

(c) See as to the cases of that kind, *ante*, p. 55, *et seq.*

(d) 1 Hawk. P. C. c. 31, s. 57; *Keb.* 87; 4 Co. 40, b; 1 East P. C. c. 5, s. 82, p. 316.

under the like ignorance.(e) The law upon this point may, perhaps, hardly seem to be reconcilable with that above-mentioned, of a person not knowing the constable, and killing him in an affray; but it is defended on the principle, that every person wilfully engaging, in cool blood, in a breach of the peace, by assaulting another, instead of endeavoring to assuage the dispute, is bound first to satisfy himself of the justice of the cause he espouses at his peril.(f) And, upon this principle, if a stranger seeing two persons engaged, one of them a bailiff, attacking the other, with a sword, and the other resisting an arrest by such bailiff, interfere between them without knowing the bailiff, for the express purpose of defending the party attacked against the bailiff, he must abide the consequence at his peril; but if he interfere, not for the purpose of aiding one party against the other, but *with intent only to preserve the peace, and prevent mischief*, and in so doing happen to kill the bailiff, the case would possibly fall under a different consideration.(g)

In all cases, whether criminal or civil, where doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity.(h) In a case where an outer door had been broken open by two constables and a gamekeeper, to execute a warrant granted under the 22 & 23 Car. 2, c. 25, s. 2, to search for, and seize any guns, &c., for destroying game; and it appeared that the door was broken open without the party having been previously requested to open it; the Court held, that, in a case of misdemeanor, a previous demand of admittance was clearly necessary, before an outer door was broken open. Abbott, C. J., said, "it is not at present necessary to decide how far in a case of a person charged with felony it would be necessary to make a previous demand of admittance, before you could justify breaking open the outer door of the house; because I am clearly of opinion, that, in the case of a misdemeanor, such previous demand is requisite." Bayley, J., said, generally, "even in the execution of *criminal process, you must demand admittance, before you can justify [*840 breaking open the outer door. That point was mentioned in the judgment of the Court in *Burdett v. Abbott*."(i) The question as to what should be considered as due notice was much considered in a case where two officers went to the workshop of a person, against whom they had an escape warrant; and finding the shop door shut, called out to the person, and informed him that they had an escape warrant against him, and required him to surrender, otherwise they said they would break open the door; and, upon the person's refusing to surrender, they broke open the door, and one of their assistants was immediately killed. Nine of the Judges were of opinion, that no precise form of words was required in a case of this kind; and that it is sufficient if the party had notice that the officer comes not as a mere trespasser, but claiming to act under a proper authority. The judges who differed, thought that the officers ought to have declared, in an explicit manner, what sort of warrant they had; and that an escape does not, *ex vi termini*, nor in the notion of law, imply any degree of force, or breach of the peace; and, consequently, that the prisoner had not due notice that they came under the authority of a warrant grounded on the breach of the peace; and that, for want of this due notice, the officers were not to be considered as acting in discharge of their duty, but as mere trespassers.(k)

In the case of a *private or special bailiff*, either it must appear that the party knew that he was such an officer, as where the party said, "Stand off, I know you

(e) 1 East P. C. c. 5, s. 82, p. 316.

(f) 1 Hawk. P. C. c. 31, s. 59; 1 East P. C. c. 5, s. 82, pp. 316, 317, where the grounds upon which the law in each of these cases may be supported, and considered as reconcilable, are more fully stated.

(g) See the case of Sir C. Standlie and Andrews, Sid. 159, where Andrews, under similar circumstances, was holden not to be guilty of murder. This case is differently reported by Kelyng; and Keble, reporting the same case very shortly, says:—It was adjudged, that if any casually assist against the law, and kill the bailiff, it is murder, especially if he knew the cause: 1 Keb. 584; and see 1 East P. C. c. 5, s. 83, p. 318.

(h) Fost. 320; 2 Hawk. P. C. c. 14, s. 1; 1 East P. C. c. 5, s. 87, p. 324.

(i) Lannock v. Brown, 2 B. & A. 592.

(k) Curtis's case, Fost. 135.

well enough; come at your peril;" or, that there was some such notification thereof that the party might have known it, as by saying, "I arrest you." These words, or words to the like effect, give sufficient notice; and if the person using them be a bailiff, and have a warrant, the killing of such officer will be murder.(l) A private bailiff ought also to show the warrant upon which he acts, if it is demanded;(m) and with respect to the writ or process against the party, both the public and private bailiff, in case the party submit to the arrest and make the demand, are bound to show at whose suit, and for what cause the arrest is made, out of what court the process issues, and when and where returnable.(n) In no case, however, is he required to part with the warrant out of his own possession; for that is his justification.(o)

It may be observed generally, that where an officer, in executing his office, proceeds irregularly, and exceeds the limits of his authority, the law gives him no protection in that excess; and if he be killed, the offence will amount to no more than *841] manslaughter in the person whose liberty is so invaded.(p) He should be careful, therefore, to execute process only within the jurisdiction of the court from whence it issues; as, if it be executed out of such jurisdiction, the killing the officer attempting to enforce the execution of it will be only manslaughter.(q) But, if the process be executed within the jurisdiction of the court or magistrate from whence it is issued, it will be sufficient, though it be executed out of the vill of the constable, provided it be directed to a particular constable by name, or even by his name of office.(r) And the officer must also be careful not to make an arrest on a Sunday, except in cases of treason, felony, or breach of the peace; as, in all other cases, an arrest on that day will be the same as if done without any authority.(s) But process may be executed in the night time, as well as by day.(t)

The right of officers to break open windows or doors, in order to make an arrest, has been a subject of some litigation; but many of the points have been settled, and require to be shortly noticed. And the general rule must be kept in mind, that in every case, whether criminal or civil, in which doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity.(u)

Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced, after the notification, demand, and refusal which have been mentioned.(v) So, where a minister of justice comes armed with process, founded on a breach of the peace, doors may be broken.(w) And it is also settled, upon unquestionable authorities, that where an injury to the public has been committed, in the shape of an insult to any of the courts of justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors, if necessary, in order to execute it.(x) And the

(l) 1 Hale 461; Mackally's case, 9 Co. 69 b.

(m) 1 Hale 583. That is, the warrant by which he is constituted bailiff; which a bailiff or officer, *juratus et cognitus*, need not show upon the arrest: 1 Hale 458. And see 1 Hale 459, where it is said that a justice of peace may issue his warrant to a private person; but then such person must show his warrant, or signify the contents of it.

(n) 1 Hale 458, note (g); 6 Co. 54 a; 9 Co. 69 a.

(o) 1 East P. C. c. 5, s. 83, p. 319.

(p) Fost. 312.

(q) 1 Hale 458, 459; 1 East P. C. c. 5, s. 80, p. 314.

(r) 1 Hale 459; 2 Hawk. P. C. c. 13, s. 27, 30; 1 East P. C. c. 5, s. 80, p. 314. And see the new statutes. *Ante*, p. 824.

(s) 29 Car. 2, c. 27; 1 East P. C. c. 5, s. 88, p. 324, 325. The statute makes void all process, warrants, &c., served and executed on a Sunday, except in the cases mentioned in the text.

(t) 9 Co. 66 a; 1 Hale 457; 1 Hawk. P. C. c. 31, s. 62.

(u) Fost. 320; 2 Hawk. P. C. c. 14, s. 1. *Ante*, p. 839.

(v) Fost. 320; 1 Hale 459. And see 2 Hawk. P. C. c. 14, s. 7, where it is said that doors may be broken open, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person.

(w) Fost. 320; 1 Hale 459; 2 Hawk. P. C. c. 14, s. 3; Curtis's case, Fost. 135.

(x) Burdett v. Abbott, 14 East 157, where the process of contempt proceeded upon the

officer may act in the same manner upon a *capias ultagatum*, or *capias pro fine*,^(y) or upon an *habere facias possessionem*.^(z) The same force may be used where a forcible entry or detainer is found by inquisition before justices of peace, or appears upon their view;^(a) and also where the proceeding is upon a warrant of a justice of peace, for levying a penalty on a conviction grounded on any statute, which gives the whole or any part of such penalty to the King.^(b) But in this latter case the officer executing the warrant must, if required, show the same to the person whose goods and chattels are distrained, and suffer a copy of it to be taken.^(c) [*842

But though a felony has been actually committed, yet a bare suspicion of guilt against the party will not authorize a proceeding to this extremity, unless the officer comes armed with a warrant from a magistrate, grounded on such suspicion.^(d) For where a person lies under a probable suspicion only, and is not indicted,^(e) it is said to be the better opinion, that the breaking open doors without a warrant, in order to apprehend him, cannot be justified;^(f) or must at least be considered as done at the peril of proving that the party, so apprehended on suspicion, is guilty.^(g) But a different doctrine appears to have formerly prevailed upon this point; by which it was held, that if there were a charge of felony laid before the constable, and reasonable ground of suspicion, such constable might break open doors, though he had no warrant.^(h) A plea justifying the entering a house without warrant, the door being open, on suspicion of felony, ought distinctly to show the purpose for which the house was entered, viz., either to search for the stolen property or to arrest the plaintiff, as well as that there was reason to believe that the stolen property or the plaintiff was there.⁽ⁱ⁾

It is said, that if there be an affray in a house, the doors of which are shut, whereby there is likely to be manslaughter or bloodshed, and the constable demand entrance, and be refused by those within, who continue the affray, the constable may break open the doors to keep the peace, and prevent the danger:^(k) and it is also said, that if there be disorderly drinking or noise in a house at an unreasonable time of night, especially in inns, taverns, or ale-houses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder.^(l) And further, that where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers in either case, he may justify breaking open the doors.^(m)

But this mode of proceeding, by breaking the doors of the party, is founded upon the necessity of the measure for the public weal, and is not permitted to the particular interest of an individual. In civil suits, therefore, the principle that a man's house is his castle, for safety and repose to himself and his family, is admitted; and, accordingly, in such cases, an officer cannot justify the breaking open an outward door or window to execute the process.⁽ⁿ⁾ If he do so, he will be a trespasser; and if the occupier of the house resist him, and in the struggle kill him, the offence will be only manslaughter;^(o) for if the occupier of the house do not know him to be an officer, and have reasonable ground of suspicion that the house is broken with a felonious intent, the killing such officer will be no felony.^(p) [*843

It has been considered, however, that this rule of every man's house being his castle has been carried as far as the true principles of political justice will warrant, order of the House of Commons; and see *Semayne's case*, Cro. Eliz. 909; and *Brigg's case*, 1 Rol. Rep. 336.

(y) 1 Hale 459; 2 Hawk. P. C. c. 14, s. 4.

(z) 1 Hale 458; 5 Co. 95 b.

(a) 2 Hawk. P. C. c. 14, s. 6.

(b) Ibid. 5.

(c) 27 Geo. 2, c. 20.

(d) Fost. 321.

(e) *Ante*, p. 801.

(f) 2 Hawk. P. C. c. 14, s. 7.

(g) 1 East P. C. c. 5, s. 87, p. 322.

(h) 1 Hale 583; 2 Ibid. 92, 13 Ed. 4, 9 a.

(i) *Smith v. Shirley*, 3 C. B. 142 (54 E. C. L. R.).

(k) 2 Hale 96.

(l) Ibid.; and it is added, "This is constantly used in London and Middlesex." But see *ante*, p. 409, *et seq.*

(m) 2 Hawk. P. C. c. 14, s. 8.

(o) Ibid.

(n) *Cook's case*, Cro. Car. 537; Fost. 319.

(p) 1 Hale 458; 1 East P. C. c. 5, s. 87, p. 321, 322.

and that it will not admit of any extension.(q) It should be observed, therefore, that it will apply only to the breach of *outward* doors or windows; to a breach of the house for the purpose of arresting *the occupier or any of his family*; and to arrests *in the first instance*.

Outward doors or windows are such as are intended for the security of the house against persons from without endeavoring to break in.(r) These are protected by the privilege which has been before mentioned; but if the officer find the outward door open, or it be opened to him from within, he may then break open any *inward* door, if he find that necessary in order to execute his process.(s) Thus, it has been holden that an officer, having entered peaceably at the outer door of a house, was justified in breaking open the door of a lodger, who occupied the first and second floors, in order to arrest such lodger.(t) And in a late case it was decided, that a sheriff's officer in execution of *mesne process*, who had first gained peaceable entrance at the outer door of the house of A., might break open the windows of the room of B., a person residing in such house; B. having refused to open the door of the room, after being informed by the officer that he had a warrant against him.(u) But it seems that if the party, against whom the process is issued, *be not within the house* at the time, the officer can only justify breaking open inner doors in order to search for him, after having first demanded admittance.(v) Though in case the person, or the goods of the defendant, are contained in the house which the officer has entered, he may break open any door within the house without any further demand.(w) If, however, the house is the house of a stranger, and not of the defendant, the officer must be careful to ascertain that the person or the goods (according to the nature of the process) of the defendant are within, before he breaks open any inner door; as, if they are not, he will not be justified.(x)

In a case where an outward door was in part open (being divided into two parts, the lower hatch of which was closed, and the upper part open), and the officer put his arm over the hatch, to open the part which was closed, upon which a struggle ensued between him and a friend of the prisoner, and, the officer prevailing, the prisoner shot at and killed him; it was held to be murder.(y)

*844] *The privilege only extends to the dwelling-house, but it should seem that within that term are comprehended all such buildings as are within the curtilage, and as are considered as parcel of the dwelling-house at common law. In trespass the defendant justified an entry into a close and breaking into a barn under a *feri facias*; the plaintiff replied that the door of the barn was shut, and it was adjudged upon demurrer that in such a case the sheriff can break open the door of the barn without a request, in order to take the goods; for it shall be intended to be a barn in a field, and not a barn which is parcel of a house. For the Court agreed that if the barn had been adjoining to and parcel of the house, it could not be broken open.(z)

This personal privilege of an individual, in respect to his outer door or window, is confined also to cases where the breach of the house is made in order to arrest *the occupier or any of his family*, who have their domicile, their ordinary residence, there: for if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, this is not the castle of such stranger, nor can he

(q) Fost. 319, 320.

(r) Fost. 320.

(s) 1 Hale 458; 1 East P. C. c. 5, s. 87, p. 323.

(t) Lee v. Gansel, Cowp. 1.

(u) Lloyd v. Sandilands, 2 Moore 207; 8 Taunt. 250 (4 E. C. L. R.). See Hodgson v. Towning, 5 Dowl. P. R. 410.

(v) Ratcliffe v. Burton, 3 Bos. & Pull. 223.

(w) Per Gibbs, J., in Hutchinson v. Birch and another, 4 Taunt. 619.

(x) Cook v. Birt, 5 Taunt. 765 (1 E. C. L. R.); Johnson v. Leigh, 6 Taunt. 240 (1 E. C. L. R.). Post, p. 845.

(y) Baker's case, 1 Leach 112; 1 East P. C. c. 5, s. 87, p. 323. It should be observed that in this case there was proof of a previous resolution in the prisoner to resist the officer, whom he afterwards killed in attempting to attach his goods in his dwelling-house, in order to compel an appearance in the county court. The point reserved related to the legality of the attachment. Ante, p. 827.

(z) Penton v. Browne, 1 Sid. 186. See the authorities as to what is comprehended under the term dwelling-house at common law, under the titles of *Burglary* and *Arson*.

claim in it the benefit of sanctuary.(a) But it should be observed, that in all cases where the doors of strangers are broken open, upon the supposition of the person sought being there, it must be at the peril of finding him there; unless, as it seems, where the parties act under the sanction of a magistrate's warrant (b) And an officer cannot even enter the house of a stranger, though the door be open, for the purpose of taking the goods of a defendant, but at his peril as to the goods being found there or not; and if they be not found there, he is a trespasser.(c) A sheriff's officer is not justified in entering and searching the house of a stranger, though the door be open, for the purpose of arresting a defendant under a *capias ad satisfaciendum*, although the defendant may have resided there immediately before the entry, and although the officers have reasonable cause *to suspect [845 that the defendant is in the house; if it turned out that he was not in the house at the time; for a party who enters the house of a stranger to search for and arrest a defendant, can be justified only by finding him there. But if a sheriff enters the house of the defendant for the purpose of arresting him or taking his goods, he is justified if he has reasonable grounds for believing that the party or his goods are there.(d) And it has been decided that a sheriff cannot justify breaking the inner doors of the house of a stranger, upon suspicion that a defendant is there, in order to search for such defendant, and arrest him on mesne process.(e)

And the privilege is also confined to arrests in the first instance. For if a man, being legally arrested,(f) escape from the officer, and take shelter, though in his own house, the officer may, upon fresh suit, break open doors in order to retake him, having first given due notice of his business, and demanded admission, and been refused.(g) If it be not, however, upon fresh pursuit, it seems that the officer should have a warrant from a magistrate: and it should be observed, that the officer will not be authorized to break open doors in order to retake a prisoner in any case where the first arrest has been illegal.(h) Therefore, where an officer has made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned again with assistants, who attempted to force the door, when the party within shot one of the assistants: it was ruled to be only manslaughter.(i)

(a) *Fost.* 320; 5 *Co.* 93. Mr. Smith, in his learned note to *Semayne's case*, 1 *Sm. Lead. Cas.* 45, after citing the observations of Lord Loughborough in *Sheere v. Brookes*, 2 *H. Bl.* 120, says, "it seems to follow from this that, as a house in which the defendant habitually resides is on the same footing with respect to executions as his own house, the sheriff would not be justified in breaking the outer door of such a house, even after demand of admittance and refusal."

(b) 2 *Hale* 103; *Fost.* 321; 1 *East P. C. c.* 5, s. 87, p. 324. Mr. Smith, in the same note, says, "there may, perhaps, be another case in which the sheriff might justify entering the house of a stranger upon bare suspicion, viz., if the stranger were to use fraud, and to inveigle the sheriff into a belief that the defendant was concealed in his house for the purpose of favoring his escape, while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit so as to treat the sheriff who entered under the false supposition thus induced as a trespasser; or, perhaps, such conduct might be held to amount to a license to the sheriff to enter." It certainly is reasonable in such a case that the party should not be permitted to show that in fact the defendant was not concealed in this house, and this would be in accordance with the principles established by *Pickard v. Sears*, 6 *A. & E.* 469 (33 *E. C. L. R.*); *Heane v. Rogers*, 9 *B. & C.* 586 (17 *E. C. L. R.*); *Kieran v. Sanders*, 3 *A. & E.* 515 (33 *E. C. L. R.*), and *Gregg v. Wells*, 10 *A. & E.* 90 (37 *E. C. L. R.*), in which last case it was held that a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact, which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. C. S. G.

(c) *Cooke v. Birt*, 5 *Taunt.* 765 (1 *E. C. L. R.*).

(d) *Morrish v. Murrey*, 13 *M. & W.* 52.

(e) *Johnson v. Leigh*, 6 *Taunt.* 246 (1 *E. C. L. R.*), *ante*, p. 843.

(f) Laying hold of the prisoner, and pronouncing the words of arrest, is an actual arrest: *Fost.* 320. But bare words will not make an arrest; the officer must actually touch the prisoner: *Genner v. Sparkes*, 1 *Salk.* 79; *Berry v. Adamson*, 6 *B. & C.* 528 (13 *E. C. L. R.*).

(g) *Fost.* 320; *Genner v. Sparkes*, 1 *Salk.* 79; 1 *Hale* 459; 2 *Hawk. P. C. c.* 14, s. 9.

(h) 1 *East P. C. c.* 5, s. 87, p. 324.

(i) *Stevenson's case*, 10 *St. Tr.* 462.

In all cases where the officer or his assistants, having entered a house in the execution of their duty, are locked in, they may justify breaking open the doors to regain their liberty. (*k*) So where a sheriff being lawfully in a house makes a lawful seizure of the goods of the owner of the house, and cannot take the goods out of the house without opening the outer door, and neither the owner nor any one else is there so that he can request them to open the door, he may break the door open to take out the goods. (*l*)

It has been deemed a question worthy of great consideration how far *third persons, especially mere strangers*, interposing in behalf of a party illegally arrested, are entitled to insist upon the illegality of the arrest, in their defence, as extenuating their guilt in killing the officer.

The point was raised in the following case:—One Bray, who was a constable of St. Margaret's parish in Westminster, came into the parish of St. Paul, Covent Garden, where he was no constable, and consequently had no authority; (*m*) and there took *846] up one Anne Dekins, under suspicion of being a disorderly person, but who had not misbehaved herself, and against whom Bray had no warrant. The prisoners came up; and though they were all strangers to the woman, drew their swords, and assaulted Bray, for the purpose of rescuing the woman from his custody; upon which he showed them his constable's staff, declared that he was about the Queen's business, and intended them no harm. The prisoners then put up their swords, and Bray carried the woman to the round-house in Covent Garden. A short time afterwards, the woman being still in the round-house, the prisoners drew their swords again, and assaulted Bray, on account of her imprisonment, and to get her discharged. Bray called some persons to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners; upon which a person named Dent came to his assistance; and before any stroke received, one of the prisoners gave Dent, while assisting the constable, a mortal wound. This case was elaborately argued; and the Judges were divided in opinion; seven of them holding that the offence was manslaughter only, and five that it was murder. (*n*) The seven Judges who held that it was manslaughter thought that it was a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue her who was unlawfully restrained of her liberty; and that it could not be murder, if the woman was unlawfully imprisoned; (*o*) and they also thought that the prisoners, in this case, had sufficient provocation; on the ground that if one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people, out of compassion, and much more where it is done under a color of justice; (*p*) and that, where the liberty of the subject is invaded, it is a provocation to all the subjects of England. But the five judges who differed thought that, the woman being a stranger to the prisoners, it could not be a provocation to them; otherwise if she had been a friend or servant; and that it would be dangerous to allow such a power of interference to the mob.

The case of Hugget, and also that of Sir Henry Ferrers, appear to have been relied upon in support of the argument of the seven Judges, who in the preceding case held the offence to be manslaughter. Hugget's case, in the fuller report of it, (*q*) appears to have been thus:—Berry and two others pressed a man without any warrant for so doing; to which the man quietly submitted, and went along with them.

(*k*) 2 Hawk. P. C. c. 14, s. 11; 1 East P. C. c. 5, s. 87, p. 324.

(*l*) Pugh v. Griffith, 7 A. & E. 827 (34 E. C. L. R.).

(*m*) One judge only thought that Bray acted with authority, as he showed his staff, and that, with respect to the prisoners, he was to be considered as constable *de facto*.

(*n*) Reg. v. Tooley, 2 Lord Raym. 1298. "That case has been overruled," per Alderson, B.: Rex v. Warner, R. & M. C. C. R. 385; and per Pollock, C. B.; Reg. v. Davis, 1 L. & C. 64.

(*o*) For this Young's case, 4 Co. 40, was cited, and Mackally's case, 9 Co. 65.

(*p*) In Rex v. Osmer, 5 East 304, *ante*, p. 571, Lord Ellenborough, C. J., said, "If a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose."

(*q*) Hugget's case, Kel. 59.

The prisoner, with three others, seeing them, instantly pursued them, and required to see their warrant; on which Berry showed them a paper, which the prisoner and his associates said was no warrant, and immediately drew their swords to rescue the impressed man, and thrust at Berry; whereupon Berry and his two companions drew their *swords, and a fight ensued in which Hugget killed Berry. But [*847 this case is stated very differently by Lord Hale, as having been under the following circumstances:—A press-master seized B. for a soldier; and, with the assistance of C., laid hold of him. D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C.; and by the advice of all the Judges, except very few, it was ruled that this was but manslaughter.^(r) The case of Sir Henry Ferrers was only this:—That Sir Henry Ferrers being arrested for debt, upon an illegal warrant, his servant, in seeking to rescue him, as was pretended, killed the officer; but, upon the evidence, it appeared clearly that Sir Henry Ferrers, upon the arrest, obeyed, and was put into a house before the fighting between the officer and his servant; wherefore he was found not guilty of the murder and manslaughter.^(s)

But Mr. Justice Foster is of opinion, that these cases of Hugget and Sir Henry Ferrers' servant did not warrant the doctrine laid down by the seven Judges in the case of Tooley; and this great master of the crown law^(t) has animadverted upon that doctrine with much force, viewing it as having carried the law in favor of private persons officiously interposing in cases of illegal arrest further than sound reason, founded on the principles of true policy, will warrant.^(u) After observing that, in Hugget's case, swords were drawn, a mutual combat ensued, the blood was heated before the mortal wound was given, and a rescue seemed to be practicable at the time the affray began;^(v) whereas, though in Tooley's case the prisoners had, at the first meeting, drawn their swords against the constable unarmed, they had put them up again, appearing to be pacified, and cool reflection seeming to have taken place; and it was at the second meeting that the deceased received his death wound, before a blow was given or offered by him or any of his party; and also in that case there was no possibility of rescue, the woman having been secured in the round-house; he says, that the second assault on the constable seems rather to have been grounded upon resentment, or a principle of revenge, for what had before passed, than upon any hope or endeavor to assist the woman. He then proceeds, "Now, what was the case of Tooley and his accomplices, stript of a pomp of words, and the colorings of artificial reasoning? They saw a woman, for aught appears, a perfect stranger to them, led to the round house under a charge of a criminal nature. This, upon evidence at the Old Bailey, a month or two afterwards, comes out to be an illegal arrest and imprisonment, a violation of Magna Charta; and these ruffians are presumed to have been seized, all on a sudden, with a strong fit of zeal for Magna Charta^(w) and the laws, and in this frenzy to have drawn upon the constable, and stabbed his assistant. It is extremely *difficult to conceive that the viola- [*848 tion of Magna Charta, a fact of which they were totally ignorant at the time, could be the provocation which led them into this outrage. But, admitting for argument sake that it was, we all know that words of reproach, how grating and offensive soever, are in the eye of the law no provocation in the case of voluntary homicide; and yet every man who hath considered the human frame, or but attended to the workings of his own heart, knows that affronts of that kind pierce deeper, and stimulate the veins more effectually, than a slight injury done to a third person, though under the color of justice, possibly can. The indignation that kindles in the breast in one case is instinct: it is human infirmity; in the other it may possibly be called a concern for the common rights of the subject; but this concern, when well founded, is rather founded in reason and cool reflection than in human

(r) 1 Hale 465.

(s) Sir Henry Ferrer's case, Cro. Car. 371.

(t) So called by Mr. J. Blackstone, 4 Com. 2. (u) Post. 312, *et seq.*

(v) In Hugget's case the Judges, who held it to be manslaughter, put the point upon an endeavor to rescue.

(w) Holt, C. J., in delivering the judgment in Tooley's case, said, "Sure a man ought to be concerned for Magna Charta and the laws; and if any one against the law imprison a man, he is an offender against Magna Charta."

infirmity; and it is to human infirmity alone that the law indulges in the case of a sudden provocation." He then proceeds further: "But if a passion for the common rights of the subject, in the case of individuals, must, against all experience, be presumed to inflame beyond a personal affront, let us suppose the case of an upright and deserving man, universally beloved and esteemed, standing at the place of execution, under a sentence of death manifestly unjust. This is a case that may well rouse the indignation, and excite the compassion, of the wisest and best men; but wise and good men know that it is the duty of private subjects to leave the innocent man to his lot, how hard soever it may be, without attempting a rescue; for otherwise all government would be unhinged. And yet, what proportion doth the case of a false imprisonment, for a short time, and for which the injured party may have an adequate remedy, bear to that I have now put?"(x)

In a more recent case, the prisoner, who cohabited with a person named Farmello, killed an assistant of a constable, who came to apprehend Farmello, as an idle and disorderly person, under the 19 Geo. 2, c. 10. Farmello, though he was not an object of the act, did not himself make any resistance to the arrest; but the prisoner, immediately upon the constable and his assistant requiring Farmello to go along with them, without making use of any argument to induce them to desist, or saying one word to prevent the intended arrest, stabbed the assistant. And Hotham, B., with whom Gould, J., and Ashhurst, J., concurred, held the offence to be murder. A special verdict, however, was found: (y) and the case was argued in the Exchequer Chamber, before ten of the Judges; but no opinion was ever publicly delivered.(z)

*849] * *Sec. IV.—Cases where the Killing takes place in the Prosecution of some other Criminal, Unlawful, or Wanton Act.*

It has been shown, that where from an action, unlawful in itself, done deliberately, and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder: (a) and it may be here observed, that if such deliberation and mischievous intention does not appear, (which is

(x) *Fost.* 315, 316, 317.

(y) The Court advised the jury to find a special verdict, on the ground of the difference of opinion which had been entertained in *Tooley's case*, and the case of *Haggert*, *ante*, p. 846.

(z) *Adey's case*, 1 *Leach* 206. And see *Id.* p. 212, where it is said that the prisoner laid eighteen months in gaol, and was then discharged: but the following note is added, "It is said, that the Judges held it to be manslaughter only, but no opinion was ever publicly given; and *qu.* whether the prisoner did not escape pending the opinion of the Judges, when the gaol was burnt down in 1780, and was never retaken." And see also 1 *East P. C. c.* 5, s. 89, p. 329, note (a), where it is said, "Upon inquiry, however, it appears that, pending the consideration of the case, by the Judges, she escaped during the riots in 1780, and was never retaken." In *Reg. v. Porter and others*, which is reported as to another point, 9 *C. & P.* 778 (38 *E. C. L. R.*), upon an indictment for murder, where it appeared that the deceased, who was a watchman, and another were taking a person towards a station-house on a charge of robbing a garden, and were proceeding quietly along a road, the prisoner making no resistance, when they were attacked and the deceased beaten to death; in opening the case, it was asserted, that even if the prisoner were not lawfully in custody, the offence was murder; for if a person were illegally in custody, and was making no resistance, no person had any right to attack the persons who had him in custody, and that if they did, and death ensued in consequence of the violence used to release the prisoner, it was murder; and that although there might be old cases to the contrary, they were no longer considered as binding authorities; the point, however, did not ultimately become material, as it was held that the party was in lawful custody, but the above position was neither controverted by the very learned Judge who tried the case, nor by the prisoner's counsel; and it should seem that it could not be successfully disputed, for it is difficult to discover upon what principle any individual can be justified in interfering to prevent what apparently is the due execution of the law, and that the question, whether he is guilty of murder or manslaughter, if death ensue, is to depend upon whether the custody is legal or illegal, of which, probably, at the time he was perfectly ignorant, and which, consequently, could in no respect influence his conduct. See *ante*, p. 838. *C. S. G.*

(a) *Ante*, p. 739, *et seq.*

matter of fact, and to be collected from circumstances,) and the act was done heedlessly and incautiously, it will be manslaughter.(b)

Where an injury, intended against one person, mortally affects another, as where a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offence would have been murder or manslaughter.¹ For if a blow, intended against A., and lighting on B., arose from a sudden transport of passion, which, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it shall have caused the death of B.(c)

There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief: and the party committing them, and causing death by such conduct, will be guilty of manslaughter. As if a person, breaking an unruly horse, ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it appear clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter.(d) But it is said, that in such a case it would be murder if the rider had intended to divert himself with the fright of the crowd.(e) And if a man, knowing that people are passing along the streets, throw a stone or shoot an arrow over a *house or wall, and a person be thereby killed, this will be manslaughter, though there were no intention to do hurt to any one, because the act itself was unlawful.(f) So where a gentleman came to town in a chaise, and, before he got out of it, fired his pistols in the street, which, by accident, killed a woman, it was ruled manslaughter; for the act was likely to breed danger, and manifestly improper.(g)²

A party who causes the death of a child by giving it spirituous liquors, in a quantity quite unfit for its tender age, is guilty of manslaughter. Upon an indictment for manslaughter, which charged the prisoner with giving a quartern of gin to a child of the age of four years, which caused its death, and which quantity of gin was averred to be excessive for a child of that age, it appeared that the prisoner having ordered a quartern of gin, asked the child if it would have a drop, and that on his putting the glass to the child's mouth, the child twisted the glass out of his hand, and swallowed nearly the whole of the gin, which caused its death. Vaughan, B.: "As it appears clearly that the drinking of the gin in this quantity was the act of the child, the prisoner must be acquitted; but if it had appeared that the prisoner had willingly given a child of this tender age a quartern of gin out of a sort of brutal fun, and had thereby caused its death, I should most decidedly have held that to be manslaughter, because I have no doubt that the causing the death of a child by giving it spirituous liquors in a quantity quite unfit for its tender age, amounts, in point of law, to that offence." (h)

Where an indictment for manslaughter stated that the prisoner gave, administered, and delivered to M. A. divers large and excessive quantities of wine and porter, and induced, procured, and persuaded M. A. to take, drink, and swallow the said quantities of spirituous liquors; the same being likely to cause and procure his death, and which the prisoners then and there well knew; and that M. A., by means of the said inducement, procurement, and persuasion took, drank, and swallowed the said large quantities of spirituous liquors; by means whereof he became greatly drunk, &c., and while he was so drunk as aforesaid, the prisoners made an assault on him and forced and compelled him to go, and put, placed, and confined him in a cabriolet, and drove and carried him about therein for a long time, and

(b) *Fost.* 261.

(d) 1 *East P. C. c.* 5, s. 18, p. 231.

(f) 1 *Hale* 475; 1 *Hawk. P. C. c.* 29, s. 9.

(A) *Rex v. Martin*, 3 *C. & P.* 211.

(c) *Fost.* 262.

(e) 1 *Hawk. P. C. c.* 31, s. 68.

(g) *Burton's case*, 1 *Str.* 481.

¹ Where the prisoner shot at a person on horseback and declared that he did so only with the intention to cause the horse to throw him, and the ball took effect on another person and produced his death, the court held the crime to be murder: *State v. Smith*, 2 *Strobh.* 77.

² For cases of reckless shooting, see *People v. Fuller*, 2 *Parker C. R.* 16; *Gallihier v. Comm.*, 2 *Duvall* 163; *State v. Meyers*, 19 *Iowa* 517; *Sparks v. Comm.*, 3 *Bush.* 111.

thereby shook, threw, pulled, and knocked about M. A., by means whereof M. A. became mortally sick; of which said large quantities of spirituous liquors, and of the drunkenness occasioned thereby, and of the said shaking, &c., and the sickness occasioned thereby, M. A. died; it appeared that the deceased was in possession of the goods of one of the prisoners under a warrant from the sheriff, and the three prisoners plied him with drink, themselves drinking freely also, and when he was very drunk, put him into a cabriolet, and caused him to be driven about the streets, and about two hours after he was put in the cabriolet he was found dead. Parke, B., after directing the jury to dismiss from their consideration that part of the indictment which alleged that the *prisoners knew that the quantity of liquor *851] taken was likely to cause death, of which there did not appear to be any evidence, and which, if proved, would make the offence approach to murder, told the jury that if they were of opinion that the prisoners put the deceased in the cabriolet, then the questions would be: first, whether they or any of them were guilty of administering or procuring the deceased to take large quantities of liquor for an unlawful purpose; or, whether, when he had taken it, they put him into the cabriolet for an unlawful purpose. If they thought that the three prisoners, or one of them, made him excessively drunk, to enable the prisoner, whose goods were seized, to prevent the completion of the execution; or if they were satisfied that the object of the prisoners, or any of them, was otherwise unlawful, and that the death of the deceased was caused in carrying their unlawful object into effect, they must be found guilty. The simple fact of persons getting together to drink, or one pressing another to do so, was not an unlawful act; or, if death ensued, an offence that could be construed into manslaughter. Upon the first question stated, it would be essential to make out that the prisoners administered the liquor with the intention of making the deceased drunk, and then getting him out of the house; and if that were doubtful, still if, when he was drunk, they removed him into the cabriolet with the intention of preventing his returning, and death was the result of such removal, the act was unlawful, and the case would be a case of manslaughter. If, however, they all got drunk together, and afterwards he was put into the cabriolet with an intention that he should take a drive only, that was not an unlawful object, such as had been described, and the prisoners would be entitled to an acquittal. And to a question put by the jury, the learned Baron answered, that if the prisoners, when the deceased was drunk, drove him about in the cab, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter.(i)

It has been shown, that where death ensues from an act done in the prosecution of a felonious intention, it will be murder;(k) but a distinction is taken in the case of an act done with intent only of committing a bare trespass; as if death ensues from such an act, the offence will be only manslaughter.(l) Thus, though if A. shoot at the poultry of B., intending to steal them, and by accident kill a man, it will be murder; yet, if he shoot at them wantonly, and without any such felonious intention, and accidentally kill a man, the offence will be only manslaughter.(m) And any one, who voluntarily, knowingly, and unlawfully, intends hurt to the person of another, though he intend not death, yet, if death ensue, is guilty of murder or manslaughter, according to the circumstances of the nature of the instrument used, and the manner of using it, as calculated to produce great bodily harm or not.(n) And if a man be doing an unlawful act, though not intending bodily harm to any one, as if he be throwing a stone at another's horse, and hit a person and kill him, *852] it is *manslaughter.(o) But it seems, that in cases of this kind the guilt would rather depend upon one or other of these circumstances, either that the act might probably breed danger, or that it was done with a mischievous intent.(p)

Where a carman was in the front part of a cart loading it with sacks of potatoes,

(i) Reg. v. Packard, C. & M. 236 (41 E. C. L. R.).

(k) *Ante*, p. 740.

(l) *Fost.* 258. Though Lord Coke seems to think otherwise: 3 *Inst.* 56.

(m) *Fost.* 258, 259; 1 *Hale* 475.

(n) 1 *East P. C. c.* 5, s. 32, pp. 256, 257; 1 *Hale* 39.

(o) 1 *Hale* 39.

(p) 1 *East P. C. c.* 5, s. 32, p. 257.

and a boy pulled the trapstick out of the front of the cart, but not with intent to do the man any harm, as he had seen it done several times before by others; and in consequence of the trapstick having been taken out, the cart tilted up, and the deceased was thrown out on his back on the stones, and the potatoes were shot out of the sacks, and fell on and covered him over, and he died in consequence of the injuries then received, it was held that the boy was guilty of manslaughter.(q) So where an indictment for manslaughter alleged that the prisoners in and upon one L. H. did make an assault, and that L. H. then lying in a certain cart containing divers bags of nails of great weight, the prisoners did with their hands force up the shafts of the said cart, and throw down the body of the said cart in which L. H., was so as aforesaid lying, and him the said L. H. by such forcing up of the shafts and throwing down of the body of the said cart as aforesaid, did cast and throw upon the ground under the said bags of nails; by means whereof the said bags of nails were thrown and forced against, over and upon the breast of L. H., L. H. then being upon the ground, and the said bags of nails then and there did press and lie upon the breast of L. H., thereby giving, &c., and it was urged that this indictment was bad, as it did not allege that the prisoners knew that the deceased was in the cart; Taunton, J., held that it was not necessary to allege such knowledge, as malice was not an ingredient in the crime.(r)

On an indictment for manslaughter, it appeared that the deceased having deposited a gun with the prisoner for a loan of money, called at the prisoner's house when he was absent, and took the gun away without repaying the loan. When the prisoner found the gun was gone he went after the deceased, and demanded it back. The deceased refused to comply, and the prisoner thereupon endeavored to wrest it from him. The deceased said that the gun was loaded; the prisoner, however, persisted in his attempt to take it away, and after a violent struggle succeeded in doing so; but falling on the ground as he was in the act of wrenching the gun away, the gun went off accidentally, and killed the deceased. Lord Campbell, C. J., told the jury that, though the prisoner had a right to the possession of the gun, to take it away from the deceased by force was unlawful; and that as the discharge of the gun was the result of this unlawful act, it was their duty to find the prisoner guilty of manslaughter.(s)

On an indictment for manslaughter, a statement of the prisoner was proved as follows: "As I was going home about four o'clock this afternoon I heard the report of a gun. Shortly afterwards I *saw the deceased with a gun, and I went to him to take his gun from him. We had a scuffle together for about ten minutes, and there were blows exchanged on both sides; the deceased struck me, and knocked me down with his gun: at the same time the gun went off, and shot the deceased. I was insensible for a short time, and when I came round found the deceased was dead and had the barrel of the gun in his hand." The prisoner was a gamekeeper of a gentleman who had permission by parol to shoot over the land where this transaction took place. It was contended that, admitting the prisoner had no right to take the gun away, and that he was guilty of an assault in attempting to do so, the death was not the result of that assault, but of the excess of violence of the deceased himself. Lord Campbell, C. J., told the jury that the case was one of manslaughter. The struggle between the prisoner and the deceased was to be considered as one continuous illegal act on the part of the prisoner, and death resulting from that act.(t)

(q) *Rex v. Sullivan*, 7 C. & P. 641 (32 E. C. L. R.), Gurney, B., and Williams, J.

(r) *Rex v. Lear and Kempson*, Stafford Spr. Assizes, 1832, MSS. C. S. G.

(s) *Reg. v. Archer*, 1 F. & F. 351. As no more violence appears to have been used than was necessary to obtain possession of the gun, this case cannot be considered as rightly decided after *Blades v. Higgs*, 10 C. & B. (N. S.) 713 (100 E. C. L. R.).

(t) *Reg. v. Wesley*, 1 F. & F. 528. Lord Campbell refused to reserve the point; and yet it seems well deserving of better consideration. If the prisoner had died from the excess of violence inflicted by the deceased, it cannot be doubted that the deceased would have been guilty of manslaughter, and it is not a little startling to hold that that excess of violence which caused the gun to explode is to make the prisoner guilty of manslaughter. Suppose the deceased had pulled the trigger intending to shoot the prisoner, and in the struggle he had shot himself instead, it would be startling to hold the prisoner guilty

Where a defendant kept a gun loaded with printing types, in consequence of several robberies having been committed in the neighborhood, and sent a mulatto girl, his servant, of the age of about thirteen, for the gun, desiring the person in whose house he lodged to take the priming out; which he did, and told the girl so, and delivered the gun to her, and she put it down in the kitchen, resting on the butt, and soon afterwards took it up again, and presented it, in play, at the plaintiff's son, a young boy, saying she would shoot him, and drew the trigger, and the gun went off, and wounded the boy; it was held that the defendant was liable to an action for the injury. Lord Ellenborough, C. J.: "The defendant might and ought to have gone farther; it was incumbent on him, who, by charging the gun, had made it capable of doing mischief, to render it safe and innoxious. This might have been done by the discharge or drawing the contents; and though it was the defendant's intention to prevent all mischief, and he expected that this would be effectuated by taking out the priming, the event has unfortunately proved that the order to his landlord was not sufficient; consequently, as by this want of care the instrument was left in a state capable of doing mischief, the law will hold the defendant responsible."^(u) And therefore it would seem, that if death had ensued the defendant would have been guilty of manslaughter.

*854] If death ensues in consequence of a wrongful act, which the *party who commits it can neither justify nor excuse, it is manslaughter. An indictment charged that there was a scaffolding in a certain coal mine, and that the prisoners, by throwing large stones down the mine, broke the scaffolding; and that in consequence of the scaffolding being so broken, a corf, in which the deceased was descending the mine, struck against a beam, on which the scaffolding had been supported, and by such striking the corf was overturned, and the deceased precipitated into the mine and killed. It was proved that scaffolding was usually found in mines in the neighborhood, for the purpose of supporting the corves, and enabling the workmen to get out and work the mines; that the stones were of a size and weight sufficient to knock away the scaffolding, and that if the beam only was left, the probable consequence would be that the corf striking against it would upset, and occasion death or injury. Tindal, C. J.: "If death ensues as a consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death but manslaughter. If the wrongful act was done under circumstances which show an intent to kill, or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance, the act was one of mere wantonness and sport, but still the act was wrongful—it was a trespass. The only question therefore is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offence is manslaughter; if it is altogether unconnected with it, it is accidental death."^(v)

Where sports are unlawful in themselves, or productive of danger, riot, or disorder, so as to endanger the peace, and death ensue, in the pursuit of them, the party killing is guilty of manslaughter.^(w) Such manly sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, are not, however deemed unlawful sports;^(x) but prize-fighting, public boxing matches, or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, have met with a different consideration.^(y) For in these last-mentioned cases the intention of the parties is not innocent in itself, each

of manslaughter. The reason why an excess of violence is punishable is, that it is not in point of law attributable to the assault committed, but to the wrongful act of the party assaulted, and to hold the party assaulting guilty of the result of an excess of violence is to hold him guilty of the consequences of an act, of which the law not only holds him not to be guilty, but holds the other party to be guilty, or, to put it in still simpler terms, to hold him responsible for an act which the law holds not to be his act at all, but to be wholly the act of another person.

(u) *Dixon v. Bell*, 5 M. & S. 198.

(v) *Fenton's case*, 1 Lewin 179, Tindal, C. J.

(w) *Fost.* 259, 260; 1 East P. C. c. 5, s. 41, p. 268.

(x) *Post*, Chap. on *Excusable Homicide*.

(y) *Fost.* 260.

being careless of what hurt may be given, provided the promised reward or applause be obtained; and meetings of this kind have also a strong tendency in their nature to a breach of the peace.^(z) Therefore, where the prisoner had killed his opponent in a boxing match, it was holden that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts; and the occasion was sudden.^(a)

There is no doubt that prize-fights are altogether illegal; *indeed, just as much so as that persons should go out to fight with deadly weapons, and it is not at all material which party strikes the first blow; and all persons who go to a prize-fight to see the combatants strike each other, and who are present when they do so, are in point of law guilty of an assault.^(b) Where it appeared that there was a fight between the deceased and another person, at which a great number of persons were assembled, and that in the course of the fight the ring was broken in several times by the persons assembled, who had sticks, which they used with great violence, and the deceased died in consequence of blows received on this occasion, and for the prisoner it was attempted to be proved, that though he was present during the fight, yet he neither did nor said anything. Littledale, J., said, "If the prisoner was at this fight encouraging it by his presence, he is guilty of manslaughter, although he took no active part in it. My attention has been called to the evidence of those witnesses who have said that the prisoner did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, all are guilty of manslaughter, if they encouraged it by their presence: I mean if they remained present during the fight. I say if they were not casually passing by, but stayed at the place, they encouraged it by their presence, although they did not say or do anything. This is my opinion of the law of this case. However, you ought to consider whether the deceased came by his death in consequence of blows he received in the fight itself; for if he came by his death by any means not connected with the fight itself, that is, if his death was caused by the mob coming in with bludgeons, and taking the matter as it were out of the hands of the combatants, then persons merely present encouraging the fight would not be answerable, unless they were connected in some way with that particular violence. If the death occurred from the fight itself, all persons encouraging it by their presence are guilty of manslaughter; but if the death ensued from violence unconnected with the fight itself, that is, by blows given not by the other combatant in the course of the fight, but by persons breaking in the ring and striking with their sticks, those who were merely present are not, by being present, guilty of manslaughter."^(c)

The custom of cock-throwing at Shrovetide has been considered as an idle, dangerous, and unlawful sport; and accordingly where a person throwing at a cock missed his aim, and killed a child who was looking on, Foster, J., ruled it to be manslaughter; and, speaking of the custom, he says, "it is a barbarous, unmanly custom, frequently productive of great disorders, dangerous to the by-standers, and ought to be discouraged."^(d) So throwing stones at another wantonly in play, being a dangerous sport without the least appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some *one or other, and by such means killing a person, will be manslaughter.^(e)

Though the sports be not in their nature unlawful, yet, if the weapons used be of an improper and deadly nature, the party killing will be guilty of manslaughter; as was the case of Sir John Chichester, who unfortunately killed his man-servant as he was playing with him. Sir John Chichester made a pass at the servant with the sword in the scabbard, and the servant parried it with a bed-staff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out

(z) 1 East P. C. c. 5, s. 42, p. 270.

(a) Ward's case, O. B. 1789, cor. Ashhurst, J.; 1 East P. C. c. 5, s. 42, p. 270.

(b) Rex v. Perkins, 4 C. & P. 537 (19 E. C. L. R.), Patteson, J.; Rex v. Bellingham, 2 C. & P. 234 (12 E. C. L. R.), Burrough, J.; Rex v. Hargrave, 5 C. & P. 170 (24 E. C. L. R.), Patteson, J. In the last case it was held, that persons present at a prize-fight were not such accomplices as to need corroboration.

(c) Rex v. Murphy, 6 C. & P. 103 (25 E. C. L. R.), Littledale J., and Bolland, B. See also Reg. v. Young, 8 C. & P. 644 (34 E. C. L. R.). *Ante*, p. 729.

(d) *Fost.* 261.

(e) 1 Hawk. P. C. c. 29, s. 5.

of the scabbard: and the thrust not being effectually broken, the servant was killed by the point of the sword.^(f) This was adjudged manslaughter: and Foster, J., thinks, in conformity with Lord Hale, that it was rightly so adjudged, on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm.^(g)

Shooting at deer in another's park, without leave, is an unlawful act, though done in sport, and without any felonious intent; and therefore if a bystander be killed by the shot, such killing will be manslaughter.^(h)

It has been shown, that where a body of persons, resolving generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, happen to kill any one in the prosecution of this unlawful purpose, they will be guilty of murder.⁽ⁱ⁾ Yet, in one case, where divers rioters, having forcibly gained possession of a house, afterwards killed a partisan of the person whom they had ejected, as he, in company with a number of others, was endeavoring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty only of manslaughter.^(k) It is said, that perhaps it was so adjudged for this reason, that the person slain was so much in fault himself.^(l)

Sec. V.—Cases where the Killing takes place in consequence of some Lawful Act being criminally or improperly performed, or of some Act performed without Lawful Authority.

AN act, not unlawful in itself, may be performed in a manner so criminal and *857] improper, or by an authority so defective, as to make *the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder.^(m) And as the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter.

Though officers of justice are authorized to execute their duties in a proper and legal manner, notwithstanding any resistance which may be made to them;⁽ⁿ⁾ yet they should not come to extremities upon every slight interruption, nor unless there be a reasonable necessity. Therefore, where a collector, having distrained for a duty, laid hold of a maid servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the Court held her opposition to the officer to be a sufficient provocation to extenuate the homicide, yet they were clearly of opinion that he was guilty of manslaughter in so far exceeding the necessity of the case.^(o)

There is a case reported in *Strange*, as a case of manslaughter, which, if the circumstances of it were as stated in that report, does not seem to have been entitled to so favorable a construction. Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he

^(f) Sir John Chichester's case, 1 Hale 472, 473; Alleyn 12; Kell. 108.

^(g) 1 Hale 473; Fost. 260; 1 East P. C. c. 5, s. 41, p. 269. But see in Hale 473, the following note:—"This seems a very hard case; and indeed the foundation of it fails; for the pushing with a sword in the scabbard, by consent, seems not to be an unlawful act; for it is not a dangerous weapon likely to occasion death, nor did it so in this case, but by an unforeseen accident, and therein differs from the case of justing or prize-fighting, wherein such weapons are made use of as are fitted and likely to give mortal wounds."

^(h) 1 Hale 475.

⁽ⁱ⁾ Drayton Bassett case, Crom. 28; 1 Hale 440.

^(m) *Ante*, p. 747, *et seq.* ⁽ⁿ⁾ *Ante*, pp. 735, 747.

⁽ⁱ⁾ *Ante*, p. 738.

^(j) 1 Hawk. P. C. c. 31, s. 53.

^(o) Goffe's case, 1 Vent. 216.

laid down on the table, saying, "He did not intend to hurt the officers, but he would not be ill used." The officer who had been sent for the attorney's bill soon returned to his companion at the lodgings; and, words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him; *one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them*; and one of them fired one of the pistols at him *while on the ground*, and gave him his death's wound.(p) This is reported to have been holden manslaughter, *by reason of the first assault with the cane*: but Foster, J., thinks it was a very extraordinary case, as thus reported; and mentions the following additional circumstances, which are stated in another report.(q) 1. Mr Lutterel had a sword by his side, which, after the affray was over, was found drawn and broken. 2. When Mr. Lutterel laid the pistols on the table, he declared that he brought them down because he would not be forced out of his lodgings. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot (for both pistols were discharged in the affray), and slightly wounded on the wrist by some sharp-pointed weapon, and the other was slightly wounded in the hand by a like weapon. 5. The evidence **touching Mr. Lutterel's begging for mercy* [*858 was not that he was on the ground begging for mercy, but that on the ground he held up his hands *as if* he was begging for mercy. Upon these facts the Chief Justice directed the jury, that if they believed Mr. Lutterel endeavored to rescue himself, which he seemed to think was the case, and which very probably was the case, it would be justifiable homicide in the officers. And as Mr. Lutterel gave the first blow, accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done, if the debt had not been paid or bail given, he declared it would be no more than manslaughter.(r)

Though resistance be made to an officer of justice, yet if the officer kill the party after the resistance is over, and the necessity has ceased, the crime will at least be manslaughter (s)

Where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit, if he cannot otherwise be overtaken. And the same rule holds, if a felon, after arrest, break away as he is carrying to gaol, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is, at least, manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not.(t) In making arrests in cases of misdemeanor and breach of the peace (with the exception, however, of some cases of flagrant misdemeanors), it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; and, generally speaking, it will be murder; but, under circumstances, it may amount only to manslaughter, if it appear that death was not intended.(u)

Although an officer must not kill for an escape, where the party is in custody for a misdemeanor, yet if the party assault the officer with such violence that he has reasonable ground for believing his life to be in peril, he may justify killing the party. Upon a trial for murder it appeared that the prisoner, an excise officer, being in the execution of his office, had seized, with the assistance of another person, two smugglers in the act of landing whiskey from the Scottish shore, contrary to law; the deceased had surrendered himself quietly into the hands of the prisoner, but shortly afterwards, when the prisoner was off his guard, he assaulted him violently with an ash stick, which cut his head severely in several places, and he lost much blood, and was greatly weakened in the struggle which succeeded; the

(p) *Rex v. Tranter*, Stra. 499. *Ante*, p. 714.

(q) 6 St. Tri. 195; 16 St. Tri. (by Howell) 1.

(r) *Fost.* 293, 294.

(s) *MS.*, Burnet, 37; 1 East P. C. c. 5, s. 63, p. 297. And if there were time for the blood to have cooled, it would, it is conceived, amount to murder. *Ante*, p. 724.

(t) 1 East P. C. c. 5, s. 67, p. 298.

(u) *Fost.* 271; 1 East P. C. c. 5, s. 70, p. 302.

officer, fearing the deceased would overpower him, and having no other means of defending himself, discharged a pistol at the deceased's legs, in the hopes of deterring him from any further attack, but the discharge did not take effect, and the deceased prepared to make another assault; that, seeing this, the prisoner warned him to keep off, telling him he must shoot him if he did not; but the deceased dis-
 *859] regarded the warning, *and rushed towards him to make a fresh attack; that he thereupon fired a second pistol, and killed him. Holroyd, J., told the jury, "an officer must not kill for an escape, where the party is in custody for a misdemeanor; but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of such weapon by the previous violence that he had received, then he was justified. If an affray arises, and blows are received, and weapons used in heat, and death ensues, although the party may have been at the commencement in the prosecution of something unlawful, still it would be manslaughter in the killer. In this case it is admitted that the custody was lawful. The question is, whether, under all circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself, as any reasonable man might fairly and naturally be expected to resort to." (v)

In civil suits, if the party against whom the process has issued, fly from the officer endeavoring to arrest him, and be killed by him in the pursuit, it has been said that it will be murder. (w) But it is rather to be considered as murder or manslaughter, as circumstances may vary the case; for if the officer in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence. (x)

In cases of pressing for the sea service, if the party fly, the killing by the officer, in the pursuit to overtake him, will be manslaughter, at least, and in some cases, murder, according to the rules which govern the case of misdemeanors; paying attention, nevertheless, to those usages which have prevailed in the sea service in this respect, as far as they are authorized by the Courts which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land. An officer in the impress service, put one of his seamen, on board a boat belonging to one William Collyer, a fisherman, with intent to bring it under the stern of another vessel, in order to see if there were any fit objects of the impress service on board. The boat steered away in another direction; and the officer pursued in another vessel for three hours, firing several shots at her, with a musket loaded with ball, for the purpose of hitting the halyards, and bringing the boat to, which was found to be the usual way, and one of the shots unfortunately killed Collyer. The Court said it was impossible for it to be more than manslaughter. (y) It is presumed that this decision proceeded on the ground that the musket was not levelled at the deceased, nor any bodily hurt intended to him. But inasmuch as such an act was calculated to breed danger, and not warranted at law, though no bodily
 *860] hurt were intended, it was holden to be manslaughter, and the *defendant was burned in the hand. (z) It may here be observed, however, that by the statute for the prevention of *smuggling*, it is enacted, that in case any vessel or boat, liable to seizure or examination, shall not bring to on being required to do so, or being chased by any vessel or boat in her Majesty's navy, having the proper pendant and ensign of her Majesty's ships hoisted, or by any vessel or boat duly employed for the prevention of smuggling, having a proper pendant and ensign hoisted, it shall be lawful for the captain, master, or other person, having the charge or command of such vessel in her Majesty's navy, or employed as aforesaid (first causing a gun to be fired as a signal), to fire at or into such vessel or boat; and such captain, master, or other person, acting in his aid or assistance, or by his

(v) Forster's case, 1 Lewin 187, Holroyd, J.

(w) By Lord Hale, 1 Hale 481.

(z) Fost. 271.

(y) Rex v. Phillips, Cowp. 830.

(z) 1 East P. C. c. 5, s. 75, p. 308.

direction, shall be indemnified and discharged from any indictment, penalty, action, or other proceeding for so doing.(a)

Where an officer makes an arrest out of his proper district, or without any warrant or authority,(b) and purposely kills the party for not submitting to such illegal arrest, the crime will, generally speaking, be murder; that is, in all cases at least where an indifferent person, acting in the like manner, without any such pretence, would be guilty to that extent.(c) In the case of private persons, using their endeavors to bring felons to justice, caution must be used to ascertain that a felony has actually been committed, and that it has been committed by the party arrested or pursued upon suspicion; as, if the suspicion be not supported by the fact, the person endeavoring to arrest or imprison, and killing the party in the prosecution of such purpose, will be guilty of manslaughter.(d)

Gaolers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; therefore, an assault upon a gaoler, which would warrant him (apart from personal danger) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent.(e) And if an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, he will at least be guilty of manslaughter.(f)

Persons on board ship are necessarily subjected to something like a despotic government, and it is extremely important that the law should regulate the conduct of those who exercise dominion over them. Therefore, in a case of manslaughter against the captain and mate of a vessel, by accelerating the death of a seaman really in ill health, but whom, they allege, they believe to be a skulker, that is, a person endeavoring to avoid his duty, the question is (in determining whether it is a slight or aggravated case), whether the phenomena of the disease were such as would *excite the attention of humane and reasonable men; and, in such a [861 case, if the deceased be taken on board after he was discharged from a hospital, it is important to inquire whether he was sent on board by the surgeon of the hospital as a person in a fit state of health to perform the duties of a seaman.(g)

Moderate and reasonable correction may properly be given by parents, masters, and other persons, having authority *in foro domestico*, to those who are under their care: but if the correction be immoderate or unreasonable, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case. If it be done with a dangerous weapon, likely to kill or maim, due regard being always had to the age and strength of the party, it will be murder; but if with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter.(h)

In the following case, the nature of the instrument used, and the probability of its causing death, or great bodily harm, when used in the manner stated in the case, occasioned much doubt. The prisoner having employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the right side of the head, on the temple, and caused her death soon afterwards. The stool was of sufficient size and weight to give a mortal blow: but the prisoner did not intend, at the time she threw it, to kill the child. These facts were stated in a special verdict: but the matter was considered of great difficulty, and no opinion was ever delivered by the Judges.(i)

(a) 16 & 17 Vict. c. 107, s. 218, *ante*, p. 172.

(b) *Ante*, p. 747.

(c) 1 East P. C. c. 5, s. 80, p. 312.

(d) *Fost* 318.

(e) 1 East P. C. c. 5, s. 91, p. 331, citing 1 MS. Sum. 145, *semb.*; Pult. 120, 121. And see 1 Hawk. P. C. c. 28, s. 13, where it is said, that if a criminal endeavoring to break the gaol, assault the gaoler, he may be lawfully killed by him in the affray.

(f) 1 Hawk. P. C. c. 29, s. 5.

(g) *Reg. v. Leggett*, 8 C. & P. 191 (34 E. C. L. R.), Alderson, B., Williams and Colman, JJ.

(h) *Fost*. 262; 1 Hale 454; *Rex v. Keite*, 1 Ld. Raym. 144.

(i) *Rex v. Hazel*, 1 Leach 368; *ante*, p. 717.

In the foregoing case, the counsel for the prisoner cited the following case :—A shepherd boy had suffered some of the sheep, which he was employed in tending, to escape through the hurdles of their pen. The boy's master, the prisoner, seeing the sheep get through, ran towards the boy, and taking up a stake that was lying on the ground, threw it at him. The stake hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died. Nares, J., in his directions to the jury, after stating that every master had a right moderately to chastise his servant, but that the chastisement must be on just grounds, and with an instrument properly adapted to the purposes of correction, desired them to consider, whether the stake, which, lying on the ground, was the first thing the prisoner saw, in the heat of his passion, was, or was not, under such circumstances, and in such a situation, an improper instrument. For that the using a weapon from which death is likely to ensue, imports a mischievous disposition; and the law implies that a degree of malice attended the act, which, if death actually happen, will be murder. Therefore, if the jury should think the stake was an improper instrument, they would further consider whether it was probable that it was used with an intent to kill; that if they thought it was, they must find the prisoner guilty of murder; but *862] if they were persuaded it was *not done with an intent to kill, the crime would then at most amount to manslaughter. The jury found it manslaughter. (k) In this case it is presumed that the learned Judge must be understood as meaning, that if the jury should think the instrument so improper as to be dangerous, and likely to kill or maim, the age and strength of the party killed being duly considered, the crime would amount to murder; as the law would in such case supply the malicious intent; but that if they thought that the instrument, though improper for the purpose of correction, was not likely to kill or maim, the crime would only be manslaughter, unless they should also think that there was an intent to kill.

A mother, being angry with one of her children for not having prepared her dinner, as she had directed him to do, began to scold him, upon which he made her some very impertinent answers, which put her in a passion, and she took up a small piece of iron, used as a poker, intending to frighten him, and seeing she was very angry, he ran towards the door, when she threw the poker at him, and the iron struck the deceased, who happened to be coming in at the moment, on the head, and killed him: it was held, that when a blow intended for A. lights upon B., being given in a sudden transport of passion, if, supposing A. had been struck and died, it would have amounted to manslaughter, it is no less manslaughter if it causes the death of B., and there was no doubt, if the child at whom the blow was aimed had been struck and died, it would have been manslaughter; and so it was under the present circumstances. (l)

Though the correction exceed the bounds of moderation, the Court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must, in all probability, occasion death, though the party were hurried to great excess. A father, whose son had frequently been guilty of stealing, and who, upon complaints made to him of such thefts, had often corrected the son for them; at length, upon the son being charged with another theft, and resolutely denying it, though proved against him, beat him, in a passion, with a rope, by way of chastisement for the offence, so much that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned Judge, by whom the father was tried, consulted his colleague in office, and the principal counsel on the circuit, who all concurred in opinion that it was only manslaughter; and so it was ruled. (m)

The prisoner was aunt to the deceased, a girl about fifteen, who, with her sister, who was two to three years younger, had been placed, after their mother's death, under the prisoner's care, who employed them in stay-stitching fourteen or fifteen

(k) *Rex v. Wiggs*, Norfolk Sum. Ass. 1784; 1 Leach 378, note (a).

(l) *Rex v. Conner*, 7 C. & P. 438 (32 E. C. L. R.), Park, J. A., and Gaselee, JJ.

(m) *Anon.*, Worcester Spring Ass. 1775, Serj. Forster's MS.; 1 East P. C. c. 5, s. 37, p. 261.

hours a day, and, when they did not do the required quantity of work, severely punished them with the cane and the rod. The deceased was in a consumption, and did not do so much work as her sister, and, in *consequence, was much oftener and more cruelly punished by the prisoner, who accompanied her [*863 corrections with very violent and threatening language, and said that she was sure that she was acting the hypocrite and shamming illness, and that she had a very strong constitution. The surgeon said she died from consumption, but that her death was hastened by the treatment she had received. Under these circumstances, the counsel for the prosecution thought there was not proof of malice sufficient to constitute the crime of murder, as the prisoner always alleged that she believed the girl was shamming illness, and was really able to do the work required, and which it appeared her younger sister actually did, and the Court concurred in that opinion.(n)

Cases may occur in which the correction is not inflicted by means of any active and personal violence, but by a system of privation and ill-treatment. The following case seems to be of this nature:—The prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehavior, in a lousy and dis-tempered condition, did not take that care of him which his situation required, and which he might have done; the apprentice not having been suffered to lie in bed, on account of the vermin, but being made to lie on the boards for some time without covering, and without common medical care. In this case, the medical persons who were examined were of opinion, that the boy's death was most probably occasioned by his ill-treatment in Bridewell, and the want of care when he went home; and they inclined to think, that if he had been properly treated when he came home, he might have recovered. But, though some harsh expressions were proved to have been spoken by the prisoner to the boy, yet there was no evidence of any personal violence having been used by the prisoner; and it was proved that the apprentice had had sufficient sustenance; and the prisoner had a general good character for treating his apprentices with humanity, and had made application to get this boy into the hospital. Under these circumstances, the Recorder left it to the jury to consider, whether the death of the boy was occasioned by the ill-treatment he received from his master, after returning from Bridewell, and whether that ill-treatment amounted to evidence of malice, in which case they were to find him guilty of murder. At the same time they were told, with the concurrence of Gould, J., and Hotham, B., that if they thought otherwise, yet, as it appeared that the prisoner's conduct towards his apprentice was highly blameable and improper, they might, under all these circumstances, find him guilty of manslaughter; which they accordingly did.(o) And upon the question being afterwards put to the Judges, whether the verdict were well found, they all agreed that the prisoner should be burned in the hand and discharged.(p)

In a note upon the foregoing case, Mr. East says, "I have been the more particular in stating the ground of the decision in this case, because Gould, J.'s, note of the case, from whence this is *taken, is evidently different from another [*864 report(q) of the opinion of the Judges in this case, from whence it might be collected, that there could be no gradation of guilt in a matter of this sort, where a master, by his ill-conduct or negligence, had occasioned or accelerated the death of his apprentice, but that he must either be found guilty of murder or acquitted; a conclusion which, whether well or ill founded, certainly cannot be drawn from this statement of the case. The same opinion, however, is stated in the Old Bailey Sessions Papers, to have been thrown out by the Recorder in Wade's case."(r)

Major-general Hutchinson was commandant of the forces at the garrison of Plymouth. A target was placed in the Sound, under the general directions of the Horse Guards, and the artillerymen were accustomed to practice by firing at it with

(n) *Rex v. Cheeseman*, 7 C. & P. 455 (32 E. C. L. R.), Vaughan, J. The prisoner pleaded guilty of manslaughter.

(o) *Rex v. Self*, O. B. 1770, MS., Gould, J.; 1 East P. C. c. 5, s. 13, pp. 226, 227.

(p) *Easter T.*, 16 Geo. 3, De Grey, C. J., and Ashhurst, J., being absent.

(q) 1 Leach 137.

(r) *Rex v. Wade*, O. B., Feb. 1784, Sess. Pap.

ball. One day while such practice was proceeding a ball missed the target, and, striking the waves, ricocheted and hit a boatman, who was taking a boat across the Sound in the lawful and proper exercise of his vocation, and in a place where he might lawfully be. Byles, J., after stating that the depositions were extremely long and vague, so that he hardly knew in what shape the charge would be presented, is said to have told the grand jury that "manslaughter was when one man was killed by the culpable negligence of another. A slight act of negligence was not sufficient—all men and women were negligent at some time; it would depend on the degree of negligence. A slight deviation from proper care and skill was not sufficient. By way of illustration: suppose a man were to fire a gun in a field where he saw no one, and as he fired another man suddenly raised his head from a ditch; he could not say that that man would be guilty of manslaughter; it would be held not to be culpable negligence. [It is clear this would be no negligence at all. The case as put is of a man lawfully shooting in a lawful place, where he had no reason to suppose any other person was.] But supposing a man were to fire down the High Street of Exeter because he saw no one, and some one was suddenly to appear, and he was killed, that would be culpable negligence in the man who fired the gun. It would seem, and the results showed it, that the boat was within the range of fire; but that was no defence. If a man had not been killed, and had brought an action for damages, or if his wife and family had brought an action, if he had in any degree contributed to the result an action could not be maintained. But in a criminal case it was different. The Queen was the prosecutor, and could be guilty of no negligence; and if both the parties were negligent, the survivor was guilty; and therefore it was no defence that the boat was within danger. He could only speculate upon the negligence imputed in this case. First, he did not know that it would be said that it was an improper place whether to fire from or to fire over. The gun was fired from one of the batteries kept on purpose for practice. It was said that this battery was too low; but that was not the point of defence. Therefore, subject to their better judgment, nothing could be imputed to the defendant as to the place whence the gun was fired. Then as to the place over which it was fired. Had the defendant the selection of it? Then in using the place, although an improper one, was he obeying military orders? If so, he would not be guilty. [With all deference, this seems to be an error. The commission of a felony can never be excused by the order of any superior, except in cases where the circumstances are such as to warrant the act that is done, as in case of rebellion, &c. In other cases the law acknowledges no distinction between the soldier and the private individual. See the charge of Tindal, C. J., p. 402 of Vol. I. note (q). And the command of the master is no defence to the servant. See *Reg. v. James*, 8 C. & P. 131 (34 E. C. L. R.), Vol. II. p. 1020. If the Horse Guards gave an order to practice at a particular place, that order would only justify practising in a careful and proper manner.] Common danger did not make the place improper. He was a man performing a most important duty. Supposing, therefore, that the defendant had been personally engaged in the firing: if he thought that the place from which the gun was fired was not improper, and that the place to which the firing was directed was not improper, assisted by additional precautions, which might be used, he would not be responsible, because acting under the direction of superior authority. It seemed that complaints had been made by a great many persons residing in Plymouth and Devonport, and he must beg their attention to the orders the defendant had given. The major-general would impress upon the officers in command to see with the utmost diligence that the range was free before the firing. Then there was a second order. The major-general impresses upon the officers the necessity of seeing that all was free, as he should hold them personally responsible. He had hitherto presumed that the defendant had personally to do with the firing; and, if he had, he would not be guilty of manslaughter. But the next question was, did he personally superintend the firing or did he not? They would see whether he did or not. Was he guilty of a breach of duty in not personally superintending the firing? He could not see that he was. Again, it might be said, that if he issued orders it was his duty to see that proper persons were appointed to keep a proper look-out; and if proper persons were nominated by

him, it did not appear whether they were properly disciplined, and it might be a question whether there was any negligence in them. There were persons with flags, but whether a proper look-out was kept might possibly be doubtful; whether means were taken for keeping a proper look-out they would have to determine. Under these circumstances it would be for them to say whether negligence was brought home to the defendant."^(rr) This report is manifestly imperfect, and, as counsel are never present when the grand jury are charged, cannot be the report of any barrister. The editor has inserted the parts between brackets.

Where an inquisition alleged that the defendants were trustees under an Act of Parliament, and that it was their duty to contract for the repair of a road, and also to repair the road, and that they did feloniously neglect to contract for the reparation of the said road, and did feloniously neglect to repair the same, and that W. B., being riding in a barrow along the said road, the defendants, by their neglect to contract for the reparation of the said road, and by their neglect to repair the same, did cause one wheel of the said barrow to fall into a large hole in the said road, and the said W. B. to be thereby thrown with great violence from the said barrow upon the ground, whereby he was killed; it was held that the inquisition was bad: not only must the neglect, to make a party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect, and here the death was not the direct consequence of the neglect charged.^(s)

Where persons employed about such of their lawful occupations, from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter, at least, on account of such negligence.^(t) Thus, if workmen throw stones, rubbish, or other things from a house, in the ordinary course of their business, by which a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and there was even a small probability of persons passing by, it will be manslaughter.^(u) It was a lawful act, but done in an improper manner. It has, indeed, been said, that if this be done in the streets of London, or other populous towns, it will be manslaughter, notwithstanding such caution used.^(v) But this must be understood with some limitation. If it be done early in the morning, when few or no people are stirring, and the ordinary caution be used, the party may be excusable; but when the streets are full, such ordinary caution will not suffice; for, in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it.^(w)¹

If a chemist's apprentice be guilty of negligence in delivering medicine, and death ensues in consequence, he is guilty of manslaughter. *Upon an indictment for the manslaughter of a child, it appeared that the child being ill, the [865 mother sent to a chemist for a pennyworth of paregoric; the chemist's apprentice delivered a phial, with a paregoric label on it, but with laudanum in it; and the mother, supposing it to be paregoric, gave the child six or seven drops, which killed it. The laudanum bottle and the paregoric bottle stood side by side. Bayley, J., told the jury:—"If you think there was negligence on the part of the prisoner, you will find him guilty; if not, you must acquit him."^(x)

If a person adopts a mode of raising casks over a street, which is reasonably sufficient, and death ensues from the fall of a cask, he is not guilty of manslaughter. The prisoner was indicted for manslaughter, in having, by negligence in the manner

^(rr) Reg. v. Hutchinson, 9 Cox C. C. 555.

^(s) Reg. v. Pocock, 17 Q. B. 34 (19 E. C. L. R.).

^(t) Fost. 262; 1 East P. C. c. 5, s. 38, p. 262.

^(u) Fost. 262; 1 Hale 475. *Item si putator, ex arbore ramo dejecto, servum tuum transeuntem occiderit, si prope viam publicam aut vicinalem id factum est, neque proclamavit, ut casus evitari posset, culpæ reus est; sed si proclamavit, nec ille curavit præcavere, extra culpam est putator. Æque extra culpam esse intelligitur si seorsum a viâ forte, vel in medio fundo cædebat, licet non proclamavit, quia in eo loco nulli extraneo jus fuerat versandi:* Just. Inst. L. iv. tit. iii. s. 5.

^(v) Rex v. Hull, Kel. 40.

^(w) Fost. 263.

^(x) Tessymond's case, 1 Lew. 169.

¹ See case of the negligence of a switch tender on a railroad: State v. O'Brian, 3 Vroom 169.

of slinging a cask, caused the same to fall and kill two females, who were passing along the causeway. It appeared that there were three modes of slinging casks customary in Liverpool: one by slings passed round each end of the cask; a second by can hooks; and a third in the manner in which the prisoner had slung the cask, which caused the accident—namely, by a single rope round the centre of the cask. The cask was hoisted up to the fourth story of a warehouse, and on being pulled endways towards the door, it slipped from the rope as soon as it touched the floor of the room. Park, J., told the jury: "The double slings are undoubtedly the safest mode; but, if you think that the mode which the prisoner adopted was reasonably sufficient, you cannot convict him." (y)

Where the prisoner, who was an ironfounder, was employed to make twelve cannon, to celebrate the passing of the Reform Bill, and four of them were sent home and tried, and one of them burst under the touch-hole, and was sent back to the prisoner, with orders to have it melted up; but the prisoner returned it nailed down to a carriage, and there was some lead in it, which must have been put there to stop up the part which had burst, as it matched the former aperture; and the cannon, being loaded not heavier than usual, burst, and thereby killed the deceased, it was held that the prisoner was guilty of manslaughter. (z)

The prisoner had a firework-shop in the Westminster Road, where he had for some time carried on openly the business of selling fireworks. He had also a workshop at a neighbor's, named Sunter, and a factory at Peckham. He supplied Vauxhall and Cremorne, under contracts, with considerable quantities of fireworks. He made and kept his stock at the factory at Peckham, and from thence he used to take the supply necessary for the gardens daily to the house in Westminster Road, where they used to be kept for two or three hours before they were taken to the gardens. In Sunter's room the smaller sort of rockets were made, excepting the heads for holding the stars. These heads were added at the shop in Westminster Road. At the house in Westminster Road fireworks were offered for sale. No fireworks were made there except as follows:—First, the finishing the smaller rockets, and making the stars for them of combustible matter; secondly, making fireworks called serpents; thirdly, making cases and filling them with combustible matter, called red, blue, and green fires. (a) The fire was employed for filling colored cases used to imitate revolving lights in fireworks called wheels. These cases affixed were not used by themselves, but in connection with those fireworks, to add to their effect. The contents of the cases of fire made at the Westminster Road were combustible, and the red fire would explode if struck hard. Five or six pounds of fire were made every day in the house in Westminster Road, and filled there in the back room into cases with a rammer and mallet by persons employed for the purpose. At the time of the fire there was a quantity of the red and blue fire in the house, in the room where it was to be put into cases, in order to be used in the course of the business, and a quantity of fireworks for the evening. The prisoner being out of the house and not personally interfering, a fire broke out in the red and blue fire, which communicated to the fireworks, causing a rocket to cross the street and set fire to a house, in which the deceased was consequently burnt to death. The fire was accidental in the sense of not being wilful or designed. It did not happen through any personal interference or negligence of the prisoner; and he is entitled to the benefit of any distinction between its happening through negligence of his servants, or by pure accident without any such negligence. It was contended that there was no case, as the cases of red, &c., fire, were only parts of the fireworks, and not within the 9 & 10 Will. 3, c. 7; that it did not appear that it was by reason of making the fireworks that the mischief happened, and that the death was not the direct and immediate result of any wrong or omission on the prisoner's part. Willes, J., held that the prisoner was guilty of a misdemeanor in doing an act with intent to do what was forbidden by the statute, and

(y) Rigmaidon's case, 1 Lew. 180.

(z) *Rex v. Carr*, 8 C. & P. 163 (34 E. C. L. R.), Bayley and Gurney, BB., and Patterson, J.

(a) To this last part of the business the particular attention of the Judges was directed.

that, as the fire was occasioned by such misdemeanor, and without it would not have taken place, or could not have been of such a character as to cause the death, a case was made out; but, upon a case reserved, the conviction was held wrong. Cockburn, C. J.: "The keeping of the fireworks in the shop by the prisoner caused the death only by the superaddition of the negligence of some one else. By the negligence of the prisoner's servants the fireworks ignited, and the house in which the deceased was, was set on fire and death ensued. The keeping of the fireworks may be a nuisance; and if, from the unlawful act of the prisoner, death had ensued as a necessary and immediate consequence, the conviction might be upheld. The keeping of the fireworks, however, did not alone cause the death: *plus* that act of the prisoner there was the negligence of the prisoner's servants." (b)

*If a person driving a cart or other carriage, happen to kill another, and it appears that he might have seen the danger, but did not look before him. [*867 it will be manslaughter, for want of due circumspection. (c) Upon this subject the following case is reported:—A. was driving a cart with four horses, in the highway at Whitechapel; and he being in the cart, and the horses upon a trot, they threw down a woman, who was going the same way, with a burthen upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder Lovel, held this to be only misadventure. But by Holt, C. J., if it had been in a street where people usually pass, it had been manslaughter. (d) But upon this case the following observations have been made:—"It must be taken for granted from this note of the case, that the accident happened in a highway, *where people did not usually pass*; for otherwise the circumstance of the driver's being in his cart, and going so much faster than is usual for carriages of that construction, savored much of negligence and impropriety; for it was extremely difficult, if not impossible, to stop the course of the horses suddenly, in order to avoid any person who could not get out of the way in time. And, indeed, such conduct, in a driver of such heavy carriages, might, under most circumstances, be thought to betoken a want of due care, if any, though but few, persons might probably pass by the same road. The greatest possible care is not to be expected, nor is it required: but whoever seeks to excuse himself for having unfortunately occasioned, by any act of his own, the death of another, ought at least to show that he took that care to avoid it, which persons in similar situations are accustomed to do." (e)

It is the duty of every man who drives a carriage to drive it with such care and caution as to prevent, as far as is in his power, any injury to any person.¹ And if

(b) *Reg. v. Bennett*, Bell C. C. 1. The case stated that the question of a nuisance, independent of the statute, was disposed of upon the facts in favor of the prisoner. Not a single authority or case was referred to in the argument, or by the Court: and this case seems deserving of reconsideration. The death would not have happened except for the unlawful act of the prisoner; for, unless the combustibles had been where they were, the death would not have occurred. If they had spontaneously ignited, or a stranger had accidentally ignited them by striking his nailed boots on the floor, it cannot be doubted that the prisoner would have been guilty of manslaughter; but it is said that the negligence of the servant exonerates the master. It is submitted that, in point of law, it has no such effect. A master may be criminally responsible for the *wilful* acts of his servants, where they are done in the course of their employment and for his profit: *Rex v. Dixon*, 3 M. & S. 11, and other cases, *ante*, p. 170; and *a fortiori*, he ought to be held to be criminally responsible for the negligence of his servants in his employment, where that employment is a dangerous one, and carried on unlawfully in a place where it is perilous to the public. "The law takes notice that occasional carelessness may be reckoned upon, and forbids that to be done which, on the recurrence of carelessness, will, in all probability, prove destructive to life:" *Reg. v. Lister*, D. & B., C. C. 209, *ante*, p. 440, and therefore a person, who carries on such an employment in such a place, must be taken to contemplate the carelessness of his servants as one of the natural consequences of his carrying it on, and ought to be held criminally responsible for it. See the principles laid down in *Reg. v. Lister*. The 9 & 10 Will. 3, c. 7, is repealed by the 23 & 24 Vict. c. 139, which amends the law relating to the making, keeping, and carriage of gunpowder and fireworks.

(c) *Fost.* 263.

(d) *Anon.*, O. B., 1704; 1 East P. C. c. 5, s. 38, p. 263.

(e) 1 East P. C. c. 5, s. 38, pp. 263, 264.

¹ *Lee v. State*, 1 Cold. 62.

death be caused to any person, by the rapidity of the driving, it is no answer that the driver called out to the deceased to get out of the way, which the deceased might have done if he had not been in a state of intoxication. On an indictment for manslaughter, it appeared that the deceased was walking along a road, in a state of intoxication: the prisoner was driving a cart drawn by two horses, without reins; the horses were cantering, and the prisoner was sitting in front of the cart; on seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so, and one of *868] the cart wheels passed over *him, and he was killed; it was held, that if a man drive a cart at an unusually rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if, from the rapidity of the driving, or from any other cause, the person cannot get out of the way time enough, but is killed, the driver is in law guilty of manslaughter; and that it is the duty of every man, who drives any carriage, to drive it with such care and caution as to prevent, as far as in his power, any accident or injury that may occur. (f)

A foot passenger, though he may be infirm from disease, has a right to walk on the carriage-way, although there be a foot-path, and he is entitled to the exercise of reasonable care on the part of persons driving carriages along the carriage-way. (g) A tradesman was walking on a road, about two feet from the foot-path, after dark, but there were lamps at certain distances along the line of road, when the prisoner drove along in a cart drawn by one horse, at the rate of from eight to ten miles an hour, according to some witnesses, and of from six to seven miles an hour, according to other witnesses; the prisoner sat on some sacks, laid on the bottom of the cart, and he was near-sighted. Other persons, who were walking along the same road, had with considerable difficulty got out of the way of the prisoner's cart. Bolland, B., told the jury, that the question was, whether the prisoner, having the care of the cart, and being a near-sighted man, conducted himself in such a way, as not to put in jeopardy the limbs and lives of his Majesty's subjects. If they thought he had conducted himself properly, they would say he was not guilty; but if they thought that he acted carelessly and negligently, they would pronounce him guilty of manslaughter. (h)

If, in consequence of a person sitting in a cart, instead of being at the horse's head, or by its side, death is occasioned, such person is guilty of manslaughter. Upon an indictment for manslaughter, the evidence was, that the prisoner, being employed to drive a cart, sat in the inside instead of attending at the horse's head, and while he was sitting there, the cart went over a child, who was gathering up flowers on the road. Bayley, B., held, that the prisoner, by being in the cart, instead of at the horse's head, or by its side, was guilty of negligence; and death having been caused by such negligence, he was guilty of manslaughter. (i)

If the driver of a carriage urges his horses to such a pace, that he loses the command over them, and thereby death is occasioned, he is guilty of manslaughter. So, if the driver be racing with another carriage, and, from being unable to pull up his horses in time, his carriage is upset, and a person killed, the driver is guilty of manslaughter. Upon an indictment for manslaughter, it appeared that there were two omnibuses, which were running in opposition to each other, galloping *869] along a road, and that the prisoner was driving that on which the deceased *sat, and the witnesses for the prosecution stated that the prisoner was whipping his horses just before his omnibus upset. The defence was, that the horses in the omnibus driven by the prisoner took fright and run away. Patteson, J.: "The question is whether you are satisfied that the prisoner was driving in such a negligent manner that, by reason of his gross negligence, he had lost the command of his horses; and that depends upon whether the horses were unruly, or whether you believe that he had been racing with the other omnibus, and had so urged his horses that he could not stop them; because, however he might be ac-

(f) *Rex v. Walker*, 1 C. & P. 320 (12 E. C. L. R.), Garrow, B.

(g) *Boss v. Litton*, 5 C. & P. 407 (24 E. C. L. R.), Lord Denman, C. J.

(h) *Rex v. Grout*, 6 C. & P. 629 (25 E. C. L. R.), Bolland, B., and Park, J. A. J.

(i) *Knight's case*, 1 Lew. 168. In a similar case, *Hullock, B.*, expressed a similar opinion: *Ibid.*

deavoring to stop them afterwards, if he had lost command of them by his own act, he would be answerable; for a man is not to say, 'I will race along a road, and when I am got beyond another carriage I will pull up.' If the prisoner did really race, and only when he had got past the other omnibus endeavored to pull up, he must be found guilty; but if you believe that he was run away with, without any act of his own, then he is not guilty. The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace, that he could not control them? If you are of that opinion you ought to convict him." (k)

Swindall and *Osborne* were indicted for the manslaughter of *J. Durose*. The prisoners, who were each driving a cart and horse, were seen two miles and a half from the place where the deceased was killed. *Swindall* there paid the toll, not only for that night, but for having passed with *Osborne* through the same gate a day or two before. They then appeared to be intoxicated. They were next seen at a bridge, over which they passed at a gallop, the one cart close behind the other. A person there told them to mind their driving; this was 990 yards from the place where the deceased was killed. They were next seen forty-seven yards beyond the place where the deceased was killed. The carts were then going at a quick trot, one closely following the other. At a turnpike-gate a quarter of a mile from that place *Swindall*, who appeared all along to have been driving the first cart, told the toll-gate keeper, "We have driven over an old man;" and desired him to bring a light, and look at the name on the cart, on which *Osborne* pushed on his cart, and told *Swindall* to hold his bother, and they then started off at a quick pace. They were subsequently seen at two other places, at one of which *Swindall* said he had sold his concern to *Osborne*. The carts were loaded with pots from the potteries. The surgeon stated that the deceased had a mark on his body, which would correspond with the wheel of a cart, and also several other bruises, and although he could not say that both carts had passed over the body, it was possible that both might have done so. For the prosecution it was contended that it was perfectly immaterial in point of law whether one or both carts had passed over the deceased. The prisoners were in company, and had concurred in jointly driving furiously along the road; that it was an unlawful act, and as both had joined in it, each was responsible for the consequences, though they might arise *from the act of the other. [*870 For the prisoners it was urged that the evidence only proved that one of the prisoners ran over the deceased, and that the other was entitled to be acquitted. *Pollock, C. B.*: "I think that is not so. I think the counsel for the Crown is right in his law. If two persons are in this way inciting each other to do an unlawful act, and one of them runs over a man, whether he be the first or the last, he would be equally liable. The person who runs over the man would be a principal in the first degree, and the other a principal in the second degree." And in summing up, *Pollock, C. B.*, said: "The prisoners are charged with contributing to the death of the deceased by their negligence and improper conduct; and if they did so, it matters not whether he was deaf, or drunk, or negligent, or in part contributed is own death; for in this consists a great distinction between civil and criminal proceedings. If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view; for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person." And his Lordship then directed the jury on the other point in the manner above mentioned. (l)

On an indictment for manslaughter it appeared that the two prisoners were in a partial state of intoxication, and drove a gig along a road at a very rapid pace, and met three men, and at that time they were driving rapidly down a hill, the top of which was thickly shaded with trees, and when the three men got to the trees they found the deceased lying insensible in the middle of the road, presenting all the

(k) *Rex v. Timmins*, 7 C. & P. 499 (32 E. C. L. R.), *Patteson*, J.

(l) *Reg. v. Swindall*, 2 C. & K. 230 (61 E. C. L. R.).

appearance of having just been run over by some vehicle, and he shortly afterwards died. He had been deaf from his childhood, and had contracted an inveterate habit of walking at all hours in the middle of the road, though he had been frequently warned of the probable consequences of doing so. It was contended that the prisoners ought to be acquitted, as the deceased had contributed to his own death. Rolfe, B.: "Whatever may have been the negligence of the deceased, I am clearly of opinion that the prisoners would not be thereby exonerated from the consequences of their own illegal acts, which would be traced to their negligent conduct, if any such existed. I am of opinion, that if any one should drive so rapidly along a great thoroughfare leading to a large town, as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence in the conduct of a horse and gig which amounts to an illegal act in the eye of the law, and, if death ensues from the injuries then inflicted, the parties driving are guilty of manslaughter, even though considerable blame may be attributed to the deceased." "There is a very wide distinction between a civil action for pecuniary compensation for death arising from alleged negligence and a proceeding by way of indictment for manslaughter. The latter is a charge imputing *871] criminal negligence, amounting to illegality; and there is no balance of blame in charges of felony; but wherever it appears that death has been occasioned by the illegal act of another, that other is guilty of manslaughter in point of law, though it may be that he ought not to be severely punished. If the jury should be of opinion that the prisoners were driving along the road at too rapid a pace, considering the time and place, and were conducting themselves in a careless and negligent way in the management of the horse and gig, I am of opinion that such conduct amounts to illegality, and that the prisoners must be found guilty on this indictment, whatever may have been the negligence of the deceased himself." (m)

Upon a trial for manslaughter it appeared that the prisoner was standing up in a spring cart; the reins were not in his hands, but lying on the horse's back; while the horse was trotting down a hill with the cart, the deceased, a child about three years old, ran across the road before the horse, and the wheel of the cart knocked it down and killed it. It did not appear that the prisoner saw the child before the accident. Erle, J., told the jury, that if the prisoner had had the reins, and by using them could have saved the child, he was guilty of manslaughter; but if they thought he could not have saved the child by pulling the reins or otherwise by their assistance, they must acquit him. (n)

Where on an indictment for manslaughter it appeared that the deceased was knocked down by a car driven by the prisoner, and great numbers were in the streets at the time: Perrin, J., told the jury, that this unusual concourse of people, instead of offering any extenuation for the prisoner, or diminishing the criminality of his careless driving, if they found it to have been such, would but be a circumstance to add to it, and that it was his duty, as well as of all driving upon such occasions, to take more than ordinary precautions against accidents, and to use more than ordinary diligence for the safety of the public. (o)

A person driving a carriage is not bound to keep on the ordinary side of the road; but if he do not do so, he is bound to use more care and diligence, and keep a better look-out, that he may avoid any concussion, that would be requisite if he were to confine himself to his proper side of the road. (p)

If a person, riding in an improper and furious way along a road, cause the death of a person, it is manslaughter; but if two persons be riding in such an improper way, and death be caused by the second after the first has passed, the first is not respon-

(m) Reg. v. Longbottom, 3 Cox C. C. 439.

(n) Reg. v. Dalloway, 2 Cox C. C. 273.

(o) Reg. v. Murray, 5 Cox C. C. 509.

(p) Pluckwell v. Wilson, 5 C. & P. 375 (24 E. C. L. R.), Alderson, B. In Christian's note, 1 Bl. Com. 74, it is said "that the law of the road is that horses and carriages should respectively keep the left side of the road, and consequently in meeting should pass each other on the whip hand," and he adds that Judges have "so far confirmed it as to declare frequently at nisi prius that he who disregards this salutary rule is answerable in damages for all the consequences," and he cites Leame v. Bray, 3 East R. 593.

sible. A. and B. were riding on horseback, at a very rapid pace along the highway; the deceased, who was also on horseback, drew off his horse as far from the middle of the road as the place would allow: A. passed by him without any accident; but B.'s horse and the horse of the deceased came in collision, and both the deceased and *B. were thrown, and the deceased killed. Patteson, J.: "I think that [*872 if two are riding fast, and one of them goes by without doing any injury to any one, he is not answerable because the other, riding equally fast, rides against some one, and kills him. A., therefore, must be acquitted. If you think that B. was riding in an improper and furious way, and rode against the deceased, he is guilty of manslaughter; but if you think that the deceased's horse was unruly, and got into the way, you ought to acquit." (g)

Those who navigate a river improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway, either by furious driving or by negligent conduct. An inquisition charged that the prisoner did "propel and force" a vessel against a skiff, whereby the deceased was drowned. The counsel for the prosecution, in opening the case, said, that he apprehended that the rule as to traversing the river Thames was the same as that applicable to the mode of passing along any of the Queen's common highways: therefore if the speed at which, or the manner in which, the prisoners were navigating the vessel, and were proceeding before they saw the skiff, was such as to prevent them, after they did see it, from stopping in time to prevent mischief to the person in it, they would be responsible for the offence of manslaughter, if his death happened in consequence; if, on a misty night, the prisoners were proceeding at such a rate that they could not stop in time, their so proceeding was illegal, and, as death ensued, they were responsible. Parke, B.: "You have stated the law most correctly. There is no doubt that those who navigate the Thames improperly, either by too much speed, or by negligent conduct, are as much liable, if death ensues, as those who cause it on a public highway, either by furious driving or negligent conduct." (r)

On an indictment for manslaughter it appeared that the prisoner was a pilot, and was on board a Portuguese barque sailing down the Thames; the barque was manned entirely by Portuguese, who did not understand English or nautical directions. The deceased was shrimping in a small boat, and while such occupation is going on, the boat is kept motionless by the shrimp net. When the barque was about a quarter of a mile distant the boat made a signal to her, and when she was within twenty yards, the deceased hailed her. The prisoner called to the Portuguese helmsman to turn the vessel to the starboard, but the helmsman, not understanding the prisoner's directions steered to the larboard; the barque struck the deceased and killed him. Lord Denman, C. J., after consulting Alderson, B., told the jury: "The law is, that if the prisoner has produced the death by any conduct of his, he is guilty of manslaughter. It appears to me that he was the person guiding and directing the vessel, and that he is responsible for its management. It is extremely unfortunate that he did not, in the first instance, make the foreigners understand such simple directions as starboard and larboard. You will consider whether there was some negligence upon the part of the prisoner in not making the foreigners understand thoroughly. I take your opinion whether he was *guilty of negligence in this respect, and [*873 whether that negligence caused the death. If you think so, you will find him guilty." (s)

In order to convict the captain of a steamer of manslaughter in causing a death by running down another vessel, there must be some act of personal misconduct or personal negligence shown on his part. The captain and pilot of a steamer were indicted for manslaughter in causing a death by running down a smack, and it appeared that at the time the steamer started there was a man forward in the fore-castle to keep a look-out, but at the time when the accident happened, which was about an hour afterwards, the captain and pilot were both on the bridge which communicates between the paddle-boxes; the night was dark, and it was raining

(g) *Rex v. Mastin*, 6 C. & P. 396 (25 E. C. L. R.), Patteson, J.

(r) *Reg. v. Taylor*, 9 C. & P. 672 (38 E. C. L. R.).

(s) *Reg. v. Spence*, 1 Cox C. C. 352.

hard; the steamer had a light at each end of the topsail yard; an oyster smack, on board which the deceased was, was coming up the Thames without any light on board; the deceased was below: a boy who was on board the smack stated that when the steamer struck the smack he got on board the steamer, and found nobody forward; other witnesses were present to show that no person was forward on the look-out at the time. Park, J. A. J.: "Then the captain is not responsible in felony; it is the fault of the person who ought to be there, and who may have disobeyed orders; if the captain leaves the pilot on the paddle-box, as he did here, he is not criminally responsible. In a criminal case every man is answerable for his own acts; there must be some personal act; these persons may be civilly responsible." Alderson, B., "If you could show that there was a man at the bow, and that the captain had said, 'Come away, it's no matter about looking out,' that would be an act of misconduct on his part. If you can show that the death of the deceased was the result of any act of personal misconduct on the part of the captain, you may convict him." Park, J. A. J., "Supposing he had put a man there, and had gone to lie down, and the man had walked away, do you mean to say he would be criminally responsible? And you must carry it to that length, if you mean to make anything of it." Alderson, B., "I think this case has arrived at its termination; there is no act of personal misconduct or personal negligence on the part of these persons at the bar."^(t)

To make the captain of a vessel guilty of manslaughter in causing a person to be drowned, by running down a boat, the prosecutor must show some act done by the captain; and a mere omission on his part, in not doing the whole of his duty, is not sufficient: but if there be sufficient light, and the captain of a *steamer *874] is either at the helm, or in a situation to be giving the command, and does that which causes the injury, he is guilty of manslaughter. Upon an indictment against the captain of a steamer for manslaughter in causing a death by running down a boat, the counsel for the prosecution, in opening the case, said, if a party engaged in a lawful occupation is guilty of wilful misconduct, or of gross negligence, it is manslaughter. Park, J. A. J., "You must show some act done; you rather state it as if a mere omission on the part of the prisoner in not doing the whole of his duty would be enough: and we are of opinion that is not sufficient. I have no hesitation in saying, that if there was sufficient light, and the captain himself was at the helm, or in a situation to be giving the command, and did that which caused the accident, he would be guilty of manslaughter." Alderson, B., "There must be some personal act. In the case of a coach, the coachman is driving animals, and in the case of the captain, he is governing reasonable beings." It appeared in evidence that the deceased and two other persons were in a small boat going down the river, when a small steamer used for towing, of which the prisoner was master, met them, and, notwithstanding their shouting, struck the boat, and nearly cut it in two, in consequence of which the deceased was drowned; the waterman proved that he and the captain were on the starboard side of the windlass, and two other men were on the larboard side; that the captain did not leave his place once, and the mate was at the helm, and remained there till after the accident; that the engine was all open, and worked on deck, and made a great noise; that he did not hear the shouting in time to do anything to avert the accident. Park, J. A. J., "This case has come to its end; at the outside it can only be considered as one of those accidents

(t) *Rex v. Allen*, 7 C. & P. 153 (32 E. C. L. R.). *Quære*, whether this case amounts to more than this: that the captain had placed a proper person forward, who had left his post without the captain perceiving it? In opening the case, Ryland said, the question will be whether there was a sufficiently cautious and careful look-out kept by the people on board the steamer. Alderson, B., "You put it as a case of a negligent act of omission. I have great doubt whether that amounts to manslaughter; not keeping a good look-out is a negligent act of omission." Ryland, "The steering in a particular and improper direction, in consequence of not keeping a good look-out, is an act of commission." Alderson, B., "It may be; but it is very difficult to make felony out of a negligent act of omission, unless the party is bound by law to do the act omitted, as providing food for a person of tender years." At the conclusion of the case a juryman asked, "Is the captain bound to have a person on the look-out?" Alderson, B., "Civilly he is, but not criminally." See *ante*, p. 750; *Fost.* 322.

which will happen in a river navigation; it appears that they kept a proper lookout; there were several persons on deck at the time."^(u)

Where an indictment for manslaughter alleged that the prisoner was employed to superintend and keep in motion the working of an engine at a colliery for pumping out the water from the colliery, and thereby keeping a clear course for the passage of air and the dispersing of foul air, and that the prisoner neglected to superintend and keep in motion the working of the engine, and did thereby prevent a clear course being left for the passage of the air, and did cause noxious gases to accumulate, and then went on to state that an explosion took place and death ensued; it was proved that there was an old and new mine, and between the two there was a passage for the air from the old to the new mine, and in the old mine there was an engine which was used for the purpose of pumping the water out of that mine, in order that the passage between the two mines might be kept clear, and the prisoner, an engineer, had been employed to work this engine, but he had absented himself from his duty for three days, during which the engine did not work, and the consequence was that the water collected in, and prevented the air from circulating through, the passage between the mines, thereby occasioning an accumulation of foul air, which exploded and caused the death. It was objected that the charge in the indictment was no more than a nonfeasance, and did not disclose any act of misfeasance; and that *acts of mere nonfeasance did not make a man criminally responsible.^(v) Wightman, J., was of opinion that [875 the facts as charged did not constitute an indictable offence, observing that the indictment contained no direct allegation that it was the duty of the prisoner to do that which he was alleged to have neglected to do.^(w)

An indictment for manslaughter alleged that it was the duty of the prisoner to cause to be ventilated a coal mine, and to cause it to be kept free from noxious gases, and that the prisoner feloniously omitted to cause the mine to be ventilated, and that the noxious gases accumulated and exploded, whereby the deceased was killed. It appeared that the deceased was killed by the explosion of fire-damp in a colliery, of which the prisoner was a sort of manager, and it was imputed on the part of the prosecution that this explosion would have been prevented if the prisoner had caused an air-heading to have been put up, as it was his duty to have done. For the defence it was attempted to be proved that it was the duty of one of the persons killed to have reported to the prisoner that an air-heading was required, and that he had not done so. In summing up, Maule, J., said, "The questions for you to consider are, whether it was the duty of the prisoner to have directed an air-heading to be made in this mine; and whether, by his omitting to do so, he was guilty of a want of reasonable and ordinary precaution. If you are satisfied that it was the plain and ordinary duty of the prisoner to have caused an air-heading to be made in this mine, and that a man using reasonable diligence would have done it, and that, by the omission, the death of the deceased occurred, you ought to find the prisoner guilty of manslaughter. It has been contended that some other persons were, on this occasion, also guilty of neglect; still, assuming that to be so, their neglect will not excuse the prisoner; for if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one, who was negligent, to say that another was negligent also, and thus, as it were, to try to divide the negligence among them."^(x)

Upon an indictment for manslaughter it appeared that the prisoner was an engineer, and his duty was to manage a steam engine employed for the purpose of drawing up miners from a coal pit; and when the skip containing the men arrived at the pit's mouth his duty was to stop the revolution of the windlass, so that the men might get out. On the day in question he deserted his post, leaving the engine in charge of an ignorant boy, who, before the prisoner went away, declared

^(u) *Rex v. Green*, 7 C. & P. 156 (32 E. C. L. R.).

^(v) *Reg. v. Green*, *supra*, was cited.

^(w) *Reg. v. Barrett*, 2 C. & K. 343 (61 E. C. L. R.). This case was before *Reg. v. Hughes*, *post*, p. 877, and *Reg. v. Lowe*, *post*, p. 876.

^(x) *Reg. v. Haines*, 2 C. & K. 368 (61 E. C. L. R.). See *Reg. v. Swindall*, 2 C. & K. 230, *ante*, p. 870, as to the last point.

himself to the prisoner to be utterly incompetent to manage such a steam engine as the one intrusted to him. The prisoner neglected this warning, and threatened the boy, in case he refused to do as he was ordered. The boy superintended the raising of two skips from the pit with success; but on the arrival at the pit's mouth *876] of a third, containing four men, he was unable to stop the engine, and the skip being drawn over the pulley, one of the men was thrown down *the shaft of the pit, and killed on the spot. The engine could not be stopped, "in consequence of the slipper being too low," an error which any competent engineer could have rectified, but which the boy in charge of the engine could not. For the prisoner it was contended that a mere omission or neglect of duty could not render a man guilty of manslaughter. (y) Lord Campbell, C. J., "I am clearly of opinion that a man may, by a neglect of duty, render himself liable to be convicted of manslaughter, or even of murder." (z)

Upon an indictment for manslaughter it appeared that the prisoner was a bankman at the top of a shaft of a colliery, where there was an engine and ropes to send down bricks and materials in a bucket, and draw up the empty baskets. It was his duty to send down materials, and to superintend the proper letting down of the buckets, and to place the stage hereafter mentioned. The buckets were run on a truck on to a movable stage over half of the area of the top of the shaft, and there the bucket was attached and lowered down, the stage being removed. The prisoner on the occasion in question had omitted to put or cause to be put the stage on the mouth of the shaft, and in the absence of the stage a bucket with a truck and bricks ran along the tram-road, into the shaft, fell down the pit, and killed the deceased. It did not appear that the prisoner was directing or driving the wagon at the time. It was left to the jury to say whether the accident happened by negligence of the prisoner, and whether that negligence arose from an act of omission or commission, and they found that the death arose from the negligent omission of the prisoner in not putting the stage on the mouth of the pit; and upon a case reserved Lord Campbell, C. J., delivered judgment: "We are of opinion that this conviction ought to be affirmed. It was the duty of the prisoner to place the stage on the mouth of the shaft; the death of the deceased was the direct consequence of the omission of the prisoner to perform this duty; if the prisoner, of malice aforethought, and with a premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. According to the common law form of an indictment for murder by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state facts from which the law would infer this *877] duty. (a) But it has never been doubted that if death is the direct consequence of the malicious omission of the *performance of a duty (as of a mother to nourish her infant child), this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter. It has been held that to make the captain of a vessel guilty of manslaughter in causing a person to be drowned by running down a boat, proof of a mere omission on his part to do the whole of his duty is not sufficient. (b) But there is no authority for the

(y) *Rex v. Green*, ante, p. 874, and *Rex v. Allen*, ante, p. 873.

(z) *Reg. v. Lowe*, 3 O. & K. 123. Lord Campbell discussed this case with the Editor, and they fully concurred that a man might render himself equally culpable by neglecting to do his duty as by a wilful act. *E.g.* It is the duty of a pointsman to turn the switches on the approach of a train, and he wilfully neglects to do so, whereby an accident happens and a man is killed; another man wilfully turns some points with which he has nothing to do, and a death occurs; the offence of the one is precisely the same as that of the other. A man who wilfully neglects to feed his infant child is just as guilty of murder as if he poisoned it. Indeed, it has been truly said, that "between wilful mischief and gross negligence the boundary line is hard to trace; I should rather say, impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice;" per Lord Denman, C. J., *Lynch v. Nurdin*, 1 Q. B. 29 (41 E. C. L. R.).

(a) *Reg. v. Edwards*, 8 O. & P. 611 (34 E. C. L. R.); *Rex v. Goodwin*, 1 Russ. C. & M. 563.

(b) *Rex v. Allen*, 7 C. & P. 153 (32 E. C. L. R.).

position that without an act of commission there can be no manslaughter; and, on the contrary, the general doctrine seems well established, that what constitutes murder, being by design and of malice prepense, constitutes manslaughter where arising from culpable negligence."(c)

The prisoner was a porter at the Brighton Station, and it was his duty to start the trains. It being an excursion day, three up trains came in succession, all of them late, so that none of them could be started at the proper time. There was a rule of the company that under such circumstances no train should be started at intervals of less than five minutes after the preceding one. The case against the prisoner was that he had started the three trains so that there was only an interval of three or four minutes between the second and third. The first train arrived safely at the Clayton Tunnel (seven miles from Brighton), and passed safely through, and the man at the Brighton end of the tunnel, when it entered, telegraphed "train in;" but, owing to some improper working of the signal at his end became confused, and on the arrival of the second train, not feeling certain that he had received the signal which authorized him to send on the second train, again telegraphed "train in" just as the second train had gone into the tunnel. Fearing that the signal might be misunderstood, he showed the red flag, which he supposed the second train had not seen, but which had the effect of pulling up the second train in the tunnel. He again telegraphed to ask, "is that train out?" upon which the man at the north end of the tunnel, supposing that this referred to the first train, telegraphed "train out," whereupon the porter at the Brighton end of the tunnel sent the third train into the tunnel, and this ran into the second, which had come to a standstill in consequence of seeing the red flag. Erle, C. J., is reported to have told the grand jury that "they must be satisfied before they found the bill that there was a *prima facie* case of such criminal negligence as had been the proximate and efficient cause of the catastrophe. The negligence imputed appeared to be the sending on one train after another in a shorter interval of time than, according to the rules, he ought to have done. A mistake, indeed, was said to have arisen from the negligence of the defendant. Still, if the particular negligence imputed to the prisoner appeared not to have been the proximate cause of the catastrophe, the bill for manslaughter ought not to be found; and if it appeared that other causes had intervened, the prisoner's negligence would not have been the proximate and efficient cause of the deaths which had occurred. That this was in entire accordance with the authorities will appear from the most recent [*878 cases. The case is to be clearly distinguished from that of joint negligence. It is indeed well settled that it is no defence in a case of manslaughter that the death was caused by the negligence of others as well as by that of the prisoner; for if the death of the deceased be caused partly by the negligence of others, the prisoner and all those others are guilty of manslaughter."(d)

(c) Reg. v. Hughes, D. & B. C. C. 248. This case was not argued; but the opinion here expressed is in entire accordance with the conclusion arrived at in Reg. v. Lowe, *supra*.

(d) Reg. v. Ledger, 2 F. & F. 857. Erle, C. J., then referred to Reg. v. Haines, *supra*, and Reg. v. Barrett, *supra*. The great importance of placing the culpability of railway officials in a clear light has caused the following remarks, in which the words "neglect" and "negligence" are always used as importing such a degree of culpability as, if death ensue from it, the offence would amount to manslaughter at least. First, then, a clear distinction exists between negligence and a wilful act—a distinction well illustrated by the numerous cases, in which the rule has been established, that the master is answerable for the negligent, but not for the wilful act of his servant. And it should seem that if a railway official deliberately starts a train in direct opposition to the orders he has received, this is a wilful act, and that, as it is an intentional violation of his duty, it ought to be considered precisely in the same light as if it were done by a person who had no authority whatever to interfere with the train. Next, where a train is started before its proper time, and it runs into another train and kills a person, it seems that, whether the starting of the train be considered as a wilful or negligent act, the starter of the train is guilty of manslaughter. If the accident would not have happened if the train had not been started till its proper time, the case seems clear from doubt; for there the too early starting of the train is manifestly the cause of the death; and supposing the accident would have happened had the train been started at the proper time, still the death was caused at the time when it occurred by the culpable conduct of the starter of the train; in other words,

On an indictment for manslaughter against an engine-driver and fireman of a railway, it appeared that by the general rules of the company the fireman was always to follow the directions of the engine-driver, but both of them had the duty of looking out, the engineman being directed to attend to and act upon signals, the fireman obeying his directions. There was a regular system of signals, in which a red flag by day showed that the train must stop instantly. On Ascot race day special instructions were issued, which materially differed from the regular rules, and by them the red signal did not mean, as it usually did, "Stop," but only "Danger," and that meant that the engine should proceed with caution. The rules prohibited engines from running tender foremost; but there was no turn-table at Ascot, and the engines consequently returned with their tenders foremost. The return trains were started at irregular intervals of about five minutes by the station-master and traffic manager at Ascot. One of them stopped at Egham, and about five minutes afterwards another was started from Ascot. The prisoners, who had charge of it, did not know that the preceding train would stop at Egham; the stoppage delayed it two or three minutes; when the prisoners' train passed the two stations before Egham the signal was red. There was contradictory evidence as to the pace their trains went; but, after passing the auxiliary signal before reaching Egham, the speed was slackened. The prisoners' train, not having to stop at Egham, went right through the station; a minute or two afterwards the engineer saw the preceding train, and tried to stop his train, but they did not succeed in stopping the train before it ran into the other train, and caused the death of several persons. Willes, J., held that in a criminal prosecution an inferior officer must be

the death arose from the culpable act of the starter of the train, and sooner than it otherwise would have done, and the case seems to be very similar to those where the death of a person is accelerated by violence (*ante*, p. 702), and which establish the principle, that if a man is caused by a wrongful act to die at any time earlier than he otherwise would have done, it is a case of manslaughter, and if the accelerating the death of a sick man be such an offence, it is not easy to suggest a reason why the accelerating the death of a healthy man is not so also. It must also be observed, that in such a case all that is certain is what has actually happened; it is mere speculation what might have happened if the train had been started at its proper time: the mere shifting of the deceased from one seat to another might have saved his life. Nor is it any excuse that the train which was run into was met with at a place at which it would not have been but for the wilful or negligent act of some other person; the answer to this excuse is, that the time for starting having been fixed expressly for the purpose of preventing the possibility of such accidents, whether they might arise from the preceding train being met with on the line through negligence or otherwise, it does not lie in the starter's mouth to excuse his own wrongful act by such a wilful or negligent act of another. Lastly, it is submitted that the clear rule of law is, that every one who contributes by his wilful or negligent act to the death of a man is guilty of manslaughter, although there be no community of purpose or action between them, and although the act of the one may be proximate to, and the acts of the others remote, from the immediate cause of death; and that the only correct question in these cases is, whether the act did in any way whatever contribute to the death. In *Reg. v. Haines*, the prisoner's duty was to cause an air-heading to be put in a mine; and it was alleged to be the duty of another person to report to the prisoner that an air-heading was wanting—two such totally different duties, that the neglect of either could not possibly be the joint neglect of the two parties. Now Maule, J., said, "It has been contended that some other persons were also guilty of neglect; still, assuming that to be so, their neglect will not excuse the prisoner, for if a person's death be occasioned by the neglect of several, they are all guilty of manslaughter; and it is no defence for one who was negligent to say that another was negligent also, and thus, as it were, try to divide the negligence among them." This decision is directly against there being any limitation to joint negligence or proximate negligence, and, as far as it goes, entirely supports the position above laid down. Suppose three railway officials each negligently turned three different sets of points at A., B. and C., and that the result was an accident and death, it is submitted that all of them would be guilty of manslaughter, provided the act of each contributed in any degree to the accident. So again, suppose A. and B. each negligently turned the points for two different trains, so that the trains were caused thereby to run into each other, can it admit of doubt that both would be responsible for the result? In *Reg. v. Barrett*, *ante*, p. 875, the decision turned on the defect in the indictment, which, being in the old form, contained no allegation that it was the prisoner's duty to do that which he was alleged to have neglected to do. See also *Reg. v. Swindall*, *ante*, p. 870; and *Reg. v. Longbottom*, *ante*, p. 871, as to the negligence of the deceased forming no excuse.

held justified in obeying the directions of a superior not obviously improper or contrary to law; that is, if an inferior officer acted honestly upon what he might not unreasonably deem to be the effect of the orders of his superior, he would not be guilty of culpable negligence, these orders not appearing to him, at the time, to be improper or contrary to law. It appeared that the prisoners had nothing to do with the general management or regulation of the traffic, and their duty was to obey the special instructions issued to them as well as they could, presuming there was no apparent illegality in them; and in that case, provided they put the best construction they could upon them, and acted honestly in the belief that they were carrying them out, they were not criminally responsible for the result. In a civil case they might be responsible, but not criminally. As to the fireman, as he was bound to follow the direction of the engineman, there was no case. The jury then interposed, and said that they were all of opinion that there was no case of culpable negligence against either of the prisoners. Willes, J., said he was quite of the same opinion, and thought that the prisoners ought not be convicted on a criminal charge. They had instructions of an unusual kind, and were doing their best at the time to prevent an accident; that is, they were trying to put on the break so near to the time when, according to any view, they could be expected to have done so, that they can hardly be deemed guilty of culpable negligence. They only saw a red signal, and that, according to their special instructions, did not mean "Stop." There was no symptom of danger; they did not know that the other train had stopped at Egham, and they had no instructions to do so; and so they went right on, although a minute afterwards they did their best to stop the train. The arrangement was such as could not but cause imminent danger of the second train running into the first, which had passed only five or six minutes before, and had stopped three minutes at Egham. He therefore concurred in the verdict. In the course of the case, Willes, J., also held that a witness could not be asked to give an explanation as to his construction of the effect of the rules. The rules were in writing, and must speak for themselves, and the judge must declare their meaning. The special rules, if not consistent with the general rules, must override them, but their construction was for the judge. And that an officer of the Board of Trade could not be asked his opinion on the mode of conducting the traffic (which rather affected the company than the prisoners), nor whether in his judgment, as a man of experience, the driver of the engine ought to be convicted of negligence, nor (it seems) whether, in his opinion, the driver had kept a sufficient look-out ahead; but that he might be asked whether, supposing the train was going about forty miles an hour, it could have been stopped. (dd)

*Where on a trial for manslaughter it was stated that the deceased was the stoker on board a steam tug, of which the prisoners were the captain and engineman; the steam tug had exploded and killed the deceased whilst the prisoners, with the deceased, were the only persons on board. It was afterwards discovered that the lever of the safety valve was so tied down by weights that it could not act as a safety valve. There was therefore considerably more pressure on the boiler plates than they could bear. There was a government valve, one of the keys to the lock of which was kept by a government inspector, and the other ought to have been in possession of the captain; but there was no proof that he had the key at the time of the explosion. It was afterwards found that this valve was in such a state that it could not work. If it had been working, no mischief could have occurred. At the time of the explosion the tug was racing with a steamer, and had been so for some time. Against the captain it was urged that he had the control of the tug, and that he was guilty of culpable neglect in not seeing that the government valve was put into working order, or in allowing the other valve to be in a state in which it could not work. As to the engineer, it was his duty to attend to the working of the engine, and he was bound to see that too much steam was not generated. Hill, J., held that there was no case for a conviction. There was a difficulty to show that either of the prisoners was in a position to see that the government valve was out of order; and there was nothing inconsistent with the assumption that the deceased himself could see it to be out of order; and it was perfectly possible that he might have put the valve in order without the interven-

tion of either of the prisoners; if so, it was clear that a felony could not be made out.^(e)

On an indictment for manslaughter it appeared that thirteen persons embarked in a boat, besides two watermen, of whom the prisoner was one; two witnesses proved that by the swell of a steamer in motion the boat was carried against the bows of another steamer, and that as soon as it struck, the prisoner called out to the passengers to sit still, but they all jumped up and tried to lay hold of the steamer, and in consequence the boat was upset. Had the passengers remained quiet, the witnesses believed the accident would not have happened. Another witness was of opinion that the fault lay in the prisoner's pushing off the boat from the stairs with one of the oars, he standing upright at the time, instead of being seated and having the command of the skulls; he ought to have known the danger under such circumstances of crossing the strong tide that rushed through the arch of the bridge; but for his pushing off as he did, the boat would have cleared the steamer. He thought the same thing might have happened to the boat if there had been only three persons in it or only one. Williams, J.: "If the circumstance of the *880] passengers jumping up really caused *the accident, the overloading of the boat was immediately productive of such a result, and thus the prisoner is answerable; for he should have contemplated the danger of such a thing happening. If the fact of the prisoner standing up in the boat was the cause of the catastrophe, then it may be gross negligence on his part to have done so, because he is supposed to be acquainted with the force and velocity of the tide, and the danger of crossing it under the circumstances. On the whole, it is a question for the jury, whether the deceased met his death either by the gross carelessness of the prisoner in the management of the boat, or in taking on board a greater number of passengers than it was capable of safely carrying."^(f)

There is one species of criminal negligence, punishable by the provisions of the statute law, which may be mentioned in this place, though the offence is not made manslaughter. By the 7 & 8 Geo. 4, c. 75 (local and personal), s. 38, in case any greater number of persons or passengers shall be taken or carried in any such wherry, boat, or other vessel (mentioned in the Act) on the river Thames (within the limits there mentioned), than are respectively allowed to be carried therein, and any one or more of them shall by reason thereof be drowned, every person or persons who shall work or navigate such wherry, &c., offending therein, and being convicted, shall be deemed guilty of a misdemeanor, and shall be liable to punishment, as in cases of misdemeanor, at the discretion of the Court, and shall also be disfranchised, and not allowed to work or navigate any wherry, &c., or to enjoy any of the privileges of a freemen of the company of watermen, &c., on the river Thames.^(g)

Sec. VI.—Of the Indictment and Judgment.

THE indictment for manslaughter differs from the indictment for the higher crime of murder, in the omission of any statement as to malice, and of the conclusion that the party accused did kill and "murder;" and we have seen that a bill of indictment for murder may be converted into one for manslaughter, by striking out such statement and conclusion.^(h)¹

(e) Reg. v. Gregory, 2 F. & F. 153. The deceased might himself have weighted the other safety valve, or at least must have seen that it was so weighted.

(f) Reg. v. Williamson, 1 Cox C. C. 97, Gurney, B., and Williams, J. It was also held that the fact of no number being painted on the boat was *prima facie* evidence that the boat was unlicensed.

(g) It was observed upon a former statute, 10 Geo. 2, c. 31, containing a more severe punishment for an offence of this kind, that it might serve as a caution to stage coachmen and others, who overload their carriages for the sake of lucre, to the great danger of the lives of the passengers, the number of whom are regulated by Act of Parliament: 1 East P. C. c. 5, s. 38, p. 264, and see the provisions as to carrying too many passengers, in the 2 & 3 Will. 4, c. 120, s. 34.

(h) *Ante*, p. 768.

¹ It is no defence to an indictment for manslaughter, that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was therefore murder; but the defendant in such case may notwithstanding be properly convicted of the offence of manslaughter: *Comm. v. M'Pike*, 3 Cush. 181.

By the 24 & 25 Vict. c. 100, s. 5, "Whosoever shall be convicted of manslaughter shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor,⁽ⁱ⁾ or to pay *such fine as the Court shall award, in addition to or without any such other [*881 discretionary punishment as aforesaid."^(k)

Sec. 57. "In the case of every felony punishable under this Act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable: and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for any term not exceeding two years, with or without hard labor; and every accessory after the fact to murder shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years with or without hard labor; and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act, shall be liable to be proceeded against, indicted, and punished as a principal offender."^(l)

Where a party is charged with manslaughter in causing the death of a person by negligence in the discharge of his duty, it must be proved that the negligent act was that of the party charged. Upon an indictment for manslaughter, it appeared that it was the prisoner's duty to attend to a steam engine, but on the occasion in question he had stopped the engine and gone away, and that, during his absence, a person came and put it in motion, and being unskilled was not able to stop it again, and in consequence of the engine being thus put in motion, the deceased was killed. Alderson, B., stopped the case, saying that the death was the consequence, not of the act of the prisoner, but of the person who set the engine in motion after the prisoner had gone away; that it is necessary, in order to a conviction for manslaughter, that the negligent act which causes the death should be that of the party charged.^(m)

On a trial for manslaughter of a person who was burnt in a ship, where the prisoner had struck a light with a match, and lighted a candle, in a part of the ship forbidden by the ship's regulations, and had thrown down the match before it was extinguished, but a period of six hours elapsed without sign of fire by sight or smell; Bramwell, B., thought the evidence too slight to justify a conviction.⁽ⁿ⁾

Where an indictment for manslaughter stated that the prisoner "did compel and force A. B. and C. D. to leave" a windlass, by means of which the death was occasioned, and it appeared that the prisoner, who was working one handle of the windlass, went away, and A. B. and C. D., then finding they were not strong enough to hold the windlass without him, let go their hold, by reason of which the deceased was killed, it was held that the words "did compel and force" must be taken to mean personal affirmative force applied to A. B. and C. D., and therefore the prisoner must be acquitted.^(o) So where an indictment alleged that the *prisoners did "propel and force" a vessel against a skiff, Parke, B., said, [*882 "The allegation in the inquisition is, that the defendants forced and propelled the vessel against the skiff: evidence against those who gave the immediate orders will be necessary to sustain this allegation."^(p)

It has been held, upon two cases reserved, that a person indicted for murder may be convicted of manslaughter, and punished accordingly, although such indictment do not conclude *contra formam statuti*.^(q) And so on an indictment for man-

(i) As to hard labor, see *ante*, p. 4. As to sureties for keeping the peace, see *ante*, p. 5.

(k) This clause is taken from the 9 Geo. 4, c. 31, s. 9, and 10 Geo. 4, c. 34, s. 12 (I.).

(l) This clause is framed on the similar clauses in the 7 & 8 Geo. 4, c. 29, s. 61; 7 & 8 Geo. 4, c. 30, s. 26; 9 Geo. 4, c. 31, s. 31; 9 Geo. 4, c. 55, s. 54 (I.); 9 Geo. 4, c. 56, s. 33 (I.); and 10 Geo. 4, c. 34, s. 40 (I.). As to hard labor, &c., see note (i) *supra*.

(m) *Hilton's case*, 2 Lew. 214, Alderson, B. See *Rex v. Waters*, 6 C. & P. 328 (25 E. C. L. R.), *ante*, p. 677.

(n) *Reg. v. Gardner*, 1 F. & F. 669.

(o) *Rex v. Lloyd*, 1 C. & P. 301 (12 E. C. L. R.), Garrow, B.

(p) *Reg. v. Taylor*, 9 C. & P. 672 (38 E. C. L. R.). See the case, *ante*, p. 872.

(q) *Rex v. Chatburn*, R. & M. C. C. R. 403; *Rex v. Rushworth*, R. & M. C. C. R. 404.

slaughter not concluding *contra formam statuti*, the punishment provided by the 9 Geo. 4, c. 31, s. 9, might be awarded, for such conclusion is only necessary where a statute creates the offence, not where it merely regulates the punishment.(*r*)

If a person be indicted as accessory after the fact to a murder, he may be convicted as accessory after the fact to manslaughter, if the offence of the principal turns out to be manslaughter.(*s*) Either assisting the party to conceal the death, or in any way enabling him to evade the pursuit of justice, will render a party, who knows the offence to have been committed, an accessory after the fact.(*t*)¹

*883]

*CHAPTER THE THIRD.

OF EXCUSABLE AND JUSTIFIABLE HOMICIDE.

WE may now properly proceed to treat of such homicide as, not amounting even to manslaughter, must be considered either as excusable or justifiable: excusable when the person, by whom it is committed, is not altogether free from blame; and justifiable when no blame whatever is attached to the party killing.

Excusable homicide is of two sorts: either *per infortunium*, by misadventure; or *se et sua defendendo*, upon a principle of self-defence. The term *excusable homicide* imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, that the punishment inflicted for this offence was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them:(*a*) and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expenses of suing them out. At the present time, in order to prevent this expense, it is usual for the Judge to permit or direct a general verdict of acquittal in cases where the death has notoriously happened by misadventure, or in self-defence.(*b*) There might, however, formerly have been cases so bordering upon, and not easily distinguishable from, manslaughter, that the offender might have been put to sue out his pardon, according to the provisions of the statute of Gloucester, 6 Edw. 1, c. 9;(c) but that statute was repealed by the 9 Geo. 4, c. 31; and the 24 & 25 Vict., c. 100, s. 7, enacts, that "No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner, without felony."

Justifiable homicide is of several kinds: as it may be occasioned by the performance of acts of unavoidable necessity, where no shadow of blame can be attached to the party killing; or by acts done by the permission of the law, either for the advancement of public justice, or for the prevention of some atrocious crime.

(*r*) *Rex v. Berry*, 1 Moo. & Rob. 463, Parke, B.

(*s*) *Rex v. Greenacre*, 8 C. & P. 35 (34 E. C. L. R.), Tindal, C. J., Coleridge and Colman, JJ.

(*t*) *Ibid.*

(*a*) 4 Blac. Com. 188. The penalty for this offence is said by Sir Edward Coke to have been anciently no less than death: 2 Inst. 148, 315; but this is denied by other writers: 1 Hale P. C. c. 425; 1 Hawk. P. C. c. 29, s. 20, *et seq.*; Fost. 282.

(*b*) 4 Blac. Com. 188; Fost. 288; 1 East. P. C. c. 5, s. 8, p. 222.

(*c*) Fost. 289.

¹ A person indicted for manslaughter may be convicted of an assault and battery, though the indictment contains no count specially charging the minor offence: *State v. Scott*, 24 Verm. 127. One who is indicted of murder cannot be convicted of involuntary manslaughter. If, on such indictment, the offence proved is involuntary manslaughter, the defendant should be acquitted—and he may be indicted for a misdemeanor: *Comm. v. Gable*, 7 Serg. & R. 423.

*Sec. I.—Of Excusable Homicide by Misadventure.

[*884

HOMICIDE by misadventure is where one doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person.^(d) The act must be lawful; for if it be unlawful, the homicide will amount to murder, or manslaughter, as has been already shown:^(e) and it must not be done with intention of great bodily harm; for then the legality of the act, considered abstractedly, would be no more than a mere cloak, or pretence, and consequently would avail nothing. The act must also be done in a proper manner, and with due caution to prevent danger.^(f)

Thus, if people, following their common occupations, use due caution to prevent danger, and nevertheless happen, unfortunately, to kill any one, such killing will be homicide by misadventure. As if a workman throw stones, rubbish, or other things, from a house, in the ordinary course of their business, by which a person underneath happens to be killed; this would be misadventure only, if it were done in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, or if timely and proper warning were given.^(g) to such as might be below.^(h) And the party will not be more criminal who is working with a hatchet, when the head of it flies off, and kills a by-stander.⁽ⁱ⁾ So, where a person, driving a cart or other carriage, happens to drive over another and kill him, if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused.^(k) A. was driving a cart with four horses in the highway at White-chapel, he being in the cart; and the horses being upon a trot, threw down a woman who was going the same way with a burthen upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder Lovell, held this to be only misadventure: but by Lord Holt, if it had been in a street where people usually pass, this had been manslaughter.^(l) And, upon the same ground of no want of due care being imputable to the party, in a case where a person was riding a horse, and the horse, being whipt by some other person, sprang out of the road, and ran over a child and killed it, this was held to be misadventure only in the rider, though manslaughter in the person who whipped the horse.^(m)

*As the degree of caution to be employed depends upon the probability of danger, it follows that persons using articles or instruments, in their nature peculiarly dangerous, must proceed with such appropriate and reasonable precaution as the particular circumstances may require. Thus, though where one lays poison to kill rats, and another takes it and dies, this is misadventure: yet it must be understood to have been laid in such manner and place as not easily to be mistaken for proper food; for that would betoken great inadvertence, and might in some cases amount to manslaughter.⁽ⁿ⁾

A., having deer frequenting his corn field, out of the precinct of any forest or chase, set himself in the night-time to watch in a hedge, and set B., his servant, to watch in another corner of the field, with a gun charged with bullets, giving him orders to shoot, when he heard any bustle in the corn by the deer. The master afterwards improvidently rushed into the corn himself: and the servant, supposing it to be the deer, shot and killed the master. This was ruled to be misadventure, on the ground that the servant was misguided by his master's own direction, and was ignorant that it was anything else but the deer. It seemed, however, to the

(d) 1 East P. C. c. 5, s. 8, p. 221, and s. 36, pp. 260, 261; Fost. 258; 1 Hawk. P. C. c. 29, s. 1.

(e) *Ante*, p. 739, *et seq.*, p. 849, *et seq.*

(f) 1 East P. C. c. 5, s. 36, p. 261.

(g) *Ante*, p. 864.

(h) 1 Hale 472, 475; 1 Hawk. P. C. c. 29, s. 4; Fost. 262; 1 East P. C. c. 5, s. 38, p. 262.

(i) 1 Hawk. P. C. c. 29, s. 2.

(k) Fost. 263; 1 Hale 476.

(l) O. B. Sess. before Mich. T. 1704, MS., Tracy, 32; 1 East P. C. c. 5, s. 38, p. 263; and see observations on this case, *ante*, p. 867.

(m) 1 Hawk. P. C. c. 29, s. 3.

(n) 1 Hale 431; 1 East P. C. c. 5, s. 40, p. 266.

learned Judge who so decided, (o) that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter, because of the want of due caution in the servant to shoot before he discovered his mark. (p) But upon this it has been remarked, that if, from all the other circumstances of the case, there appeared a want of due caution in the servant, it does not seem that the command of the master could supply it, much less could excuse him in doing an unlawful act: and that the excuse of having used ordinary caution can only be admitted where death happens accidentally in the prosecution of some lawful act. (q) By the same rule as to due caution being observed, it has been holden to be misadventure only, where a commander coming upon a sentinel in the night, in the posture of an enemy, to try his vigilance, is killed by him as such; the sentinel not being able to distinguish his commander, under such circumstances, from an enemy. (r)

But it should be observed, that the caution which the law requires, is not the *utmost* caution that can be used: it is sufficient that a reasonable precaution be taken; such as is usual and ordinary in similar cases; such as has been found, by long experience in the ordinary course of things, to answer the end. (s) This proper modification of the rule respecting caution does not appear to have been sufficiently attended to in the following case. A man found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer: he carried it home, and showed it to his wife; and she standing before him, he pulled up the cock, and touched the trigger; and the pistol went off and killed the *886] woman. This was ruled manslaughter. (t) But *the legality of the decision has been doubted, on the ground that the man examined the pistol in the common way, and used the ordinary caution deemed to be effectual in similar cases. (u) And Mr. J. Foster, after stating his reasons for disapproving of the judgment, says, that he had been the longer upon the case, because accidents of this lamentable kind may be the lot of the wisest and best of mankind, and most commonly fall amongst the nearest friends and relations; and then proceeds to state a case of a similar accident, in which the trial was had before himself. Upon a Sunday morning, a man and his wife went a mile or two from home with some neighbors, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way: but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church; and in the evening, returned home with his wife and neighbors, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger; and the gun went off and killed his wife, whom he dearly loved. It came out in evidence, that, while the man was at church, a person belonging to the family privately took the gun, charged it, and went after some game; but, before the service at church was ended, returned it, loaded, to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it, to all appearance, as he had left it. "I did not inquire," says Mr. J. Foster, "whether

(o) Lord Hale.

(p) 1 Hale 476. The same case is previously mentioned, 1 Hale 40, where the learned author seems to think that the offence amounted to manslaughter; but considers the question as of great difficulty. The case was, however, determined at Peterborough, as stated in the text.

(q) 1 East P. C. c. 5, s. 40, p. 266.

(r) 1 Hale 42.

(s) Fost. 264.

(t) Rampton's case, Kel. 41.

(u) Fost. 264, where it is said, that perhaps the rammer, which the man had not tried before, was too short, and deceived him. But, *quæ*, whether the ordinary and proper precaution would not have been to have examined the pan, which in all probability must have been primed. The rammer of a pistol, or gun, is so frequently too short, from having been accidentally broken, that it would be very incautious in a person previously unacquainted with the state of the instrument to rely upon such proof as he could receive from the rammer, unless it were passed so smartly down the barrel as clearly to give the sound of the metal at the bottom. However, there is a *quæ*. to the case in the margin of the report, and it appears that the learned Editor (Holt, C. J.) was not satisfied with the judgment; and that it is one of the points which, in the Preface, he recommends for further consideration.

the poor man had examined the gun before he carried it home; but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if they were of the same opinion, they should acquit him: and he was acquitted."^(v)

It has been shown, that where parents, masters, and other persons, having authority in *foro domestico*, give correction to those under their care, and such correction exceeds the bounds of due moderation, so that death ensues, the offence will be either murder or manslaughter, according to the circumstances:^(w) but if the correction be reasonable and moderate, and by the struggling of the party corrected, or by some other misfortune, death ensue, the killing will be only misadventure.^(x)

Such sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, such as playing at cudgels, or foils, or wrestling *by consent, are deemed lawful sports; and if either party happen to be killed in such sports, it is excusable homicide [*887 by misadventure.^(y) A different doctrine, indeed, appears to have been laid down by a very learned Judge:^(z) but the grounds of that doctrine have been ably combatted by Mr. J. Foster, who gave this good reason for considering such sports as lawful, that *bodily harm is not the motive on either side.*^(a) And certainly, though it cannot be said that they are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard. Proper caution and fair play should, however, be observed; and, though the weapons used be not of a deadly nature, yet, if they breed danger, there should be due warning given, that each party may start upon equal terms. For, if two be engaged to play at cudgels, and the one make a blow at the other, likely to hurt, before he is upon his guard, and without warning, from whence death ensues, the want of due and friendly caution will make such act amount to manslaughter, but not murder, the intent not being malicious^(b)

Where on a trial for manslaughter it appeared that the prisoner came into a shop and pulled a young lad by the hair off a cask where he was sitting, and put his arm round his neck and spun him round, and they came together out of the shop, and the prisoner kept spinning him round, and the lad broke away from him, and in consequence and at the moment of so doing, the prisoner being intoxicated, reeled into the road and against the deceased who was passing, and knocked her down, and she died shortly afterwards; and the lad said he did not resist the prisoner—he thought the prisoner was only playing with him, and was sure that it was intended as a joke throughout. Erle, J., told the jury: "Where the death of one person is caused by the act of another, while the latter is in pursuit of any unlawful object, the person so killing is guilty of manslaughter, although he had no intention whatever of injuring him who was the victim of his conduct. Here, however, there was nothing unlawful in what the prisoner did to this lad, and which led to the death of the woman. Had this treatment of the boy been against his will, the prisoner would have been committing an assault—an unlawful act—which would have rendered him amenable for any consequences resulting from it; but as everything that was done was with the boy's consent, there was no assault, and consequently no illegality. It is in the eye of the law an accident and nothing more."^(c)

Ordinarily the weapons made use of upon such occasions are not deadly in their nature; but, in some sports, the instruments used are of a deadly nature; yet, in such cases, if they be not directed by the persons using them against each other, and therefore no danger be reasonably to be apprehended, the killing which may casually ensue will be only homicide by misadventure. Such will be the case,

^(v) *Fost.* 265.

^(w) *Ante*, p. 751, Chap. on *Murder*; p. 861, Chap. on *Manslaughter*.

^(x) 1 *Hale* 454, 473, 474; 4 *Blac. Com.* 182.

^(y) *Fost.* 259, 260; 1 *East P. C. c.* 5, s. 41, p. 268. But there are other sports which come under a different consideration. See *ante*, p. 854.

^(z) 1 *Hale* 472.

^(a) *Fost.* 260.

^(b) 1 *East P. C. c.* 5, s. 41, p. 269.

^(c) *Reg. v. Bruce*, 2 *Cox C. C.* 282.

*888] therefore, where persons shoot at game, or *butts, or any other lawful object, and a bystander is killed :(*d*) and with respect to the lawfulness of shooting at game, it may be observed, that though the party be not qualified, the act will not be so unlawful as to enhance the accidental killing of a bystander to manslaughter.(*e*)

Sec. II.—Of Excusable Homicide in Self-Defence.

HOMICIDE in self-defence is a sort of homicide committed *se et sua defendendo*, in defence of a man's person or property, upon some sudden affray, considered by the law as in some measure blameable, and barely excusable.*f*)¹

When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defence. But, in order to entitle himself to this plea, he must make it appear, first, that before a mortal stroke given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death.(*g*) Under such circumstances, the killing will be excusable self-defence, sometimes expressed in the law by the word *chance medley*, or (as it has been written by some) *chaud medley*, the former of which, in its etymology, signifies a casual affray; the latter an affray in the heat of blood, or passion. Both of them are pretty much of the same import: but the former has, in common speech, been often erroneously applied to any manner of homicide by misadventure; whereas it appears by one of the statutes,(*h*) and the ancient books, (*i*) that it is properly applied to such killing as happens in self-defence upon a sudden encounter.(*k*)

Homicide upon chance medley borders very nearly upon manslaughter; and, in fact and experience, the boundaries are in some instances scarcely perceivable, though in consideration of law they have been fixed.(*l*) In both cases it is supposed that passion has kindled on each side, and blows have passed between the parties; but in the case of manslaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death.(*m*) And the true criterion between them is stated to be this; when both parties are actually combatting, at the time the mortal stroke was given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or, having begun, endeavors *889] to decline any further *struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence.(*n*)²

(*d*) 1 Hale 38, 472, 475; 1 Hawk. P. C. c. 29, s. 6; 1 East P. C. c. 5, s. 41, p. 269.

(*e*) 1 Hale 475; Fost. 259.

(*f*) Fost. 273. "Self-defence culpable, but through the benignity of the law excusable."

(*g*) 1 East P. C. c. 5, s. 51, p. 280; Fost. 273.

(*h*) 24 Hen. 8, c. 5.

(*i*) Staund. P. C. c. 16; 3 Inst. 55, 57; Kel. 67.

(*k*) 4 Blac. Com. 184; Fost. 275. *Shene De verborum significatione*, Verb. Chaudmelle.

(*l*) Fost. 276.

(*m*) Fost. 277.

(*n*) 4 Blac. Com. 184.

¹ The cases of killing in self-defence in the United States are very numerous, and it is not considered necessary to refer to them all, as they are generally in accord with the principles stated in this section. To excuse a homicide, there must exist on the part of the slayer an actual necessity to kill in order to prevent the commission of a felony or great bodily harm, or a reasonable belief in his mind that such necessity exists: *Noles v. State*, 26 Ala. 31. A man cannot justify himself in killing another on the ground of necessity, unless he were without fault in bringing that necessity upon himself: *Vaiden v. Comm.*, 12 Gratt. 517. Retreat when necessary: *Haynes v. State*, 17 Geo. 465. If self-defence is relied on, the prosecution may show the physical inferiority of the prisoner over the deceased: *Hinck v. State*, 25 Geo. 699.

² The right of resorting to force, upon the principle of self-defence, does not arise while the apprehended mischief exists in machination only; nor does it continue so as to authorize violence by way of retaliation or revenge for a past injury: *People v. McLeod*, 1 Hill 377. If the prisoner was going her own road, in a lawful pursuit, and was assailed in

In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice; and from the doctrine which has been above laid down, it appears that the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. For in no case will a retreat avail, if it be feigned, in order to get an opportunity or interval to enable the party to renew the fight with advantage.^(o)

The party assaulted, must therefore flee, as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step

(o) 1 Hale 481, 483; Fost. 277; 4 Blac. Com. 185.

that road with a hickory stick of dangerous character, and thereupon slew her adversary with a knife, this is homicide in self-defence: *Copeland v. State*, 7 Humph. 479. The common law of Alabama on the subject of homicide is the same as the common law of England: and wherever that law requires the person assailed to decline the contest or to retreat before he will be excused in taking the life of his adversary, the law of Alabama requires the same: *Pierson v. State*, 12 Alab. 149. Where upon the trial of an indictment for murder, the prisoner attempts to justify the homicide on the ground that it was committed in self-defence, he must show to the satisfaction of the jury that he was in imminent danger either of death or of some great bodily harm; and it is not sufficient that the accused believed that it was necessary to take the life of his assailant in order to protect himself from some great personal injury: *People v. Shorter*, 4 Barb. 460. One who is without fault himself, when assailed by another, may kill his adversary if the circumstances be such as to furnish reasonable grounds for apprehending a design to take away his life or to do him some great bodily harm, and there is also reasonable ground for believing the danger imminent that such design will be accomplished, although it may afterwards turn out that the appearances were false, and that there was in fact no such design nor any danger that it would be accomplished. A person is not justified in returning blows with a dangerous weapon, when he is struck with the naked hand, and there is no reason to apprehend a design to do him great bodily harm; nor is homicide justified when the combat can be avoided, or when, after it is commenced, the party can withdraw from it in safety before he kills his adversary: *Shorter v. People*, 2 Comst. 193.

On a trial for murder, there being evidence that the prisoner shot the deceased as he was coming up the street towards the prisoner's office, it was held, that the prisoner's declaration to the witness, "Yonder comes Macon" (the deceased) "with his yeager," (a kind of gun) before firing, was admissible as part of the *res gestæ*; but not the statement which followed, "He intends to shoot or kill me." Held, also a statement of the prisoner to a witness before the shooting, that he saw the conduct of the deceased that morning, which conduct was testified to by the witness as being violent and threatening as he passed with his gun, was admissible, as showing the prisoner's ground for alarm: *Monroe v. State*, 5 Geo. 85. Evidence of threats by the deceased, accompanied by occasional acts of personal violence, is admissible to justify the reasonableness of the defendant's fears, provided a knowledge of the threats is brought home to him. And repeated quarrels may be shown between the parties to establish the *malus animus*; but the evidence cannot be allowed to go back to a remote period and prove a particular quarrel or cause of grudge, unless it be followed up with proof of a continued difference flowing from that source. Evidence that as a justice of the peace, the prisoner had prosecuted the deceased for embezzlement of the county school fund, and that in consequence thereof the deceased vowed that the defendant should not be at the trial of said indictment, for that he would kill him, is admissible in connection with other circumstances to show that the defendant was in fear of his life from the deceased, and that the killing was in self-defence: *Ibid.* A person having reasonable apprehension of great personal violence, involving imminent peril to life or limb, may protect himself even at the expense of his assailant's life, if necessary: *Holmes v. State*, 23 Ala. 17. A reasonable apprehension of death or of great violence to his person will justify killing in self-defence by a party assailed: *Young v. State*, 11 Humph. 200. When a man expects to be attacked, the right to defend himself does not arise until he has done everything to avoid that necessity: *People v. Sullivan*, 3 Seld. 396. The necessity that will justify the taking of life, need not be actual, but the circumstances must be such as to impress the mind of the slayer with the reasonable belief that such necessity is impending: *Oliver v. State*, 17 Ala. 587; *People v. Doe*, 1 Mann. 451. When he who kills another, seeks and provokes an assault on himself in order to have a pretext for stabbing an adversary, and does, on being assaulted, stab and kill him, such killing is not excusable homicide in self-defence: *Stewart v. State*, 1 Ohio St. 66.

without manifest danger of his life, or great bodily harm, and then, in his defence, he may kill his assailant instantly. *(p)* Before a person can avail himself of the defence, that he used a weapon in defence of his life, he must satisfy the jury that defence was necessary; that he did all he could to avoid it; and that it was necessary, to protect his own life, or to protect himself from such serious bodily harm, as would give him a reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he would be justified. *(q)*

If A. challenges B. to fight, and B. declines the challenge, but lets A. know that he will not be beaten, but will defend himself; and then B., going about his business, and wearing his sword, is assaulted by A., and killed; this is murder in A. But if B. had killed A. upon that assault, it had been *se defendendo*, if he could not otherwise have escaped; or bare manslaughter, if he could have escaped and did not. *(r)*

As in the case of manslaughter upon sudden provocation, where the parties fight upon equal terms, all malice apart, it matters not who gave the first blow: so in the case of excusable self-defence, it seems that the first assault in a *sudden affray*, all malice apart, will make no difference if either party quit the combat and retreat, before a mortal wound be given *(s)* According to this doctrine, if A. upon a sudden quarrel, assaults B. first, and upon B.'s returning the assault, A. really and *bonâ fide*, flies, and being driven to the wall, turns again upon B. and kills him, this will be *se defendendo*: *(t)* but some writers have thought this opinion too favorable, inasmuch as the necessity to which A. is at last reduced, originally arose from his own fault. *(u)* With regard to the nature *of the necessity, it may be observed, that the party killing cannot, in any case, substantiate his excuse, if he kill his adversary even after a retreat, unless there were reasonable ground to apprehend that he would otherwise have been killed himself. *(v)*¹

(p) 2 Hale 483; 4 Blac. Com. 185.

(q) Per Bosanquet, J., Reg. v. Smith, 8 C. & P. 160 (34 E. C. L. R.), *presentibus*, Bolland, B., and Coltman, J. See Reg. v. Bull, 9 C. & P. 22 (38 E. C. L. R.).

(r) 1 Hale 453.

(s) Fost. 277.

(t) 1 Hale 482.

(u) 1 Hawk. P. C. c. 29, s. 17. Lord Hale seems also to distinguish the case of him who is first attacked from the assailant, with respect to the point of retreating: 1 Hale 482. Upon this subject some remarks are offered by Mr. East (1 East P. C. c. 5, s. 53, pp. 281, 282), and he concludes by saying, "At any rate I think there is great difficulty in applying the distinction taken by Lord Hale and Hawkins against him who makes the first assault, to the case of mutual combat by consent, though upon a sudden occasion, where neither of the parties makes an attack till the other is prepared; because in these cases it matters not who gives the first blow; it forms no ingredient in the merits of the question."

(v) Fost. 273, 275, 289; 4 Blac. Com. 184.

¹ If a man, though in no great danger of serious bodily harm, through fear, alarm, or cowardice, kill another under the impression that great bodily injury is about to be inflicted on him, it is neither murder nor manslaughter, but self-defence. But if, from the facts, it appears he only believed that a violent assault and battery, without endangering his life or inflicting great bodily harm, was intended, it is manslaughter: *Granger v. State*, 5 Yerg. 459. Where an assailant intends to commit a trespass, to kill him is *manslaughter*; but when a felony, the killing is in *self-defence*. The character of the deceased for violence is admissible to elucidate this question: *Monroe v. State*, 5 Geo. 85. The defendant cannot prove the character of the deceased for violence where the killing took place under circumstances that showed he did not believe himself in danger; yet in a case of doubt whether the homicide was perpetrated in malice or from a principle of self-preservation, it is right to admit any testimony of this kind, as it tends to illustrate to the jury the motive by which the defendant was influenced: *Ibid.* On a trial for murder, evidence of the good or bad character of the deceased is inadmissible, except in cases where the killing is attended by circumstances to create a doubt of its character. As where it appears that the slayer has been actuated, in the commission of the offence, by the principle of self-defence, or by some other fact that would excuse the offence: *Queensbury v. State*, 3 Stew. 308. It is not competent for one indicted for manslaughter to prove, on the trial, that the deceased was well known and understood by the accused and others to be a drunken, quarrelsome, savage, and dangerous man: *State v. Field*, 14 Maine 244. Facts that occurred at or about the time of the fatal encounter, involving

Under the excuse of self-defence, the principal civil and natural relations are comprehended: therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other, respectively are excused; the act of the relation assisting, being construed the same as the act of the party himself.(w)

If A. in defence of his house, kill B., a trespasser, who endeavors to make an entry upon it, it is at least common manslaughter; unless, indeed, there were danger of his life. But if B. enter into the house, and A., having first requested him to depart, gently lay his hands upon him to turn him out, and then B. turn upon him and assault him, and A. then kill him, it will be *se defendendo*, supposing that he was not able by any other means to avoid the assault, or retain his lawful possession. And so it will be, if B. enter upon A., and assault him first, though not intending to kill him, but only as a trespasser to gain the possession; for in such case, if A. thereupon kill B., it will only be *se defendendo*; and not manslaughter.(x) And it seems, that in such a case A., being in his own house, need not fly as far as he can, as in other cases of *se defendendo*; for he has the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by his flight.(y) But where the trespass is barely against the property of another, the law does not admit the force of the provocation as sufficient to warrant the owner in making use of any deadly or dangerous weapon; more particularly if such violence is used after the party has desisted from the trespass. But if the beating be with an instrument, or in a manner not likely to kill, it will only amount to manslaughter; and it is even lawful to exert such force against a trespasser, who comes without any color, to take the goods of another, as is necessary to make him desist.(z)

A man is not authorized to fire a pistol on every intrusion or invasion of his dwelling-house, which may be made forcibly at *night; he ought, if he has [891 a reasonable opportunity, to endeavor to remove the trespasser, without having recourse to the last extremity. M., who was indicted for murder, had made himself obnoxious to some boatmen, by giving information of certain smuggling transactions, in which some of them had been engaged; and they, in revenge, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police; the boatmen, however, as he was going away, called to him that they would come at night, and pull his house down: in the middle of the night a great

(w) 1 Hale 484; 4 Blac. Com. 186.

(x) 3 Edw. 3; Coron. 35; Crompt. 27 b.; 1 Hale 486.

(y) 1 Hale 485. In Dakin's case, 1 Lew. 166, where the prisoner was a lodger at a house, to which there was a back way, of which the prisoner was ignorant, it being the first night he had lodged at the house, and some persons split open the door of the house in order to get the prisoner out and ill-treat him, Bayley, J., is reported to have said, "If the prisoner had known of the back way, it would have been his duty to have gone out backwards, in order to avoid the conflict." But it is submitted that the protection of the house extends to each and every individual dwelling in it. In *Rex v. Cooper*, Cro. C. 544, it was held that a lodger might justify killing a person endeavoring to break into the house where he lodged with intent to commit a felony in it; and see 1 East P. C. c. 5, s. 57, p. 289; *Fost.* 274; and *Ford's case*, Kely. 51, *post*, p. 897. C. S. G.

(z) 1 Hale 473, 486; 1 East P. C. c. 5, s. 56, p. 289.

the conduct of the deceased, which might have been observed by the slayer, are competent and admissible in evidence, without precedent proof that he had notice of them: *Reynolds v. State*, 1 Geo. 230. On a trial for murder, evidence of the general character and habits of the deceased as to temper and violence cannot be received. The only exception to this rule, if there be one, is where the whole evidence as to the homicide is circumstantial: *State v. Barfield*, 8 Ired. 344. Evidence on the part of a prisoner, indicted as accessory in a murder, that he was a man of violent passions and often in the habit of using threatening language, intended to rebut the presumption arising from his threats against the defendant, is irrelevant and inadmissible: *State v. Duncan*, 6 Ired. O. 236. The character of the deceased for violence may be given in evidence to show the motive of the slayer, where there is doubt whether the act was done in self-preservation: *Monroe v. State*, 5 Geo. 85.

For other cases in which the muscular strength or violent character of the deceased is or is not admissible in evidence, see *Comm. v. Hilliard*, 2 Gray 294; *Comm. v. Mead*, 12 *Ibid.* 167; *State v. Benham*, 23 Iowa 154; *Franklin v. State*, 29 Ala. 14; *State v. Jackson*, 12 La. Ann. 679; *State v. Hicks*, 27 Mo. 588; *Wise v. State*, 2 Kans. 419.

number of persons came about his house, singing songs of menace, and using violent language, indicating that they had come with no friendly or peaceable intention. M., under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which one of the party was killed. Holroyd, J., "A civil trespass will not excuse the firing a pistol at a trespasser, in sudden resentment or anger. If a person takes forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters into the dwelling of another; but a man is not authorized to fire a pistol on every intrusion or invasion of his house: he ought, if he has a reasonable opportunity, to endeavor to remove him without having recourse to the last extremity; but the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle: and, therefore, in the eye of the law, it is equivalent to an assault; but no words or singing are equivalent to an assault, nor will they authorize an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence: if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person, in the heat of blood, kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as, where a party coming up, by way of making an attack, and, without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If you are of opinion that the prisoner was really attacked, and that the deceased and his party were on the point of breaking in, or likely to do so, and execute the threats of the day before, he was, perhaps, justified in firing as he did." (a)

A person must only use so much force as is reasonably necessary, in order to turn a trespasser out of his house. Upon an indictment for manslaughter, it appeared that the prisoner, upon returning home, found the deceased in his house, and desired him to withdraw, but he refused to go: upon this, words arose between them, and the prisoner becoming excited, proceeded to use force, and, by a kick which he gave to the deceased, caused his death. Alderson, B.: "A kick is not a justifiable mode of turning a man out of your house, though he be a trespasser. *892] If a person becomes excited, and gives another kick, it is an unjustifiable act. If the deceased would not have died but for the *injury he received, the prisoner, having unlawfully caused that injury, is guilty of manslaughter." (b)

Upon an indictment for manslaughter, it appeared that a man and his servant had insisted upon placing corn in the prisoner's barn, which she refused to allow; they exerted force: a scuffle took place, in which the prisoner received a blow on the breast, whereon she threw a stone at the deceased, the master, which killed him. Holroyd, J.: "The case fails, as it appears the deceased received the blow in an attempt to invade the prisoner's barn, against her will. She had a right to defend her barn, and to employ such force as was reasonably necessary for that purpose; and she is not answerable for any unforeseen accident that may have happened in so doing." (c)

There is one species of homicide *se defendendo* where the party slain is equally innocent as the person who occasions his death: and yet this homicide is also excusable, from the great universal principle of self-preservation, which prompts every man to save his own life, in preference to that of another, where one of them must inevitably perish. Of this kind is the case mentioned by Lord Bacon, where upon two persons being shipwrecked, and getting on the same plank, one of them, finding it not able to save them both, thrust the other from it, whereby he was drowned. (d) But, according to Lord Hale, a man cannot even excuse the killing of another who is innocent, under a threat, however urgent, of losing his own life, if he do not comply; so that if one man should assault another so fiercely as to en-

(a) Meade's case, 1 Lew. 184, Holroyd, J.

(b) Wilde's case, 2 Lew. 214, Alderson, B.

(c) Hinchcliffe's case, 1 Lew. 161, Holroyd, J.

(d) 4 Blac. Com. 186; Bac. Elem. c. 5; 1 Hawk. P. C. c. 28, s. 26.

danger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance.^(e) But upon this it has been observed, that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion^(f), there seems to be no reason why homicide may not also be mitigated upon the like consideration, of human infirmity: though, in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder.^(g)¹

It should further be observed that, as the excuse of self-defence is founded on necessity, it can in no case extend beyond the actual continuance of that necessity, by which alone it is warranted:^(h) for if a person assaulted does not fall upon the aggressor, till the affray is over, or when he is running away, this is revenge, and not defence⁽ⁱ⁾

* *Sec. III.—Of Justifiable Homicide.*

[*893

It has been already stated that justifiable homicide is of several kinds, as it may be occasioned by the performance of acts of unavoidable necessity, or by acts done by the permission of the law.^(k)²

Amongst the acts of unavoidable necessity may be classed the execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country. These are acts of necessity, and even of civil duty: and, therefore, not only justifiable, but commendable, where the law requires them.^(l) But the law must require them, otherwise they are not justifiable; and, therefore, wantonly to kill the greatest of malefactors, would be murder; and we have seen that all acts of official duty should, in the nature of their execution, be conformable to the judgment by which they are directed.^(m)

Amongst the acts done by the permission of the law, for the advancement of public justice, may be reckoned those of the officer, who in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable.⁽ⁿ⁾³ A

^(e) 1 Hale 51, 434.

^(f) 1 East P. C. c. 2, s. 15, p. 70, and the authorities there cited.

^(g) 1 East P. C. c. 5, s. 61, p. 294, Lord Hale says that in the most extreme case, where there could be no recourse to law, the person assaulted ought rather to die himself than kill an innocent person.

^(h) 1 East P. C. c. 5, s. 60, p. 293. ⁽ⁱ⁾ 4 Blac. Com. 293.

^(k) *Ante*, p. 883.

^(l) Fost. 267; 1 Hale 496, 502; 4 Blac. Com. 178.

^(m) *Ante*, p. 750, and see 1 Hale 501; 2 Hale 411.

⁽ⁿ⁾ 1 Hale 494; 1 Hawk. P. C. c. 28, ss. 17, 18; Fost. 270; 4 Blac. Com. 179; 1 East P. C. c. 5, s. 74, p. 307.

¹ Seamen have no right, even in cases of extreme peril to their own lives, to sacrifice the lives of passengers for the sake of preserving their own; and they can in no circumstances claim exemption from the common lot of the passengers. In case of shipwreck and extreme peril, where there is an absolute necessity that a part should be sacrificed in order to save the remainder, a decision by lot should be resorted to, unless the peril is so instant and overwhelming as to leave no chance of means and no moment for deliberation: *United States v. Holmes*, 1 Wallace, Jr. 1.

² A subject of Great Britain, who, under directions from the local authorities of Canada, commits homicide in this state in time of peace, may be prosecuted in our courts as a murderer; even though his sovereign subsequently approve his conduct, by avowing the directions under which he did it as a lawful act of government: *People v. McLeod*, 1 Hill 377.

³ So long as a party liable to arrest, endeavors peaceably to avoid it, he may not be killed: but whenever by his conduct he puts in jeopardy the life of any attempting to arrest him he may be killed, and the act will be excusable: *State v. Anderson*, 1 Hill 327.

rule founded in reason and public utility : for few men would quietly submit to an arrest, if, in every case of resistance, the party empowered to arrest were obliged to desist, and leave the business undone ; and a case in which the officer was holden guilty of manslaughter, because he had not first given back, as far as he could, before he killed the party who had escaped out of custody, in execution for a debt, and resisted being retaken, (o) seems to stand alone, and has been mentioned with disapprobation. (p) With respect to offenders against the revenue laws, it is enacted that if any person, liable to be detained, under that or any other act relating to the customs, shall not be detained at the time of committing the offence for which he is so liable, or after detention, shall make his escape, such person shall and may, at any time afterwards, be detained and taken before any justice, to be dealt with as if detained at the time of committing such offence. (q)

*894] *But where the party does not resist, but merely flies to avoid the arrest, the conduct of the officer should be cautiously regulated by the nature of the proceeding. For in civil cases, and also in the case of a breach of the peace, or any other misdemeanor, short of felony, if the officer should pursue a defendant flying in order to avoid an arrest, and should kill him in the pursuit, it will be murder or manslaughter, according to the peculiar circumstances by which such homicide may have been attended. (r) But if a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape ; and if in the pursuit the party flying be killed, where he cannot be otherwise overtaken, this will be deemed justifiable homicide. (s) This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it : for if in these cases fresh suit be made, and *à fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. And the same rule holds, if a felon, after an arrest, break away as he is carrying to gaol, and his pursuers cannot retake without killing him. (t)

On an indictment for shooting at the prosecutor with intent to do grievous bodily harm, it appeared that the prisoner was a constable and employed to guard a copse, from which wood had been stolen, and for this purpose carried a loaded gun. From this copse he saw the prosecutor come out, carrying wood which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner having no other means of bringing him to justice fired, and wounded him in the leg. It was further alleged that the prosecutor was actually committing a felony, he having been before convicted repeatedly of stealing wood ; but these convictions were unknown to the prisoner, nor was there any reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences. Erle, J., told the jury that shooting with intent to wound amounted to a felony charged, unless from other facts there was a justification ; and that neither the belief of the prisoner, that it was his duty to fire, if he could not otherwise apprehend the prosecutor, nor the alleged felony, it being unknown to him, constituted such justification ; and upon a case reserved, it was held that the conviction was right ; for the prisoner was not justified in firing, because the fact that the prosecutor was committing a felony was unknown to him at the time. (u)

Where a person is *indicted* for a felony, and will not suffer himself to be arrested by an officer, having a warrant for that purpose, the officer may lawfully kill him if he cannot otherwise be taken ; though such person be innocent, and though *895] in truth no felony have been committed. (v) But it seems that this must *be

(o) 1 Roll. Rep. 189.

(p) Fost. 271 ; 1 East P. C. c. 5, s. 74, p. 307.

(q) 16 & 17 Vict. c. 107, s. 238. And more particular provisions are contained in the Act, as to the arrest and detention of persons committing offences therein enumerated. See *ante*, p. 174, *et seq.*

(r) *Ante*, pp. 735, 747.

(s) 1 Hale 489, 490 ; 1 Hawk. P. C. c. 28, s. 11 ; Fost. 271 ; 4 Blac. Com. 179.

(t) *Id.* *Ibid.* ; 1 East P. C. c. 5, s. 67, p. 298.

(u) *Reg. v. Dadson*, 2 Den. C. C. 35. This case was not argued.

(v) 1 Hawk. P. C. c. 28, s. 12.

understood only of arrests by officers, and does not extend to arrests by private persons of their own authority.(w)

In the case of a riot or rebellious assembly, the peace officers and their assistants, endeavoring to disperse the mob, are justified, both at common law and by the riot act, in proceeding to the last extremity, in case the riot cannot otherwise be suppressed.(x) And it has been said, that perhaps the killing of dangerous rioters may be justified by any private persons who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the preservation of the peace.(y)

Gaolers and their officers are under the same special protection as other ministers of justice; and, therefore, if in the necessary discharge of their duty, they meet with resistance, whether from prisoners in civil or criminal suits, or from others, in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force by force; and if the party so resisting happen to be killed, this, on the part of the gaoler, or his officer, or any person coming in aid of him, will be justifiable homicide.(z)

Sir William Hawkesworth being weary of life, and willing to be rid of it by the hand of another, having first blamed his keeper for suffering his deer to be destroyed, and commanded him to execute the law, came himself into his park at night as if with intent to steal the deer; and being questioned by the keeper, who knew him not, and refusing to stand or answer, he was shot by the keeper. This was decided to be excusable homicide by the statute *De malefactoribus in parcis*.(a)

A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is *justifiable.(b) [*896 But it has been holden, that this rule does not apply to any crime unaccompanied with force, as of picking of pockets.(c) It seems, therefore, that the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent, and not be left in doubt; so that if A. make an attack upon B., it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, &c.) that the life of B. is in imminent danger; otherwise his killing

(w) 2 Hale 84. *Sed vide* 1 Hale 489, 490, and 1 East P. C. c. 5, s. 68, pp. 300, 301, where it is said, that the fact of the indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon: and that if the fact of his guilt be necessary for their complete justification, it is conceived that the bill of indictment found by the grand jury would, for that purpose, be *prima facie* evidence of the fact, till the contrary be proved. Certainly not. See *Rex v. Turner*, *ante*, p. 77. U. S. G.

(x) 1 Hale 53, 494, 495; MS., Tracy, 36, cited 1 East P. C. c. 5, s. 71, p. 304; Riot Act, 1 Geo. 1, st. 2, c. 5, where persons continue together an hour after proclamation. And see *ante*, Book II., Chap. xxv. *Of Riots, &c.*, p. 378, *et seq.*

(y) 1 Hawk. P. C. c. 28, s. 14, and see Fost. 272; Poph. 121. It was so resolved by all the Judges in Easter Term, 39 Eliz., though they thought it more discreet for every one in such a case to attend and assist the King's officers in preserving the peace. And certainly, if private persons interfere to suppress a riot, they must give notice of their intention. See note (g), *ante*, p. 402.

(z) Fost. 321; 1 Hale 481, 496.

(a) 1 Hale 40. By the 21 Edw. 1, st. 2, if a forester, parker, or warrener, found any trespassers wandering within his liberty, intending to do damage therein, who would not yield, after hue and cry made to stand unto the peace, but continued their malice, and disobeying the King's peace, did flee or defend themselves with force and arms, if such forester, parker, or warrener, or their assistants, killed such offenders, either in arresting or taking them, they should not be troubled for the same, nor suffer any punishment. The 21 Edw. 1, st. 2, was repealed by the 7 & 8 Geo. 4, c. 27, and 9 Geo. 4, c. 53. And the 3 & 4 Will. & M. c. 10, by the 16 Geo. 3, c. 30, and the 4 & 5 Will. & M. c. 23, by the 7 & 8 Geo. 4, c. 27, and the 1 & 2 Will. 4, c. 32. All further reference to their provisions has therefore been omitted. C. S. G.

(b) Fost. 273; Kel. 128, 129; 1 Hale 445, 481, 484, *et seq.*; 1 Hawk. P. C. c. 28, ss. 21, 24; *Reg. v. Bull*, 9 C. & P. 22 (38 E. C. L. R.)

(c) 1 Hale 488; 4 Blac. Com. 180. But if one pick my pocket, and I cannot otherwise take him than by killing him, this falls under the general rule concerning the arresting of felons: 1 East P. C. c. 5, s. 45, p. 273.

the assailant will not be justifiable self-defence.(d) There must be an intention on the part of the person killed to rob, or murder, or to do some dreadful bodily injury to the person killing; or the conduct of the party must be such as to render it necessary on the part of the party killing to do the act in self-defence.(e) And the rule clearly extends only to cases of felony; for if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him, so far as to make him desist, yet if he kill him, it is manslaughter.(f) But if a house be broken open, though in the day-time, with a felonious intent, it will be within the rule.(g) A person who is set to watch a yard or garden by his master, is not justified in shooting any one who comes into it in the night, even if he see him go into his master's hen-roost, and some dead fowls and a crow-bar be found near him; but if from his conduct he has fair ground to believe his own life in actual danger, he is justified in shooting him.(h)¹

Important considerations will arise in cases of this kind, as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed. One Levet was indicted for killing F. F., under the following circumstances:—Levet being in bed and asleep, his servant, who had procured F. F. to help her about the work of the house, and went to the door about twelve o'clock at night to let her out, conceived that she heard thieves about to break into the house: upon which she ran to him, and told him of what she apprehended. Levet arose immediately, took a drawn sword, and, with his wife, went down stairs; when the servant, fearing that her master and mistress should see F. F., hid her in the buttery. Levet with his sword searched the entry for thieves, when his wife, spying F. F. in the buttery, and not knowing her, conceived her to be a thief, and cried out to her husband in great fear, "Here they be that would undo us;" when Levet, *897] not knowing that it was F. F. in the buttery, hastily entered with his drawn sword, and being in the dark, and thrusting before him with his sword, thrust F. F. under the left breast and gave her a mortal wound, of which she instantly died.(i) This was ruled to be misadventure; but a great Judge appears to have thought the decision too lenient, and that it would have been better ruled manslaughter; due circumspection not having been used.(k) Upon this opinion, however, some observations have been made; and it has been ably argued, upon the peculiar facts and circumstances of the transaction, that the case seems more properly to be one of those mentioned by Lord Hale,(l) where the ignorance of the fact excuses the party from all sort of blame.(m) And in another book of great authority, the case is mentioned as one in which the defendant might have *justified* the fact under the circumstances, on the ground that it had not the appearance even of a fault.(n)

Questions will also sometimes arise as to the apperency of the intent in one of the

(d) 1 Hale 484.

(e) Reg. v. Bull, 9 C. & P. 22 (38 E. C. L. R.), Vaughan and Williams, JJ.

(f) 1 Hale 485, 486; 1 Hawk. P. C. c. 28, s. 23; Kel. 132; 1 East P. C. c. 5, s. 44, p. 272.

(g) 1 East P. C. c. 5, s. 44, p. 273. In 4 Blac. Com. 180, it is said, that the rule reaches not to the breaking open of any house in the day-time, unless it carries with it an attempt of robbery also. But it will apply where the breaking is such as imports an apparent robbery, or an intention or attempt of robbery: 1 Hale 488.

(h) Rex v. Scully, 1 C. & P. 319, Garrow, B. The 24 Hen. 8, c. 5, by which persons killing those who were attempting to rob or murder, or commit burglary, were not to suffer any forfeiture of goods, &c., but to be fully acquitted, and which was here referred to in the second edition, was repealed by the 9 Geo. 4, c. 31. C. S. G.

(i) Levet's case, Cro. Car. 538; 1 Hale 42, 474; Jones (W.) 429.

(k) Fost. 299.

(l) 1 Hale 42.

(m) 1 East P. C. c. 5, s. 46, pp. 274, 275.

(n) 1 Hawk. P. C. c. 28, s. 27.

¹ Whenever there is a reasonable ground to believe that there is a design to destroy life, to rob, or to commit a felony, a killing to arrest such a design is justifiable: *State v. Harris*, 1 Jones (Law) 190; *Harrison v. State*, 24 Ala. 67; *Dill v. State*, 25 Ibid. 15; *Dyson v. State*, 26 Miss. 362. It is lawful for the owner of a house to kill a burglar: *M'Pherson v. State*, 22 Geo. 478. Killing to prevent a felony must be necessary: *Mitchell v. State*, 22 Geo. 211.

parties to commit such felony as will justify the other in killing him. Mawgridge, on words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword, upon which Mr. Cope returned a bottle with equal violence;^(o) and it was held that this was lawful and justifiable on the part of Mr. Cope, on the ground that he that has manifested malice against another, is not fit to be trusted with a dangerous weapon in his hand.^(p) There seems to have been good reason for Mr. Cope to have supposed that his life was in danger: and it was probably on the same ground that the judgment on Ford's case proceeded. Mr. Ford being in possession of a room at a tavern, several persons insisted upon having it, and turning him out, which he refused to submit to; thereupon they drew their swords upon Mr. Ford and his company, and Mr. Ford drew his sword, and killed one of them; and this was adjudged justifiable homicide.^(q) For if several attack a person at once with deadly weapons, as may be supposed to have happened in this case, though they wait till he be upon his guard, yet it seems (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence; because so unequal an attack resembles more a desire of assassination than of combat.^(r) But no assault, however violent, will *justify* killing the assailant under the plea of necessity, unless there be a plain manifestation of a felonious intent.^(s) And it may be further observed, that a man cannot, in any case, justify killing another by a pretence of necessity, unless he were wholly without fault in *bringing that necessity upon himself; for, if he kill any person in defence of an injury done by himself, he is guilty of manslaughter at least; as in [*898 the case where a body of people wrongfully detained a house by force, and killed one of those who attacked it, and endeavored to set it on fire.^(t)

Mr. J. Foster was of opinion, that, upon the same principle upon which Mawgridge's case was decided, and possibly upon the rule touching the arrest of a person who has given a dangerous wound, the Legislature, in the case of the Marquis de Guiscard, who stabbed Mr. Harley sitting in Council, discharged the parties who were supposed to have given the Marquis the mortal wound from all manner of prosecution on that account, and declared the killing to be a lawful and necessary action.^(u)

Where a known felony is attempted upon any one, not only the party assaulted may repel force by force, but his servant attending him, or any other person present, may interpose to prevent the mischief; and if death ensue, the party so interposing will be justified.^(v) So, where an attempt is made to commit arson, or burglary, in the habitation, any part of the owner's family, or even a lodger, may lawfully kill the assailants, in order to prevent the mischief intended.^(w)

But, in cases of mutual combats or sudden affrays, a person interfering should act with much caution. Where, indeed, a person interferes between two combatants with a view to preserve the peace, and not to take part with either, giving due notice of his intention, and is under the necessity of killing one of them in order to preserve his own life or that of the other combatant, it being impossible to preserve them by other means, such killing will be justifiable;^(x) but, in general, if there be an affray and an actual fighting and striving between persons, and another

(o) Mawgridge's case, Kel. 128, 192, *ante*, p. 729.

(p) By Lord Holt, Kel. 128, 129.

(q) Ford's case, Kel. 51.

(r) 1 East P. C. c. 5, s. 47, p. 276; and see 1 East P. C. c. 5, s. 25, p. 243, where Ford's case is observed upon; and it is said that the memorandum in the margin of Kelyng to inquire of this case, and the *quære* used by Mr. J. Foster in citing it, were probably made on the ground of the reason suggested in the margin of Kelyng for the judgment, namely, that the killing by Mr. Ford in defence of his own possession of the room was justifiable, which, under those circumstances, might be fairly questioned: as, on that ground, it might have been better ruled to be manslaughter.

(s) 1 East P. C. c. 5, s. 47, p. 277.

(t) 1 Hawk. P. C. c. 28, s. 22; 1 Hale, 405, 440, 441.

(u) 9 Ann c. 16, which was repealed by the 9 Geo. 4, c. 31; Fost. 275.

(v) 1 Hale 481, 484; Fost. 274. And in *Hancock v. Baker and others*, 2 Bos. & Pul. 265, Chambre, J., said, "It is lawful for a private person to do anything to prevent the perpetration of a felony."

(w) Fost. 274.

(x) 1 Hale 484; 1 East P. C. c. 5, s. 58, p. 290.

run in, and take part with one party, and kill the other, it will not be justifiable homicide, but manslaughter.(y)¹

It should be observed, that as homicide committed in the prevention of forcible and atrocious crimes is justifiable only upon the plea of necessity, it cannot be justified, unless the necessity continue to the time when the party is killed. Thus, though the person upon whom a felonious attack is first made be not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the felon be killed after he has been properly secured, and when the apprehension of danger has ceased, such killing will be murder; though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter, on account of the high provocation.(z)

*899]

*CHAPTER THE FOURTH.

OF DESTROYING INFANTS IN THE MOTHER'S WOMB.

WE have already seen that an infant in its mother's womb, not being in *rerum naturâ*, is not considered as a person who can be killed within the description of murder.(a) An attempt, however, to effect the destruction of such an infant, though unsuccessful, appears to have been treated as a misdemeanor at common law.(b)²

The 43 Geo. 3, c. 58, 9 Geo. 4, c. 31, and 7 Will. 4, and 1 Vict. c. 85, formerly made certain attempts to procure the miscarriage of any woman highly penal; but these acts are repealed, and by the 24 & 25 Vict. c. 100, s. 58, "*Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully(c) administer to her or cause to be taken by her any poison or other noxious thing,(d) or shall unlawfully(e) use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term*

(y) 1 East P. C. c. 5, s. 58, p. 291. *Ante*, p. 795; and see also *ante*, Book II., chap. xxvi. *Of Affrays*, p. 406.

(z) 1 East P. C. c. 5, s. 60, p. 293; 4 Blac. Com. 185; 1 Hale 485.

(a) *Ante*, p. 670.

(b) See a precedent of an indictment for this offence as a misdemeanor at common law in 3 Chit. Crim. Law, 798, procured from the Crown Office, Mich. T. 42 Geo. 3.

(c) The word "maliciously" was in the 9 Geo. 4, c. 31, s. 13.

(d) The words of the 43 Geo 3, c. 58, in s. 1, were "any deadly poison or other noxious and destructive substance or thing;" in sec. 2, "any medicines, drug, or other substance or thing whatsoever." The words in the 9 Geo. 4, c. 31, where the woman was quick with child, were, "any poison or other noxious thing." Where the woman was not quick with child, "any medicine or other thing." See note (k), *post*, p. 901.

(e) "Unlawfully" was not in the 9 Geo. 4, c. 31, s. 13.

¹ When a person, who is neither assaulted or threatened, gets down from his horse, arms himself with a club, interposes himself between two other persons who are about to engage in a fight, and kills one of them, this is murder: Johnston's case, 5 Gratt. 660. As to killing in an attempt to preserve the peace, see *People v. Cob*, 4 Parker C. R. 35; *Pond v. People*, 8 Mich. 150.

² It is not a punishable offence, by the common law, to perform an operation upon a pregnant woman, with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child: *Comm. v. Parker*, 9 Metc. 263. To administer a potion to a pregnant woman with an intention to procure an abortion, is not an indictable offence, unless the woman be quick with child, and an abortion ensue: *Comm. v. Bangs*, 9 Mass. 387. See *Wilson v. Ohio*, 2 Ohio (N. S.) 319; *State v. Howard*, 32 Verm. 380.

not exceeding two years, with or without hard labor, and with or without solitary confinement."(*f*)

Sec. 59. "*Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be *imprisoned for any term not exceeding two years, with or without hard labor.*"(*g*) [**900*]

By sec. 67, principals in the second degree and accessories before the fact are punishable like principals in the first degree; "and whosoever shall counsel, aid, or abet the commission of any indictable misdemeanor punishable under this Act, shall be liable to be proceeded against, indicted, and punished as a principal offender."(*h*)

Sec. 69. "Whenever imprisonment, with or without hard labor, may be awarded for any indictable offence under this Act, the Court may sentence the offender to be imprisoned, or to be imprisoned and kept to hard labor, in the common gaol or house of correction."

Sec. 70. "Whenever solitary confinement may be awarded for any offence under this Act, the Court may direct the offender to be kept in solitary confinement for any portion or portions of any imprisonment, or of any imprisonment with hard labor, which the Court may award, not exceeding one month at any one time, and not exceeding three months in any one year; and whenever whipping may be awarded for any offence under this Act, the Court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the Court in the sentence."

Sec. 71. "*Whenever any person shall be convicted of any indictable misdemeanor punishable under this Act, the Court may, if it shall think fit, in addition to or in lieu of any punishment by this Act authorized, fine the offender, and require him to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, and being of good behavior; and in case of any felony punishable under this Act or otherwise than with death, the Court may, if it shall think fit, require the offender to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized: provided that no person shall be imprisoned, for not finding sureties under this clause, for any period exceeding one year.*"(*i*)

In order to bring a case within the 24 & 25 Vict. c. 100, s. 59, it is not necessary that the intention of using the noxious substance should exist in the mind of any other person than the person supplying it. The prisoner was indicted for supplying savin, knowing that it was intended to be unlawfully used to procure a miscarriage, and it was contended that there was no case against him, because it was necessary that he should know that the savin was intended to be used with intent to procure the miscarriage, whereas it was not intended, except by the prisoner himself, to be so used; the jury found that the case was in other respects proved, but that the prosecutrix did not intend to take the savin, nor did any other person, except the prisoner, intend that she should take it; but, upon a case reserved, it was held that the intention of any other person than the prisoner was not necessary to the commission of the offence. The statute is directed against the supply-

(*f*) This clause is framed on the 7 Will. 4 and 1 Vict. c. 85, s. 6. The first part of it is new, and extends the former enactment to any woman, who, being with child, attempts to procure her own miscarriage. The second part in terms makes it immaterial whether the woman were or were not with child, in accordance with the decision in *Reg. v. Goodhall*, 1 Den. C. C. 187; s. c. as *Reg. v. Goodchild*, 2 C. & K. 293 (61 E. C. L. R.). The Act extends to Ireland, but not to Scotland.

(*g*) This clause is new. It is intended to check the obtaining of poison, &c., for the purpose of causing abortion, by making both the person who supplies and the person who procures it guilty of a misdemeanor.

(*h*) See the previous part of this clause, *ante*, p. 881.

(*i*) See sec. 68 as to the trial of offences committed within the Admiralty jurisdiction, *ante*, p. 762.

ing of any substance with the intention that it shall be employed in procuring abortion. The prisoner, in this case, supplied the substance, and intended that it should be employed to procure abortion. He knew of his own intention that it should be so employed, and is therefore within the words of the statute. He is also within the mischief of the statute, and was rightly convicted.(ii.)

The 43 Geo. 3, c. 58, and the 9 Geo. 4, c. 31, made an important distinction between the case where the woman was quick with child and where she was not, or was not proved to be, quick with child.(j) Under the present act, however, in the case of the mother, all that it is necessary to prove is that she is with child, and in the case of any other person, it is immaterial whether the woman were or were not with child.

An indictment upon the 43 Geo. 3, c. 58, s. 2, charged the prisoner with having administered to a woman a *decoction* of a certain shrub called *savin*: and it appeared upon the evidence that the prisoner prepared the medicine which he administered by pouring boiling water on the leaves of a shrub. The medical *901] *men who were examined stated, that such a preparation is called an *infusion*, and not a *decoction* (which is made by boiling the substance in the water), upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was misdescribed. But Lawrence, J., overruled the objection, and said, that infusion and decoction are *ejusdem generis*, and that the variance was immaterial: that the question was, whether the prisoner administered any matter or thing to the woman to procure abortion.(k)

On an indictment for administering featherfew and other drugs to procure abortion, it appeared that the prisoner gave the woman, who was alleged to be with child by him, two powders, with directions to take one on each of two successive nights, and said that the effect would be to cause miscarriage. She took one of the powders, with the featherfew, which brought on violent sickness. The other powder was examined by a physician, and he could not discover any mineral substance in it; as far as he could judge from the taste, smell, and appearance, it was a mixture of *savin* and *fennigreek*, the latter being the larger ingredient. The *fennigreek* would scarcely produce any effect at all; *savin*, in that quantity, might produce a little disturbance in the stomach for the time, but would do no further injury. Featherfew(l) is an herb very similar to *camomile*: it is a tonic in common use among the peasantry, and has nothing noxious in it. A mixture of the powder and decoction of this herb would not alter the properties of either. The prisoner upon two or three subsequent occasions had brought the woman other medicines to take for the same purpose, some of which she had taken, but not the rest. Wilde, C. J., held that the evidence was not sufficient to prove that the drugs administered came within the meaning of the words "poison or other noxious thing."(m)

(ii) Reg. v. Hillman, L. & C. 343.

(j) As to where a woman was quick with child, see Rex v. Phillips, 3 Campb. 77.

(k) Rex v. Phillips, 3 Campb. 74. And in Rex v. Coe, 6 C. & P. 403 (25 E. C. L. R.), where the prisoner was indicted on the 9 Geo. 4, c. 31, s. 13, for administering saffron to a female, and his counsel was cross-examining as to her having taken something else before the saffron, and also as to the innoxious nature of the article; Vaughan, B., said, "Does that signify? It is with the intention that the jury have to do; and if the prisoner administered a bit of bread merely with intent to procure abortion, it is sufficient." It is not stated upon which branch of the section this indictment was framed; if upon the latter, which used the words "any medicine or other thing," perhaps the dictum was right. But it should seem that neither this dictum, nor that of Lawrence, J., in Rex v. Phillips, apply to the new Act, which uses the words "any poison or other noxious thing" only, in the case of administering or causing to be taken; and although a doubt has been suggested in a note to Rex v. Coe as to whether the words "other means" might not be applied to other substances than such as are poisonous or noxious; it should seem that the words "other means" cannot be so applied in the new Act: first, because they are in an entirely distinct sentence; secondly, because they are governed by the word *use*, and not by *administer*. See Rosc. Cr. Evid. 243. C. S. G.

(l) The proper name of this is *feverfew*, *matricaria*, so called from its supposed use in disorders of the womb.—Edinb. Med. & Phys. Dict.

(m) Reg. v. Perry, 2 Cox C. C. 223. Wilde, C. J., also held that the other transactions were admissible as showing the intent with which the particular drugs referred to in the indictment were administered. See Reg. v. Calder, *post*. As the prisoner administered

The thing supplied with intent to procure abortion must be noxious in its nature. Where, therefore, an indictment charged the prisoner with supplying a certain noxious thing with intent to procure abortion, and the surgeon proved that the liquid was some vegetable decoction of a harmless character, and such as would not procure a miscarriage; but if taken with the belief that it would produce it, might, by acting on the imagination, produce that effect; it was held that this liquid was not within the clause, although the woman proved that, after taking a wineglassful, she felt dizzy in the head when she went to bed, and felt stupid in the head the next morning. (*mm*)

*But it was held, on the 43 Geo. 3, c. 58, s. 2, that unless the woman were with child, the offence was not committed, although the prisoner thought [*902 she was with child, and administered the drug with intent to destroy the child (*n*) But the new Act makes this immaterial, except in cases where the mother is the offender.

To constitute an administering, or causing to be taken, it is not necessary that there should be a delivery by the hand. Where, therefore, on an indictment for administering poison and causing poison to be taken, it appeared that the prisoner had mixed poison with coffee, and had told her mistress that the coffee was for her, and the mistress took it and drank some of it; it was held that this was sufficient. (*o*) A mere delivery to the woman, however, is not sufficient; the poison must be taken into the mouth, and it seems, some of it swallowed to constitute an administering. (*p*)

Upon an indictment for unlawfully administering to, and causing to be taken by Emma Cheney, poison, with intent to procure her miscarriage, it appeared that she, being and believing herself to be pregnant, applied to the prisoner to get her something to procure her miscarriage, and that the prisoner accordingly purchased some preparation of mercury, which he gave to her, directing her to take one-half of the quantity in gin; Cheney accordingly procured the gin, and, in the absence of the prisoner, took the dose, which produced a miscarriage. The jury found these facts, and that the mercury was both given by the prisoner to Cheney, and taken by her, with intent to procure the miscarriage; and, upon a case reserved, it was held that the prisoner was properly convicted; as there was a "causing to be taken" within the meaning of the statute. (*q*) So where on a similar indictment it appeared that the prisoner had talked with L. Chuter about her being with child, and brought her a bunch of savin, and told her, if she put it in some gin, and took from half a glass to a glass two or three times a week, it would destroy her child, and she took the savin and gin three or four times accordingly; and the prisoner afterwards induced Chuter to get some blue pills from a chemist, which the prisoner made up with some flour and tea into pills, of which Chuter took twenty or thirty, and was very ill from the time of taking the pills till she was confined; it was held upon

the drugs with intent to procure a miscarriage, and as savin is unquestionably in its nature a noxious drug, the decision in this case seems open to great doubt. It is submitted that the true meaning of the words "poison or other noxious thing" is such things as in their nature are poisonous or noxious; and that it is a misapprehension to suppose that the statute requires such a quantity of a poison or other noxious thing to be administered as shall be noxious. If a person administers any quantity of a poison, however small, it has never yet been doubted, that, if it were done with intent to murder, the offence of administering poison with intent to murder was complete; and *Reg. v. Cludero*, 1 Den. C. C. 514, *post*, which was decided after this case, shows that if poison be administered in such a way that it cannot injure, the offence is nevertheless complete; and *Wilde, C. J.*, there said, "the act of administering poison with intent to kill is proved. *The effect of that act is beside the question.*" It is submitted, therefore, that if there be an intent to procure abortion, it is quite immaterial how small the quantity be of the poison or other noxious thing that is administered.

(*mm*) *Reg. v. Isaacs*, L. & C. 220.

(*n*) *Rex v. Scudder*, R. & M. C. C. R. 216; s. c., 3 C. & P. 605 (14 E. C. L. R.).

(*o*) *Rex v. Harley*, 4 C. & P. 369 (19 E. C. L. R.), *Park, J. A. J.* See this case, *post*.

(*p*) *Rex v. Cadman*, R. & M. C. C. R. 114. See this case, *post*, and the note to it.

(*q*) *Reg. v. Wilson*, D. & B. C. C. 127. Cheney, though culpable, was not guilty of felony, and therefore not guilty of the felony created by the statute, and the prisoner was, therefore, the only person coming within the words as the principal; and this distinguishes the case from *Reg. v. Williams*, 1 Den. C. C. 39.

a case reserved, that there was no distinction between this and the preceding case.(*r*)

*903] It is to be observed that under the new statute, in such cases as *the two last, the woman being with child would be a principal, and the man an accessory before the fact; but where the woman is not with child these cases will still apply; for there the woman's criminality will be exactly the same as it was under the former Act.

On an indictment for administering savin with intent to procure abortion, the administration of savin on one day was proved, and it was proposed on the part of the prosecution to prove the administration of similar drugs on many subsequent days for the purpose of showing the intent, and also as part of the same felony, and it was urged that the substance of the felony was the administration of drugs for the purpose of procuring abortion, and if that was done by homœopathic doses, taken for a long period, all would form part of one felony; but Cresswell, J., held that other matters of the same description might be proved for the purpose of showing the intent, but that the administration of other savin on other days could not be given in evidence as part of the offence.(*s*)

Upon the trial of any offence mentioned in this chapter the prisoner may be convicted of an attempt to commit the same.(*t*)

*904]

*CHAPTER THE FIFTH.

OF RAPE, THE UNLAWFUL CARNAL KNOWLEDGE OF FEMALE CHILDREN, AND PROCURING THE DEFILEMENT OF GIRLS UNDER AGE.

Sec. I.—Of Rape.

RAPE has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will.(*u*)¹

This offence formerly was, for many years, justly visited with capital punishment; but it does not appear to have been regarded as equally heinous at all periods of our Constitution. Anciently, indeed, it appears to have been treated as a felony, and, consequently, punishable with death; but this was afterwards thought too hard; and, in its stead, another severe but not capital punishment was inflicted by William the Conqueror, namely, castration and loss of eyes, which continued till after Bracton wrote, in the reign of Henry III.(*b*) The punishment for rape was still further mitigated, in the reign of Edward I., by the statute of Westm. 1, c. 13, which reduced the offence to a trespass, and subjected the party to two years' imprisonment, and a fine at the King's will. This lenity, however, is said to have been productive of terrible consequences; and it was, therefore, found necessary, in about ten years afterwards, and in the same reign, again to make the offence of forcible rape a felony, by the statute Westm. 2, c. 34. The punishment was still further enhanced by the 18 Eliz. c. 7, s. 1. But the former statutes are repealed.

And now by the 24 & 25 Vict. c. 100, s. 48, "Whosoever shall be convicted of

(*r*) Reg. v. Farrow, D. & B. C. C. 164. It is not stated expressly whether the savin and pills were taken in the absence of the prisoner, but the inference from the facts stated is that they were. See also Reg. v. Gaylor, D. & B. C. C. 288, *ante*, p. 60.

(*s*) Reg. v. Calder, 1 Cox C. C. 348. See Reg. v. Perry, *supra*, note (*m*).

(*t*) *Ante*, p. 1.

(*a*) 1 Hawk. P. C. c. 41, s. 2; 1 Hale 627, 628; Co. Lit. 123 *b*; 2 Inst. 180; 3 Inst. 60; 4 Blac. Com. 210; 1 East P. C. c. 10, s. 1, p. 434.

(*b*) 4 Blac. Com. 211; 1 Hawk. P. C. c. 41, s. 11; 1 Hale 627; Bract. lib. 3, c. 28; Leg. Gul. 1; 1. 19; Wilk. Leg. Anglo-Sax. 222, 290.

¹ Pollard v. State, 2 Clark 567; State v. Hargrave, 65 N. C. 466; State v. Tarr, 28 Iowa 397; Kelly v. Comm., 1 Grant 484.

the crime of rape shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."^(c)

An indictment for this offence may be prosecuted at any time, and notwithstanding any subsequent assent of the party grieved.^(d)

All who are present, aiding and assisting a man to commit a *rape, are principal offenders in the second degree, whether they be men or women.^(e) [*905 And there may be *accessories* before and after in this offence; and such accessories are punishable under the 24 & 25 Vict. c. 100. s. 67.^(f)

The law presumes that an infant, under the age of fourteen years is unable to commit the crime of rape; and, therefore, he cannot be guilty of it;^(g) or of an assault with intent to commit a rape;^(h) and if he be under that age, no evidence is admissible to show that, in point of fact, he could commit the offence of rape.⁽ⁱ⁾¹ This doctrine, however, proceeds upon the ground of impotency, rather than the want of discretion; and such infant may, therefore, be a principal in the second degree, as aiding and assisting in this offence, as well as in other felonies, if it appear, by sufficient circumstances, that he had a mischievous discretion.^(k) A husband cannot be guilty of a rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract; but he may be guilty as a principal, by assisting another person to commit a rape upon his wife, for though in marriage the wife has given up her body to her husband, she is not by him to be prostituted to another.^(l) Where a party took a woman by force, compelled her to marry him, and then had carnal knowledge of her by force, it appears to have been holden, that she could not maintain an appeal of rape against her husband, unless the marriage were first legally dissolved: but that when the marriage was made void, *ab initio*, by a declaratory sentence in the ecclesiastical court, the offence became punishable, as if there had been no marriage.^(m) The forcible taking away, and marrying a woman against her will, was, however, made felony by the 3 Hen. 7, c. 2. And though that statute is repealed, the 24 & 25 Vict., c. 100, ss 53, 54, 55.⁽ⁿ⁾ makes certain provisions against the forcible or unlawful abduction of females, which will be mentioned in a subsequent chapter.

The offence of rape may be committed, though the woman at last yielded to the violence, if such her consent was forced by the fear of death or by duress.^(o)² If non-resistance on the part of a prosecutrix proceeds merely from her being overpowered by actual force, or from her not being able, from want of strength, to resist any longer, or from the number of persons attacking her, she considered resistance dangerous, and absolutely useless, the crime is complete.^(p) And it will not be

(c) This clause is taken from the 9 Geo. 4, c. 31, s. 16; 10 Geo. 4, c. 34, s. 19 (1.); and 4 & 5 Vict. c. 56, s. 3. This Act extends to Ireland, but not to Scotland. As to hard labor, &c., see *ante*, p. 900.

(d) 1 Hale 631, 632; 1 East P. C. c. 10, s. 9, p. 446.

(e) *Rex v. Vide, Fitz. Corone*, pl. 86; 1 Hawk. P. C. c. 41, s. 10; Lord Baltimore's case, 4 Burr. 2179; 1 Hale 628, 633; 1 East P. C. c. 10, s. 1, p. 435; *Rex v. Burgess*, Trin. T. 1813, *post*, p. 921.

(f) See the section, *ante*, p. 881.

(g) 1 Hale 630; *Reg. v. Brimilow*, 2 Moo. C. C. R. 122; *Rex v. Groombridge*, 7 C. & P. 582 (32 E. C. L. R.), Gaselee, J., and Lord Abinger, C. B.

(h) *Rex v. Eldershaw*, 3 C. & P. 396 (14 E. C. L. R.), Vaughan, B.; *Reg. v. Phillips*, 8 C. & P. 736 (34 E. C. L. R.), Patteson, J. See *ante*, p. 8.

(i) *Reg. v. Phillips*, 8 C. & P. 736 (34 E. C. L. R.), Patteson, J.; *Reg. v. Jordan*, 9 C. & P. 118 (38 E. C. L. R.), Williams, J., *post*, p. 931.

(k) 1 Hale 620.

(l) Lord Castlehaven's case, 1 St. Tri. 387; 1 Hale 629; Hutt. 116; 1 Str. 633.

(m) 1 Hale 629.

(n) *Post*, chap. vii.

(o) 1 Hawk. P. C. c. 41, s. 6; 1 East P. C. c. 10, s. 7, p. 444.

(p) *Reg. v. Hallett*, 9 C. & P. 748 (38 E. C. L. R.), per Coleridge, J.

¹ *Contra*, *Comm. v. Green*, 2 Pick. 380.

² Non-consent is conclusively presumed in a child under ten: *People v. McDonald*, 9 Mich. 150; *Smith v. State*, 12 Ohio (N. S.) 466; *Stephen v. State*, 11 Geo. 225.

any excuse that she was first taken with her own consent, if she were afterwards *906] forced against her will; nor will it be any excuse that she *consented after the fact, or that she was a common strumpet, or the concubine of a ravisher; for she is still under the protection of the law, and may not be forced.(q) Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury, in favor of the party accused, especially in doubtful cases.(r) The notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, appears to be quite exploded.(s)

Upon an indictment for rape, it appeared that the prisoner had made the prosecutrix, a girl of thirteen years of age, quite drunk, and when she was in a state of insensibility took advantage of it, and violated her.¹ The jury found that he gave her the liquor for the purpose of exciting her, not with the intention of rendering her insensible, and then having sexual intercourse with her. It was contended that to constitute rape there must be actual resistance to that force: there must be an opposing will on the part of the woman; but, upon a case reserved, ten Judges held that the conviction was right. Several of these Judges thought the crime of rape is committed by violating a woman when she is in a state of insensibility, and has no power over her will, whether such state is caused by the man or not, the man knowing at that time that she is in such state; and Tindal, C. J., and Parke, B., remarked that in the statute of Westminster 2, c. 34(t) the offence of rape is described to be ravishing a woman "where she did not consent," and not ravishing *against her will*. But all the ten Judges agreed that in this case, where the prosecutrix was made insensible by the act of the prisoner, and that an unlawful act, and when also the prisoner must have known that the act was against her consent at the last moment that she was capable of exercising her will, because *he had attempted to procure her assent, and failed*, the offence of rape was committed. Three other Judges did not think that this was sufficiently proved.(u)

(q) 1 Hawk. P. C. c. 41, s. 7; 1 East P. C. c. 10, s. 7, pp. 444, 445; 4 Blac. Com. 213.

(r) 1 East P. C. c. 10, s. 7, p. 445.

(s) 1 Hale 631; 1 Hawk. P. C. c. 41, s. 8; 1 East P. C. c. 10, s. 7, p. 445.

(t) This Act was repealed by the 9 Geo. 4, c. 31, s. 1.

(u) Reg. v. Camplin, 1 Den. C. C. R. 90. The grounds of the decision are taken from the addenda as furnished by Parke, B. In the course of the argument Patteson, J., said, "If a man knocks a woman down and makes her insensible, and then has connection with her whilst she is insensible, according to the argument for the prisoner, that would be no rape, because she did not resist and evinced no opposing will;" and Alderson, B., added: "In cases of fraud the woman's will is exercised, though it is exercised under the influence of fraud; but in the case put by my brother Patteson there is force. There resistance was impossible, owing to the blow given by the prisoner; here it was rendered impossible by the liquor which he had administered." There is no statement in Den. C. C. to warrant the allegation that the prisoner had attempted to obtain the prosecutrix's consent, and failed. Where, on a trial for rape, the prosecutrix stated that she usually slept with her father, and having gone to sleep by his side, on waking she found he was having connection with her; and Camplin's case, *supra*, was relied on for the position that, if the prisoner had connection with the girl while she was in such a state as to be incapable of giving consent, it was rape. Alderson, B., said, "I do not understand that case to have gone so far as you affirm. It only decided that where the state of unconsciousness was caused by any act of the prisoner, connection with the woman in such a state would constitute the offence. The wine was offered to her by the man in that case, and there was at any rate evidence to show that he had induced her to take it. I concurred in that judgment only on that ground." Reg. v. Page, 2 Cox C. C. 133. Alderson, B., read the following note of the ground of his opinion in Camplin's case:—"The rest of the Judges in the affirmative thought that on these facts it must be presumed that this was *contra voluntatem*, it being clear that the woman had not consented when he began to administer the liquor, and that she never did actually consent at all; that his having connection with her when insensible was therefore clearly *contra voluntatem ultimam*, which

¹ The offence of rape can only be perpetrated by the use of force in overcoming the female: Wyatt v. State, 2 Swan. 394; Cato v. State, 9 Fla. 163; Waller v. State, 40 Ala. 325. Intercourse with a drunken woman, or in a state of dementia, is not rape: People v. Quin, 50 Barb. 128; People v. Cornwell, 13 Mich. 427. So when consent is fraudulently obtained: Walters v. People, 50 Barb. 144; Lewis v. State, 30 Ala. 54. Where the woman is insensible: Comm. v. Bush, 105 Mass. 376. See Comm. v. Field, 4 Leigh 648.

hurst, J., left it to the jury to say whether any penetration were proved. And the Judges afterwards held, upon a conference (De Grey, C. J., and Eyre, B., being absent), that this direction was perfectly right; and the least degree of penetration is sufficient, though it may not be attended with the deprivation of the marks of virginity. (*p*)

Whatever doubts may have been entertained as to the extent of penetration that was necessary since the 9 Geo. 4, c. 31, it is now settled that any penetration is sufficient, although the hymen be not ruptured. On an indictment for abusing a child, under ten years old, where it was proved that the hymen was ruptured, Mr. B. Gurney said, "I think that if the hymen is not ruptured, there is not a sufficient penetration to constitute this offence. I know that there have been cases in which a less degree of penetration has been held to be sufficient; but I have always doubted the authority of those cases; and I have always thought, and still think, that if there is not a sufficient penetration to rupture the hymen, it is not a sufficient penetration to constitute this offence." (*q*) But in a similar case, where the surgeon was not able, through the great inflammation that existed, to ascertain whether the hymen had been ruptured or not: Bosanquet, J., (Coleridge and Colman, JJ. being present.) said, "It is not necessary, in order to complete the offence, that the hymen should be ruptured, provided it is clearly proved that there was penetration; but where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape." (*r*) So also in a [913 similar case, where no evidence was given to show that the hymen had been ruptured, and it was urged, on the authority of *Rex v. Gammon*, (*s*) that it was essential that the hymen should have been ruptured, in order to constitute sufficient penetration. Williams, J., said, "I am of opinion, as matter of law, that it is not essential that the hymen should be ruptured. In the case of *Rex v. Gammon*, the hymen was ruptured, and the point was not therefore necessary to the decision of that case. I also think that it is impossible to lay down any express rule, as to what constitutes penetration. All I can say is, that the parts of the male must be inserted in those of the female; but I cannot suggest any rule as to the extent." (*t*)

And, lastly, where, on an indictment for a rape, the jury found that there had been penetration, but that the penetration had not proceeded to the rupture of the hymen, Coleridge, J., reserved the point, but on its coming on for argument before the Judges, his lordship said, "I reserved this case, from respect to my brother Gurney, on account of a dictum of his." (*u*) There is an express decision on this point by the twelve Judges, (*v*) and my brother Gurney says that he does not now hold the same opinion. There is, therefore, nothing in the case." (*w*)

But whether or not there must be *emissio seminis*, in order to constitute a rape, is a point which has been much doubted, and upon which very different opinions have been holden. (*x*) The latter cases differ also upon this question. Thus, in a case of sodomy, which is governed by the same principles as rape, six Judges held, upon a special verdict, finding penetration but the emission out of the body, that both emission and penetration were necessary; while, on the other hand, five Judges thought that the *injectio seminis* was not necessary; and they said that injection cannot be proved in the case of a child, or of bestiality, and that penetration may be evidence of emission. (*y*) Subsequently to this case, Willes, C. J., presiding at a trial for this offence

(*p*) *Rex v. Russen*, O. B. Oct. 1777. Serjt. Foster's MS.; 1 East P. C. c. 10, s. 3, pp. 438, 439; MS., Bayley, J.

(*q*) *Rex v. Gammon*, 5 C. & P. 321 (24 E. C. L. R.). The prisoner was executed.

(*r*) *Reg. v. M'Rue*, 8 C. & P. 641 (34 E. C. L. R.).

(*s*) *Supra*, note (*q*).

(*t*) *Reg. v. Jordan*, 9 C. & P. 118 (38 E. C. L. R.). See also *Reg. v. Allen*, 9 C. & P. 31.

(*u*) In *Rex v. Gammon*, *supra*, note (*q*).

(*v*) *Rex v. Russen*, *supra*, note (*p*).

(*w*) *Reg. v. Hughes*, 9 C. & P. 752 (38 E. C. L. R.); 2 M. C. C. R. 190.

(*x*) 12 Rep. 37; Sum. 117; Stamf. 44; 1 Hawk. P. C. c. 4, s. 2, c. 41, s. 3, that the *emissio seminis* is necessary; 1 Hale 628, *contra*.

(*y*) *Rex v. Duffin*, O. B. 1721, or 1722, Baron Price's MS.; 1 East P. C. c. 10, s. 3, pp. 437, 438. The judges thus differing in opinion, it was proposed to discharge the special verdict, and indict the party for a misdemeanor.

adopted the doctrine of the proof of emission being necessary;(z) but that great crown lawyer, Mr. J. Foster, held otherwise, upon a similar occasion,(a) as did Clive, J., upon another trial a few years afterwards.(b) The matter was further considered, in a case where the prosecutrix could not prove any emission; and Bathurst, J., directed the jury, that if they believed that the prisoner had had his will of her, and did not leave her till he chose it himself, they should find him guilty, though an *914] emission were not proved; and after the jury had returned a verdict of guilty, he said, that it was always his opinion, that it was not *necessary to prove emission; and Smythe, B., who was present at the trial, was clearly of the same opinion.(c) And in a case which has been before mentioned, where it was agreed that the least degree of penetration was sufficient, it seems that the jury were directed by Ashhurst, J., that if the penetration were proved, the rape was complete in law (d) The weight of the authorities, therefore, after these cases had been decided, was supposed to be much against the necessity of the proof of emission as well as penetration.(e)

But a more recent case appears to have introduced the contrary doctrine. The case, which was reserved for the opinion of the Judges, stated, that the fact of penetration was positively sworn to; but that there was no direct evidence of emission. From interruption, it appeared probable that emission was not effected; and the jury, under the direction of the learned Judge who tried the prisoner found a verdict of guilty, but said, that they did not find the emission. Upon this case, three of the Judges(f) held, that the offence was complete by penetration only; but seven of them(g) held both emission and penetration to be necessary: they thought, however, that the fact should be left to the jury. One Judge was absent;(h) and Lord Mansfield only stated, that a great majority seemed to be of opinion that both were necessary. It is said that the majority, in this case, proceeded upon the ground that carnal knowledge (which they considered could not exist without emission) was necessary to the consummation of the offence: but that this definition was denied by the others, who observed that carnal knowledge was not necessary to be laid in the indictment, but only that the defendant ravished the party.(i)

In a later case from the privy council, upon proceedings under a court martial against a seaman for sodomy, it was stated that there was complete penetration and emission; but the emission was out of the body of the person on whom the sodomy was committed; and, upon full consideration, the Judges were of opinion, that *injection seminis* was essential; and they stated as their opinion that, upon the authority of what a series of later years had been understood to be the law, and had been acted upon as such, the offence was not complete, and that the prisoner should not have been convicted.(k)

Upon the authority of these cases it seems, therefore, that at one time the offence would not have been considered as complete without some proof of the *emissio seminis*. But this doctrine is not free from considerable difficulty, and appears to be fairly open to the observation, that where the violence has proceeded to the extent of an actual penetration of the unhappy sufferer's body, an injury of the high-*915] est kind has been effected. The quick sense of honor, the pride of virtue, which nature, in order to render the *sex amiable, has implanted in the female heart, is violated beyond redemption; and the injurious consequences to society are, in every respect complete.(l)¹

(z) Rex v. Cave, O. B. 1747, Serj. Forster's MS.; 1 East P. C. c. 10, s. 3, p. 438.

(a) 1 East P. C. Ibid.

(b) Rex v. Bloomfield, Thetford, 1758, Serj. Forster's MS.; 1 East P. C. Ibid.

(c) Rex v. Sheridan, O. B., 8 Geo. 3, 2 MS.; Sum. 333; 1 East P. C. c. 10, s. 3, p. 438.

(d) Rex v. Russen, ante, note (p), p. 912. (e) 1 East P. C. c. 10, s. 3, p. 439.

(f) Lord Loughborough, Buller, J. (who tried the prisoner), and Heath, J.

(g) Skynner, Ld. C. B., Gould, Willes, Ashhurst, and Nares, Justices, and Eyre and Hotham, Barons.

(h) Perryn, B.

(i) Rex v. Hill, 1781, MS., Gould and Buller, Justices; 1 East P. C. c. 10, s. 3, pp. 439, 440.

(k) Rex v. Parker, Hil. T. 1812, MS., Bayley, J.

(l) 1 East P. C. c. 10, s. 3, pp. 436, 437; Fost. 274.

¹ Penetration alone necessary: *Pennsylvania v. Sullivan*, Addis. 143; *Comm. v. Thomas* 1 Virg. Cases 307; *State v. Le Blanc*, 3 Brevard 333.

Supposing, however, that emission were necessary, it seems that penetration was *primâ facie* evidence of it, unless the contrary appeared probable from the circumstances (*m*). Thus, where a woman swore that the defendant had his will with her, and had remained on her body as long as he pleased, but could not speak as to emission, Buller, J., said, that it was sufficient evidence of a rape to be left to the jury (*n*). And he mentioned a case, which he recollected, of an indictment for a rape, where the woman had sworn that she did not perceive anything come from the man, and that, though she had had many children, she never was in her life sensible of emission from a man; and that this was ruled not to invalidate the evidence which she gave of a rape having been committed upon her. In a case where the party ravished had died before the trial, her deposition, corroborated by other evidence of actual force and penetration, was held sufficient to warrant a conviction, though there did not appear to be any direct evidence of emission. It was left to the jury to determine whether the crime had been completed by penetration and emission; and they were directed that they might collect the fact of emission from the evidence, though the unfortunate girl was dead, and could not therefore give any further account of the transaction than that which was contained in her deposition before the magistrate (*o*).

If something occurred to create an alarm to the party while he was perpetrating the offence, it was left to the jury to say whether he left the body *re infectâ* because of the alarm, or whether he left it because his purpose was accomplished. The prisoner had been in the body of the woman two or three minutes; and then, two men coming in sight, she struggled violently, and he withdrew from her body, but jumped with his knees upon her breast, and held her by the mouth and throat so that she could not speak or stir; but afterwards, upon her seizing an opportunity and calling out, the men came up and secured the prisoner. The woman spoke of him as having seen the men before he withdrew; the men thought he did not see them at that time. Holroyd, J., left the question to the jury, whether the prisoner had completed the crime before he withdrew, and withdrew on that account; and the jury found that he had. And the Judges held, that it was a question for the jury, and rightly left to them. (*p*)

Holroyd, J., is reported to have told the jury in the preceding case, "the law requires that in order to consummate the crime of rape, there must not only be a penetration, but likewise what is called an emission of *semen*. But, although the woman may not perceive the emission, the crime may nevertheless be complete, as *where the time is fully sufficient, and there is no interruption, or other [916 circumstance, to raise a contrary presumption. Emission in fact may be presumed, unless where the probability is to the contrary; and the jury may be left to say whether the party left the body *re infectâ*, by reason of a disturbance, or because his purpose was completed. If a person *in actu coitûs* be alarmed by the sudden appearance of a third person, and if his withdrawing from the body of the female be contemporaneous with such alarm, it is for the jury to say, whether his withdrawing was in consequence of the alarm, or because he had completed his purpose by emission." (*q*)

But by the 24 & 25 Vict. c. 100, s. 63, "Whenever upon the trial for any offence punishable under this Act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only." (*r*)

(*m*) The majority of the Judges in Hill's case, *ante*, note (*i*), thought the question of emission was a fact for the jury; and see the opinion of Bathurst, J., *ante*, p. 913, and see 1 East P. C. c. 10, s. 3, p. 449.

(*n*) *Rex v. Hornwood*, Winchester Spr. Ass. 1787; 1 East P. C. c. 10, s. 3, p. 440. The indictment was for an assault with intent to ravish; and the learned Judge ordered the defendant to be acquitted of that charge, upon the evidence appearing to amount to proof of an actual rape.

(*o*) *Rex v. Flemming*, 2 Leach 854.

(*p*) *Rex v. Burrows*, MS., Bayley, J., R. & R. 519.

(*q*) *Burrows' case*, 1 Lew. 288.

(*r*) This clause is taken from the 9 Geo. 4, c. 31, s. 18; and 10 Geo. 4, c. 34, s. 21 (L.).

There was much discrepancy of opinion whether the effect of the clause in the 9 Geo. 4, c. 31, from which the preceding clause was taken, was to alter the crime of rape, or merely the mode of proving that crime. In the earlier cases it was held to have made no difference in the crime. Thus, where a prisoner was indicted for a rape, and it appeared that he was caught in the commission of the offence by a person, who came to the room-door in which he was, but the prosecutrix swore that he did not immediately desist; Park, J. A. J., said, "Notwithstanding the new statute, I should still say, that if it could be shown that a party desisted before he had completed his purpose, it was not a rape; I cannot conceive in my own mind that the mere fact of penetration is sufficient to constitute the offence; but here he did not immediately desist."^(s) So in a similar case where the prosecutrix proved penetration clearly, but stated that she did not feel anything come from the prisoner; Taitton, J., said, "In order to complete the offence it is necessary that he should have had carnal knowledge of her, and that all which constitutes carnal knowledge should have happened. Though the enactment of the statute is such as has been stated, still the jury must be satisfied from the circumstances that emission took place. It is not necessary specifically to prove it, but the circumstances must be such as infer that that fact, and everything else essential to carnal knowledge, took place. The statute did not intend to make less necessary to complete the offence than before, but merely to prevent the necessity of the indecent exposure resulting from the minute inquiries which usually took place. The jury, therefore, must be satisfied that emission occurred before they can convict."^(t) So also in a similar case, where the prosecutrix proved penetration, and that her clothes were wet, Alderson, B., thus addressed the jury: "You must be satisfied that the prisoner penetrated her private parts with his; if you are satisfied of that, I shall submit to *917] your consideration another question; according *to law it is established, beyond all doubt, that on proof of penetration, a jury may infer the completion of the offence; the offence still consisting of penetration and emission; but doubt has arisen upon a late Act of Parliament, whether when no emission has taken place, the offence is complete by penetration only. I have no doubt, however, that it is for you, if you are of opinion that there has been penetration, to presume emission, unless the contrary is proved; and it lies on the prisoner to show that emission did not take place. If you are satisfied of penetration, but that no emission did take place, I will reserve the question for the Judges; but if you are convinced of penetration, and in doubt or ignorance whether emission took place, I am clear you ought to find the prisoner guilty."^(u)

But on a similar indictment, where there was evidence of penetration, but no evidence of emission, Hullock, B., said (in summing up), "If you believe that the prisoner's parts were within the person of the prosecutrix, although there might be no emission, and although they were not withdrawn merely because his lust was satisfied, still the prisoner is equally guilty as if there had been emission, and he had been satisfied; for, as the law now stands, penetration is all that is necessary to be proved to make out the offence."^(v) And where on an indictment for abusing a child under the age of ten years; in consequence of *Rex v. Russell*,^(w) and *Coulthart's case*,^(x) Littledale, J., left the question of penetration and also of emission to the jury, and desired them in case they should be of opinion that penetration had taken place, but were uncertain whether emission had taken place, or not, they should say so, and the jury found the prisoner guilty, and said they were of opinion that penetration took place, but that no emission took place. Upon a case reserved, the Judges were unanimously of opinion that the conviction was right.^(y) So, where, upon an indictment for sodomy, the prosecutor proved circumstances that were strong to show penetration, and distinctly proved emission, but not during

(s) *Rex v. Thomas Baldwin*, Worcester Sum. Ass. 1830, MSS. C. S. G.

(t) *Rex v. Russell*, 1 M. & Rob. 122. See the Reporter's note there.

(u) *Coulthart's case*, 1 Lew. 291. Verdict, not guilty.

(v) *Rex v. Jennings*, 4 C. & P. 249 (19 E. C. L. R.); 1 Lew. 290.

(w) *Supra*, note (t).

(x) *Supra*, note (u).

(y) *Rex v. Cox*, R. & M. C. R. 337; 5 C. & P. 297 (24 E. C. L. R.), E. T. 1832, Taitton, J., and Gurney, B., *absentibus*. The case was not argued before the Judges.

penetration, the prisoner having been interrupted: Gaselee, J., left it to the jury to say whether there had been penetration, stating that, if so, the crime was complete under the new Act; and the jury were of opinion that there had been, and found the prisoner guilty, and sentence was passed, but in consequence of *Rex v. Jacobs*,^(z) and *Rex v. Russell*,^(a) the case was reserved for the opinion of the Judges, who held unanimously that the conviction was right.^(b) So in the case of bestiality, where the prisoner being interrupted, withdrew from the animal; Park, J. A. J., said, "In the former state of the law, the prisoner would have been entitled to an acquittal, but, as the law is now, if there was penetration, the capital offence is *completed, although there has been no emission."^(c) Where on a trial for [*918 rape, the prosecutrix admitted that the prisoner had penetrated but a little way, and that there was no emission; and it was objected that the direct negative being proved, the case failed, and that the 9 Geo. 4, c. 31, had not altered the character of the offence; Patteson, J., said, "The Judges have distinctly held in *Cox's case*,^(d) that proof of penetration is sufficient, notwithstanding emission be negatived;" and upon its being suggested that *Cox's case* was not argued, and that doubts as to the propriety of the decision were said to be entertained by two Judges, who were absent, Patteson, J., said, "It is true that the case was not argued, but still I cannot act against their decision." The learned Judge afterwards said that if it should prove necessary, the case should be further considered.^(e) And lastly, where on a trial for rape there was no doubt that there was penetration, but it appeared clear from the admissions of the prosecutrix that the prisoner did not in fact complete his purpose, as she succeeded in extricating herself from him very soon; and it was contended that the evidence showed that the offence was not completed; the words of the indictment were, "did ravish and carnally know," and that must mean, did have his will of her, and satisfy his lust while within her person. The object of the 9 Geo. 4, c. 31, was only to render it unnecessary to prove more than penetration, on account of the woman's possible inability to describe what actually took place. The counsel for the crown, in reply, agreed with the counsel for the prisoner, that the Act was not intended to do more than enable a jury to say that the offence was committed, when there was only proof of penetration; but that it was not intended to dispense with proof of the completion of the offence, when such proof can be given, still less to decide that the offence shall be considered to have been committed in point of law, when the evidence clearly shows that it was not committed in point of fact. Tindal, C. J.: "The 9 Geo. 4, c. 31, s. 18, recites, that upon trials of rape, &c., 'offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes.' It was thought that the law was holding itself up to contempt by having those subtle and critical subjects discussed before Judges and juries, and the statute therefore goes on to say, 'For remedy thereof, be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed, in order to constitute carnal knowledge; but the carnal knowledge shall be deemed complete upon proof of penetration only.' The only question, therefore, for the jury in such a case is, whether the private parts of the man did enter into the person of the woman. It is not necessary to enter into any nice discussion as to how far they entered; however, you must be satisfied that there was actual penetration, and not that it is the case of a person attempting to commit the offence and being disturbed before he had actually penetrated. The prosecutrix may be mistaken as to the extent to which the prisoner had proceeded in the commission of *the offence; if, therefore, you feel any doubt whether (and I can use no [*919 other words than the statute; I am not here to make the law, but only to expound and declare it), if I say, you feel any doubt whether it has been proved

(z) R. & R. 331, *post*, p. 938.

(a) *Supra*, note (t).

(b) *Rex v. Reekespear*, R. & M. C. C. R. 342, Taunton, J., and Gurney, B., *absentibus*. The case was not argued before the Judges, and seems to have been decided at the same time as *Rex v. Cox*. C. S. G.

(c) *Rex v. Cozins*, 6 C. & P. 351 (25 E. C. L. R.), Oxford Spr. Ass. 1834.

(d) *Supra*, note (g).

(e) *Brook's case*, 2 Lew. 267, York Spr. Ass. 1837. The prisoner was acquitted.

to your entire satisfaction that there has been penetration, you will acquit the prisoner of the felony," (f) So where on a trial for carnally knowing a child *920] *under ten years of age, it appeared that the hymen was not ruptured, but

(f) *Reg. v. Allen*, 9 C. & P. 31 (38 E. C. L. R.). I have inserted these cases more at length in consequence of great doubts being entertained among the Bar as to the correctness of the decision in *Rex v. Cox*, and the cases that have been decided on the authority of that case. At the time when the 9 Geo. 4, c. 31, passed, it is perfectly clear that in order to constitute the crime of rape there must have been *both* penetration *and* emission; consequently, it lay upon the prosecutor either to give express evidence of actual emission, or to prove such facts as were sufficient to induce the jury to infer that emission had actually taken place. In some cases the woman was unable to prove emission, either because she did not perceive it (see *ante*, p. 915), or (as was the case in *Rex v. Preston*, Stafford Spr. Ass. 1828, where a father was convicted of ravishing two of his daughters) because after penetration she fainted away. In such cases it was the course to leave it to the jury to infer that emission had taken place, as there was nothing to show that the prisoner had not fully completed his purpose; and acquittals sometimes took place because juries were unwilling to infer a fact, which had not been clearly proved, especially when such an inference subjected the prisoner to capital punishment. Such being the state of things, the 9 Geo. 4, c. 31, passed; and the question is whether that Act has altered the crime of rape, so that instead of consisting of *both* penetration and emission, it now consists of penetration alone. According to all the recent decisions (see *Rex v. Great Bentley*, 10 B. & C. 529 (21 E. C. L. R.); *Williams v. Roberts*, 5 Tyrw. 421; *Flight v. Thomas*, 11 Ad. & E. 688), this ought to be determined upon the grammatical construction of the words of the statute alone. In sec. 16, there is a separate substantive clause providing that "every person convicted of the crime of rape shall suffer death as a felon." Now here the crime is treated as one as clearly settled and defined as the crime of murder, *i. e.*, as consisting of both penetration and emission. It is, however, upon sec. 18 that the question mainly turns. That section recites, that "upon trials for the crimes (*inter alia*) of rape, offenders" (that is, persons guilty of those crimes), "frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes" (the mischief, therefore, was that persons who had committed rapes, consisting *both* of penetration and emission, had escaped by reason of the difficulty of proving *both* penetration and emission), "for remedy thereof" (that is to remedy the escape of persons who had committed such rapes consisting of *both* penetration and emission), "be it enacted that it shall not be necessary in any of those cases to prove the actual emission of seed" (not that emission shall be no part of the crime) "but that the carnal knowledge" (*i. e.*, *both* penetration and emission) "shall be deemed" (presumed) "complete upon proof of penetration only." Now, it is to be observed that there is no intimation whatever of any intention to alter the crime; on the contrary, the clause evidently treats the crime as continuing the same, but is framed to render the means of proving it more easy. It is submitted that upon the true construction of this clause its effect is that, whereas before the passing of the statute the prosecutor was bound not only to prove penetration, but to go farther, and give such evidence as satisfied the jury that emission had actually taken place, he is now only bound to prove penetration; on proof of which a presumption arises by virtue of the clause that emission has also taken place, but that this presumption is liable to be rebutted by showing that in fact emission did not take place. In other words, all the prosecutor has now to prove is penetration, and upon that the jury ought to convict, unless it be proved by the prisoner that he did not in fact complete his purpose. This is the view which seems to have been taken by Mr. B. Alderson in *Coulthart's case* [*supra*, note (u), p. 917], and it is submitted is the correct construction of the clause. There are several statutory provisions of a somewhat similar character, as the 23 Geo. 2, c. 11, s. 3, for remedying the difficulties attending prosecutions for perjury, and the statutes which make a certificate of the clerk of assize evidence of a previous conviction, &c., and it is evident that none of these alter the offence, but only facilitate the proof of it. At all events the clause does not clearly alter the crime, and it is against all the authorities to hold that a felony can be created by any but express and clear words. In *Searle v. Williams*, Hob. 293, it is laid down that "felonies and capital crimes shall never be made by doubtful and ambiguous words." And in *Courteen's case*, Hob. 270, it was "resolved clearly that no statute could be extended to life by doubtful and ambiguous words;" and see 1 Hawk. P. C. c. 40, s. 3. In *Rex v. Cale*, R. & M. C. C. R. 11, it was held by a majority of the Judges that the 3 Geo. 4, c. 24, s. 3, which provided that the receiving stolen goods should be "*deemed and construed to be felony*," did not create a felony, and although that case be overruled by *Rex v. Solomons*, R. & M. C. C. R. 292, still it is a strong authority to show how clear and distinct the words which create a new felony are required to be, even where the words be such as to leave no doubt that it was intended to create such felony. It may be added that the decision in *Rex v. Cox* gives a great facility to convict the innocent in those cases, which not unfrequently occur, where the parties being accidentally discovered in *coitu*, the woman makes a false charge in order to save her character. C. S. G.

there was a venereal sore on it, which must have arisen from the actual contact with the virile member of a man; Parke, B., left it to the jury to say whether at any time any part of the virile member of the prisoner was within the labia of the pudendum of the girl; for if ever it was, no matter how little, that would be sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence.(g)

It appears always to have been admitted, that *emissio seminis* of itself makes neither rape nor sodomy; but it is spoken of as *primâ facie* evidence of penetration.(h)

As the absence of previous consent is a material ingredient in the offence of rape, it must be averred in the indictment; where it is usually expressed by stating that the fact was done "against the will" of the party.(i) It is essential to aver, that the offender did feloniously "ravish" the party; and the omission of the word *ravished* will not be supplied by an averment that the offender "did carnally know," &c.(k) It has been considered, that the words "did carnally know" are not essential, on the ground that *rapere* signifies legally as much as *carnaliter cognoscere*;(l) but they are at any rate appropriate in describing the nature of the crime, and appear to be generally used.(m) The omission of them would not, therefore, be prudent.(n) In an indictment for a rape the words *carnaliter cognovit* were omitted; on a case reserved, six Judges out of twelve thought it cured by the verdict, because those words are not in the 9 Geo. 4, c. 31; but they thought it bad before verdict.(o) Where an indictment alleged that the prisoner in and upon E. F. "violently and feloniously did make (omitting 'an assault'), and her the said E. F., then and there and against her will, violently and feloniously did ravish and carnally know;" upon a case reserved, ten of the Judges were of opinion that the judgment ought not to be arrested, because of the omission of the words "an assault."(p) The indictment usually *con- [921 cludes, "against the form of the statute;" but as the offence was anciently, as has been shown,(q) a capital felony, such a conclusion has been thought to be unnecessary.(r) The indictment must conclude, as in other cases, "against the peace," &c.:(s) but where the conclusion was against the peace of our said late lord the King, the offence being in the time of the present King, and no other King had been mentioned, it was held not to be objectionable.(t)

The indictment against aiders and abettors may lay the fact to have been done by all, or may charge it as having been done by one and abetted by the rest. Thus where, upon an appeal against several persons for ravishing the appellant's wife, an objection was taken that only one should have been charged as ravishing, and the others as accessories; or that there should have been several appeals, as the ravishing by one would not be the ravishing of the others: it was answered that if two come to ravish, and one by comfort of the other does the act, both are principals, and the case proceeded.(u) And where the indictment was against three persons for a rape, charging them all as princi-

(g) Reg. v. Lines, 1 C. & K. 393 (47 E. C. L. R.).

(h) 1 Hale 628; 1 Hawk. P. C. c. 4, s. 2; 3 Inst. 60. But *qu.* how far it can be taken as evidence of penetration?

(i) Cro. Circ. Comp. 427; 2 Stark. Crim. Plead. 409; 3 Chit. Crim. Law 815.

(k) 1 Hale 628, 632; Br. Indict. pl. 7, citing 9 Ed. 4, c. 6.

(l) 2 Inst. 180, and see 2 Hawk. P. C. c. 25, s. 56; Staundf. 81; Co. Lit. 137.

(m) See the precedents referred to, *ante*, note (i).

(n) 1 East P. C. c. 10, s. 10, p. 448; 2 Stark. Crim. Plead. 409, note (p); 3 Chit. Crim. Law 812. It is laid down, generally, in some of the books, that the indictment must be *rapuit et carnaliter cognovit*: 1 Hale 628, 632.

(o) Rex v. Warren, M. T. 1832, MSS., Bayley, B.; 3 Burn. J., D. & W. 725. See 7 Geo. 4, c. 64, s. 21, which makes the indictment sufficient after verdict, "if it describe the offence in the words of the statute," "where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy, by any statute."

(p) Reg. v. Allen, 9 C. & P. 521 (38 E. C. L. R.); 2 M. C. C. R. 179.

(q) *Ante*, p. 904.

(r) 1 East P. C. c. 10, s. 10, p. 448; but see 2 Stark. Crim. Plead. 409, note (q).

(s) But see the 14 & 15 Vict. c. 100, s. 24.

(t) Rex v. Scott, MS., Bayley, J., R. & R. 415.

(u) Rex v. Vide, Fitz. Corone, pl. 86. *Ante*, pp. 57, 905.

pals in the first degree, that they ravished and carnally knew the woman; and the prisoners were all found guilty; the Judge who tried them doubted whether the charge could be supported; and, at his desire, the case was mentioned by Heath, J., to the other Judges, and all who were present agreed that the charge was valid, though the form was not to be recommended; but they gave no regular opinion, because the case was not regularly before them.(v)

An indictment in the first count charged Folkes with committing a rape, and Ludds with being present, aiding and assisting; the second count charged Ludds as principal in the first degree, and Folkes as aiding and assisting; the third count charged an evil-disposed person, to the jurors unknown, as principal in the first degree, and Folkes and Ludds as aiding and assisting; and the fourth count charged a certain other evil-disposed person as principal, and Folkes and Ludds as aiders. Previous to pleading, the Court was urged to quash the indictment on the ground that it was bad for misjoinder of two offences of a different nature, and not liable to the same punishment, and that for aiding and abetting no provision was made by the 9 Geo. 4, c. 31. It was also alleged that the indictment contained different transactions, and that the prosecutrix was bound to make an election. The Court overruled both objections. Ludds was acquitted, and a general verdict of guilty was found against Folkes. It appeared that the prisoner, together with three other men, committed *at the same time and place*, the one after the other, successively, rapes upon the body of the prosecutrix, the others aiding and abetting in turn; and the evidence, if believed, was sufficient to sustain the *922] first count, as far as it is charged Folkes as principal, as the *other counts which charged him as aiding and assisting; and, upon a case reserved, the Judges held that the conviction was good on the first count.(w) Where the first count charged Gray as principal in the first degree, and Wise as present, aiding and assisting; and the second count charged Wise as principal in the first degree, and Gray as present, aiding and assisting; it was moved to quash the indictment, on the ground of misjoinder, as the judgment might be different, and it was said that this objection did not ultimately become material in the preceding case, as one prisoner alone was convicted; but per Coleridge, J., "The 9 Geo. 4, c. 31, s. 16, awards the punishment of death to "every person convicted of the crime of rape." Now, I take it that a principal in the second degree falls clearly within that provision: and that, therefore, the objection that the judgment might be different entirely fails."(x)

It is clear that the party ravished is a competent witness: and indeed, she is so much considered as a witness of necessity, that where a husband has been charged with having assisted another man in ravishing his own wife, the wife has been admitted as a witness against her husband.(y)

But though the party ravished is a competent witness, the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony.¹ Thus, if she be of good fame: if she presently discovered

(v) *Rex v. Burgess*, Tr. T. 1813, Lord Ellenborough, C. J., Mansfield, C. J., and Grose, J., were absent. The case is mentioned as having occurred at the Chester Spr. Ass. 1813, in 5 Evans' Col. Stat. (Cl. G. p. 399, note (12)).

(w) *Rex v. Folkes*, R. & M. C. C. R. 354. There is an inaccuracy in the statement of this case; it treats the charge against the principal in the first degree as one count, and the charge against the principal in the second degree as another count; but that is not so, as both charges only constitute one count, as is plain from the indictments in murder, in which the conclusion, "and so the jurors, &c., say, that A., B. and C. murdered," always follows the allegation that B. and C. were present, aiding and assisting. C. S. G.

(x) *Rex v. Gray*, 7 P. & C. 164; *Reg. v. Crisham*, C. & M. 187 (41 E. C. L. R.), s. r. See also *Rex v. Parry*, 7 C. & P. 836 (32 E. C. L. R.), where an indictment against five charged each as principal in one count, and the others as aiders and abettors.

(y) *Rex v. Lord Castlehaven*, 1 St. Tr. 387; 1 Hale 629; Hutt. 116; 1 Str. 633. *And*, p. 905.

¹ Although no unreasonable suspicion should be indulged against the complaining witness on the trial of an indictment for rape: yet courts and juries cannot be too cautious in scrutinizing her testimony, and guarding themselves against the influence of undue sympathy in her behalf: *People v. Hulse*, 3 Hill 309.

As to the necessity of outcry and complaint by the female: *State v. De Wolfe*, 8 Conn.

the offence, and made search for the offender; if she showed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners; if the place where the fact was done were remote from inhabitants or passengers; if the party accused fled for it; these, and the like, are concurring circumstances, which give greater probability to her evidence.^(z) But if, on the other hand, the witness be of evil fame, and stand unsupported by others; if, without being under control, or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining; if the place where the fact is alleged to have been committed, was near to persons by whom she might probably have been heard, and yet she made no outcry; if she has given wrong descriptions of the place; these, and the like circumstances, afford a strong, though not conclusive, presumption that her testimony is feigned.^(a)

It is the usual course, in cases of rape, to ask the prosecutrix whether she made any complaint, and, if so, to whom; and if she mentions a person to whom she made complaint, to call such person to prove that fact; but it has been the [923 invariable practice not to permit either the prosecutrix, or the person so called, to state the particulars of the complaint, during the examination in chief.^(b) Upon this practice, in a case where a witness was proceeding to state the particulars of the complaint, when the prisoner's counsel interposed, Parke, B., observed, "The sense of the thing certainly is, that the jury should, in the first instance, know the nature of the complaint, made by the prosecutrix, and all that she then said. But for reasons, which I could never understand, the usage has obtained that the prosecutrix's counsel should only inquire generally, whether a complaint was made by the prosecutrix of the prisoner's conduct towards her, leaving the counsel of the latter to bring before the jury the particulars of that complaint, by cross-examination." And the witness was, accordingly, only permitted to prove generally that the prosecutrix complained to her of the ill-treatment she had experienced from the prisoner.^(c)

But where on a trial for rape the prosecutrix said, that very soon after the alleged offence, as she was returning home she had complained to Mrs. P., and Mrs. P., being called, was asked whether the prosecutrix made any complaint, and was directed to answer "yes" or "no;" and on her answering "yes," she was asked whether the prosecutrix named any particular person, and the witness, being directed to answer "yes" or "no," answered "yes;" it was then asked whose name was mentioned, but it was objected that this question could not be put: the rule

(z) 4 Blac. Com. 213; 1 East P. C. c. 10, s. 7, p. 445.

(a) 4 Blac. Com. 213, 214; 1 East P. C. c. 10, s. 7, pp. 445, 446.

(b) *Rex v. Clarke*, 2 Stark. N. P. C. 241 (3 E. C. L. R.); 3 Stark. Evid. 951 (3 E. C. L. R.)

(c) *Reg. v. Walker*, 2 M. & Rob. 212. It should seem that the grounds, upon which the making the complaint may be proved, but not the particulars of it, are, that the making the complaint is a fact, but the particulars of it are mere statements neither made on oath nor in the presence of the prisoner. In *Rex v. Wink*, 6 C. & P. 357 (25 E. C. L. R.), Patteson, J., held that a party, who had been robbed, might be asked if he named any person as the person who had robbed him to a constable, but that he ought not to be asked what name he mentioned. This seems at variance with *Reg. v. Walker*, because there it appears that the witness was allowed to prove a complaint of the conduct of the prisoner: now, that is proving one particular, and perhaps the most important particular of the whole. The practice, certainly, has been merely to ask whether a complaint was made, and only to permit the witness to answer "yes" or "no." The ground upon which the prisoner's counsel is entitled to ask what the particulars of the complaint were, is, that he has a right to inquire into any statement made by the prosecutrix, relative to the transaction, if he think fit, in order to ascertain whether she has, at all times, told the same story. C. S. G.

93; *Reynolds v. People*, 41 How. Pr. 179; *State v. Marshall*, Phill. (Law) 49; *Lacy v. State*, 45 Ala. 80; *People v. Morrison*, 1 Parker C. R. 625; *State v. Cone*, 1 Jones (Law) 18; *State v. Peter*, 14 La. Ann. 521; *Barney v. People*, 22 Ill. 160; *State v. Peter*, 8 Jones (Law) 19; *State v. Cross*, 12 Iowa 66.

Upon an indictment for a rape, where the injured party is examined as a witness, her complaint of the injury, and her narrative of the circumstances connected therewith, made recently after the commission of the offence, are admissible evidence in confirmation of her testimony, and may be proved by the persons to whom such complaint and narrative were made: *Phillips v. State*, 9 Humph. 246. But see *Baccio v. People*, 41 N. Y. 265.

was that the fact of a complaint having been made was admissible, but not the particulars of it. (Cresswell, J.): "What the prosecutrix said at the time of committing the offence would be receivable in evidence on the grounds that the prisoner was present and the violence going on; but if the violence was over and the prisoner had departed, and the prosecutrix had gone on running away, crying out the name of the person, it would not be evidence. I think that the case of *Reg. v. Wink* (d) is a direct authority in point; but I own that my mind is not convinced as to the latter part of that case, as it seems to me to be rather too refined a distinction to prevent the name from being mentioned, and yet to permit it to be asked, whether, in consequence of what was said, the witness apprehended a particular person. I think you ought not to go so far as that; and that the question, "whose name was mentioned?" ought not to be asked." (e)

*924] *But where on a trial for rape the prosecutrix was asked in her examination in chief whether she had made any complaint, and she said she had to certain persons; she was then asked "what did you say?" whereupon it was objected; but Byles, J., said, "Whatever she said immediately after the occasion, and what was said to her in answer, is equally evidence. It may be, for particular reasons, that neither the counsel for the prosecutrix, nor the prisoner may like to ask the question as to what was said to her; but it is my duty as judge to stand independent between the prisoner and the Crown, and I should not shrink from asking the question myself." (f)

Where the party ravished has died before the trial, it is not competent to prove the particulars of a complaint made by her soon after the offence was committed, with a view of showing who the parties were who committed it. Upon a trial for rape, after the death of the prosecutrix, it appeared that as soon as she returned home on the morning, on which it was alleged that the offence was committed, she made a complaint of what had happened to her, and it was proposed, on the part of the prosecution, to ask the terms of the complaint. Rolfe, B.: "There is a wide difference between receiving such statements, as confirmatory of a prosecutrix's credibility in a charge of rape, on which she is examined as a witness, and in a case like the present, where the complaint is to be received as independent evidence. I entertain very great doubts indeed as to the admissibility of such evidence." The evidence was not given: and, in summing up, the learned Baron said, "I had a strong feeling that it was not competent to the prosecutor to extract, in detail, the complaint made by the deceased on her return home. In ordinary cases of rape, where a witness describes the outrage in the witness-box, evidence of her complaint soon after the occurrence of the outrage, is properly admissible, to show her credit, and the accuracy of her recollection. Here, however, the object is to give in evidence the particulars of the complaint, as independent evidence, with a view of showing who were the persons who committed the offence. All that could safely be received was, I think, her complaint that a dreadful outrage had been perpetrated upon her." (g)

So where the prosecutrix is absent, it is not competent to prove that she made a complaint soon after the occurrence; for such evidence is merely confirmatory of the story of the prosecutrix, and no part of the *res gestæ*. Upon an indictment for rape, where the prosecutrix did not appear, on the part of the prosecution it was proposed to ask a witness whether the prosecutrix did not complain to her the next day: it was objected that the evidence of recent complaint is received to confirm the evidence of the prosecutrix, but as she was away, her evidence was not before the jury to be confirmed. Parke, B.: "In *Brazier's case* (h) the child who was attempted to be ravished was only five years old, and incapable of taking an oath, and it was there held, that the complaints she made to her mother and another woman, *925] on her coming home, were receivable in evidence, as she herself was not heard on oath. What a man says as complaint to his surgeon is evidence."

(d) *Supra*, note (c).

(e) *Reg. v. Osborne*, C. & M. 622 (41 E. C. L. R.).

(f) *Reg. v. Eyre*, 2 F. & F. 579. This is the whole case "reported *ex relatione Barrow*;" no authority appears to have been cited.

(g) *Reg. v. Megson*, 9 C. & P. 420 (38 E. C. L. R.). See 1 Ph. Ev. 204, 8 ed.

(h) 1 East P. C. 443. See *post*, p. 931.

"I think the safest course will be to reject the evidence, as it is not part of the *res gestæ*, but merely confirmatory evidence. At the time of *Brazier's case*, it seems to have been considered, that, as the child was incompetent to take an oath, what she said was receivable in evidence. The law was not so well settled then as it is now."⁽ⁱ⁾ So where on an indictment for abusing a child under ten years of age, the child was wholly ignorant of the nature of an oath, and therefore not examined, and it was proposed to give evidence of a statement made by her relative to the offence, and the name of the person who committed it; Pollock, C. B., refused to admit it, observing, "If a man says to his surgeon, 'I have a pain in my head,' or a pain in such a part of the body, that is evidence; but if he says to his surgeon, 'I have a wound,' and adds, 'I met John Thomas, who had a sword, and ran me through the body with it,' that would be no evidence against John Thomas: and it is certainly a very odd reason for receiving the evidence of what a child has said, that that child is not capable of taking an oath."^(k)

The character of the prosecutrix, as to general chastity, may be impeached by general evidence.^(l) as by showing her general light character, and giving general evidence of her being a street-walker.^(m) But, in a case where a question was put to a prosecutrix, "Whether she had not before had connection with other persons; and whether she had not before had connection with a particular person who was named;" an objection taken to this question by the counsel for the prosecution was allowed by the learned Judge; who also allowed an objection, made by the counsel for the prosecution, to the admissibility of evidence to prove that the girl had been caught in bed, about a year before this charge was preferred, with a young man who was tendered by the prisoner's counsel to prove that he had had connection with her: and the question as to the admissibility of such evidence being reserved, eight Judges, who were present at the discussion, held that both the objections were properly allowed.⁽ⁿ⁾

On a trial for rape upon a child between ten and twelve years of age, the witness for the prosecution was cross-examined as to particular facts of indecency on the part of the prosecutrix, and of solicitation by her previously made to men to have connection with her, and witnesses were called to prove these facts; but Lord Abinger, C. B., objected to their being examined, referring to a case (evidently *Rex v. Hodgson*) where such a course was disallowed, but saying that that ruling gave so much dissatisfaction that the Attorney-General recommended a pardon, which was granted; and afterwards, on the authority of *Rex v. Clarke*,^(o) his lordship allowed witnesses to be called to prove general want of decency in the prosecutrix, and then permitted the prosecutrix to call witnesses to rebut their evidence.^(p)

But it has since been holden, that a prosecutrix may be asked *questions as to particular criminal or discreditable acts. As, "Were you not walking [*926

(i) *Reg. v. Guttridge*, 9 C. & P. 471 (38 E. C. L. R.).

(k) *Reg. v. Nicholas*, 2 C. & K. 246 (61 E. C. L. R.).

(l) *Rex v. Clarke*, 2 Stark. N. P. C. 241 (3 E. C. L. R.); 3 Stark. Evid. 951.

(m) *Reg. v. Clay*, 5 Cox C. C. 146, where Patteson, J., admitted evidence that the prosecutrix had been seen on the streets of Shrewsbury as a reputed prostitute.

(n) *Rex v. Hodgson*, R. & R. 211.

(o) *Supra*.

(p) *Reg. v. Tissington*, 1 Cox C. C. 48.

¹ On an indictment for an assault with intent to commit a rape, evidence that the person charged to have been injured is in fact a common prostitute, or evidence of reputation that she is a woman of ill fame, may be submitted to the jury to impeach her credibility and disprove her statement that the attempt was forcible and against her consent: *Camp v. State*, 3 Geo. 419; *McCombs v. State*, 8 Ohio (N. S.) 643; *State v. Forshner*, 43 N. H. 89; *M'Dermott v. State*, 13 Ohio (N. S.) 332; *State v. White*, 35 Mo. 500; *Pratt v. State*, 19 Ohio St. 277. It is not allowable to examine the prosecutrix in relation to particular instances of connection with other men, though she may be interrogated as to her previous intercourse with the prisoner himself: *Pleasant v. State*, 15 Ark. 624. As to evidence of specific acts of unchastity, see *State v. Knapp*, 45 N. H. 148; *State v. Johnson*, 2 Wms. 512; *People v. Benson*, 6 Cal. 221; *People v. Jackson*, 3 Parker C. R. 391; *Comm. v. Regan*, 105 Mass. 593; *State v. Murray*, 63 N. C. 31; *State v. Johnson*, 38 Verm. 512; *State v. Reed*, 39 Ibid. 417.

in the High-street with a common prostitute?(*g*) So, also, whether the prisoner had not previously had connection with her, by her own consent?(*r*) So in an action for seduction of the plaintiff's daughter, she may be cross-examined as to particular acts of intercourse with other men, and, if she deny them, then such persons may be called to contradict her, and may be asked as to the fact and the time and place of its occurrence.(*s*) So on an indictment for rape, where the prosecutrix, on cross-examination, denied that she had had connection with several men who were shown to her at the time she was questioned. Coleridge, J., after consulting Erskine, J., held that these persons might be called to prove that they had had connection with her; for it was not immaterial to the question whether the prosecutrix had had this connection against her consent, to show that she had permitted other men to have connection with her, which she had denied.(*t*)

But where, on a trial for rape, the prosecutrix was cross-examined as to a charge of stealing money from a former mistress, and as to the account she had given of the money found in her possession to a constable, and she said that she told the constable a gentleman had given it her for not telling of his insulting her, and denied that she had told him that it was given her by the gentleman for having connection with her; it was held that the constable could not be called to contradict her, and to prove that she told him the gentleman had given her the money for having connection with her.(*u*)

The application of these and other rules upon this difficult subject should always be made with due regard to the cautious observations of a great and experienced Judge. Lord Hale says, "It is true, that rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."(*v*) He then mentions two remarkable cases of malicious prosecution for this crime, that had come within his own knowledge: and concludes, "I mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may, with so much ease, be imposed upon without great care and vigilance: the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes, of malicious and false witnesses."(*w*)

Where, on a trial for rape, the prosecutrix stated that she complained almost immediately to her mistress, and the next day her *clothes were washed by a
*927] washerwoman, and they had blood on them; Pollock, C. B., directed these persons to be called as witnesses for the prosecution, although they were attending as witnesses for the prisoner, but allowed the counsel for the prosecution all latitude in examining them.(*x*)

On a trial for rape it was proposed on the part of the prosecution to ask a witness for the defence as to something that had been said by a relative of the prosecutrix to a relative of the prisoner, in the presence of the prosecutrix, about making it up; it was objected that evidence of a conversation between third persons, not made in the presence of the prisoner, was inadmissible. Martin, B.: "In a civil case, what is said in the presence of either of the parties is admissible, because it is open to the party so present to express assent or dissent to what is said, and that would be admissible against him. In criminal cases, the prosecutor, although not in strict law a party to the case, is so in fact; and I think that the rule applicable to conversation

(*g*) *Rex v. Barker*, 3 C. & P. 589 (13 E. C. L. R.), Park, J. A. J., and Park, JJ.

(*r*) *Rex v. Martin*, 6 C. & P. 562 (25 E. C. L. R.), Williams, J., saying he never could understand *Rex v. Hodgson*. And the prisoner may show that she has been previously connected with him: *Rex v. Aspinall*, *cor.* Hullock, B., York Spr. Ass. 1827. 3 Stark. Evid. 952.

(*s*) *Verry v. Watkins*, 7 C. & P. 308 (32 E. C. L. R.). See also *Andrews v. Askey*, 8 C. & P. 7 (34 E. C. L. R.), Tindal, C. J.

(*t*) *Reg. v. Robins*, 2 M. & Rob. 512.

(*u*) *Reg. v. Deau*, 6 Cox C. C. 23, Platt, B., after consulting Wightman, J.

(*v*) 1 Hale 635.

(*w*) 1 Hale 636.

(*x*) *Reg. v. Stoner*, 1 C. & K. 650 (47 E. C. L. R.).

in the presence of a party in a civil case may be fairly extended to a conversation in the presence of the prosecutor in a criminal case."(*y*)

It has already been shown that this offence is now punishable by penal servitude for life.(*z*) By the 24 & 25 Vict. c. 100, s. 67, every principal in the second degree, and every accessory before the fact, is punishable in the same manner as a principal in the first degree; and every accessory after the fact to any felony *punishable under this Act* (except murder), is liable to be imprisoned for any term not exceeding two years, with or without hard labor.(*a*)

Upon an indictment for a rape, a prisoner may be convicted under the 14 & 15 Vict. c. 100, s. 9, of an attempt to commit the same, and thereupon will be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the rape.(*b*)

It may be as well to observe, that by the 4 & 5 Vict. c. 56, s. 6, the crime of rape shall not "be tried, or triable, before any justices of the peace, at any general or quarter sessions of the peace."

Where there is no reason to expect that the facts and circumstances of the case, when given in evidence, will establish that the crime of rape has been completed, the proper course will be, to prefer an indictment at common law, for an assault with intent to ravish; which offence, though only a misdemeanor, yet is one of a very aggravated nature, and has, in many instances, been visited with exemplary punishment.(*c*) Formerly where, upon an indictment for an assault with intent to commit a rape, the prosecutrix proved a rape actually committed, an acquittal would have been directed, on the ground that the misdemeanor was merged in the felony.(*d*) But now by the 14 & 15 Vict. c. 100, s. 12, * "if upon the trial of any person [*928 for any misdemeanor it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the Court, before which such trial may be had, shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case, such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

In order to convict of such an assault, the jury must be satisfied that the prisoner intended to gratify his passions, on the person of the prosecutrix, at all events, and notwithstanding any resistance on her part. Upon an indictment for an assault, with intent to commit a rape, Patteson, J., in summing up, said, "In order to find the prisoner guilty of an assault, with intent to commit a rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part."(*e*)

It was held by the same very learned Judge, in the same case, that evidence that the prisoner, on a prior occasion, had taken liberties with the prosecutrix, was not admissible, to show the prisoner's intent.(*f*)

Under a count for an assault, with intent to commit a rape, a prisoner may be convicted of a common assault.(*g*) But on an indictment, containing a count for an assault with intent to commit a rape, and a count for a common assault, if the prisoner be acquitted on the count for an assault with intent to commit a rape, on the ground that the prosecutrix consented, he cannot be convicted on the count

(*y*) Reg. v. Arnall, 8 Cox C. C. 439.

(*z*) *Ante*, p. 904.

(*a*) See the section, *ante*, p. 881.

(*b*) See the section, *ante*, p. 1.

(*c*) To the extent of fine, imprisonment, and pillory, and finding sureties for good behavior for life: 1 East P. C. c. 10, s. 4, p. 441. The punishment of the pillory could not now be imposed for such offence, in consequence of the 56 Geo. 3. c. 138; and with respect to sureties for good behavior for life, it is observed, that such part of the sentence is not consonant to the practice of our present constitution in the apportionment of discretionary punishment; as tending to imprisonment for life: East P. C. *Ibid*.

(*d*) Rex v. Harmwood, *cor.* Buller, J., Winchester Spr. Ass. 1787; 1 East P. C. c. 8, s. 5, p. 411, and c. 16, s. 3, p. 440. *Ante*, p. 915; Reg. v. Nicholls, 2 Cox C. C. 182, s. p.

(*e*) Rex v. Lloyd, 7 C. & P. 318 (32 E. C. L. R.), Patteson, J.

(*f*) *Ibid*.

(*g*) Per Hullock, B., 1 Lewin 16.

for a common assault; for to support that count such an assault must be proved as could not be justified if an action were brought for it, and leave and license pleaded. *(h)*

An indictment may contain two counts for two different attempts to commit a rape on the same female, and evidence of both may be given on the trial. *(i)* And where one count charged the prisoner with an attempt to commit a rape, and another count charged him with an assault, and the record stated that the jury found him "guilty of the misdemeanor and offence in the said indictment specified," and it was adjudged that "for the said misdemeanor," he shall be imprisoned for two years and kept to hard labor; it was held, upon error, that the word "misdemeanor" was *nomen collectivum*, and therefore the finding of the jury was in effect that the prisoner was guilty of the whole matter charged by the indictment, and consequently the judgment was warranted by the verdict. *(k)*

By the 24 and 25 Vict. c. 100, s. 38, in case of assault with *intent to commit a rape, and by sec. 52, *(l)* in case of any indecent assault on any female, the Court may sentence the offender to be imprisoned, for any term not exceeding two years, with or without hard labor, and may also (if it shall so think fit), by sec. 71, *(m)* fine the offender, and require him to find sureties for keeping the peace.

Assaults by taking indecent liberties with females, though without actual force or violence, will be mentioned in a subsequent chapter. *(n)*

Sec. II.—Of the unlawful Carnal Knowledge of Female Children.

In rape, as we have seen, the carnal knowledge must be *against the will* of the party; but, by the 18 Eliz. c. 7, carnal knowledge of any woman-child under the age of ten years, was made felony without benefit of clergy; and this without any reference to the consent or non-consent of the child, which was therefore considered as immaterial.

It appears at one time to have been thought, that the carnal knowledge of a child above the age of ten and under twelve years was rape, though she consented: twelve years being the age of consent in a female, and the statute Westm. 1, c. 13, which enacted, "That none do ravish any maiden *within age*, neither by her own consent nor without," being admitted to refer, by the words "within age," to the age of twelve years. *(o)* It was, however, afterwards well established, that if the child was above ten years old it was not a rape, unless it was against her consent. *(p)* But children above that age, and under twelve, were within the protection of the statute of Westm. 1, c. 13, the law with respect to the carnal knowledge of such children not having been altered by either of the subsequent statutes of Westm. 2, c. 34, or 18 Eliz. c. 7. The statute Westm. 1, c. 13, made the deflowering a child above ten years old, and under twelve, though with her own consent, a misdemeanor punishable by two years' imprisonment, and fine at the King's pleasure. *(q)*

These statutes, and the 9 Geo. 4, c. 31, are now repealed; and by the 24 and 25 Vict., c. 100, s. 50, "whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor." *(r)*

(h) Reg. v. Meredith, 8 C. & P. 589 (34 E. C. L. R.), Lord Abinger, C. B.

(i) Reg. v. Davies, 5 Cox C. C. 328.

(k) Rex v. Powell, 2 B. & Ad. 75 (22 E. C. L. R.), Taunton, J., thought the two counts only charged one assault.

(l) *Post*, p. 930.

(m) *Ante*, p. 900.

(n) *Post*, chap. x. s. 1.

(o) 1 Hale 631; 2 Inst. 180; 3 Inst. 60.

(p) Sum. 112; 4 Blac. Com. 212; 1 East P. C. c. 10, s. 2, p. 436.

(q) 4 Blac. Com. 212; 1 East P. C. c. 10, s. 2, p. 436.

(r) This clause is taken from the 9 Geo. 4, c. 31, s. 17; 10 Geo. 4, c. 34, s. 20 (1.), and 4 & 5 Vict. c. 56, s. 3. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 891. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900.

*Sec. 51. "Whosoever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years shall [*930 be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."(*s*)

Sec. 52. "Whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor."(*t*)

Upon an indictment on either sec. 50 or sec. 51, the prisoner may, under the 14 & 15 Vict. c. 100, s. 9, be convicted of an attempt to commit the offence with which he is charged.(*u*)

It was said, that an indictment on the 18 Eliz. c. 7, for deflowering a child under ten years of age, ought to conclude "against the form of the statute," because the crime, as well as the punishment, was created by that statute.(*v*) And that, on the same account, it was necessary for the indictment to pursue the words of the Act, and charge that the defendant feloniously, unlawfully and carnally, knew and abused the party, being under the age of ten years, without adding the word *ravished*.(*w*) These observations seem equally applicable to an indictment on the present statute.

Clear and distinct evidence ought to be given that the child is under ten years of age. Thus, where the offence of carnally knowing a child under ten years of age was charged to have been committed on the 5th of February 1832, and the only evidence of the age of the child was given by the father, who stated that in February 1822, he went from home for a few days, and that his wife had not then been confined, and that on his return on the 9th of the same month, he found the child had been born, and he was told by his wife's mother that it had been born the day before; the grandmother was alive at the time of the trial, but the mother was dead. It was held that the evidence was not sufficient, and that the grandmother ought to have been called, for in a matter of so much importance the best evidence ought to be adduced.(*x*) So, on a similar indictment, evidence by the child herself that she was ten years old on a particular day, her mother being ill at home, and her father being unable to state the precise time of her birth, has been held insufficient.(*y*) But where on an indictment for carnally knowing a child under ten years of age the mother stated that she had never kept any account of the child's [*931 age, but that her knowledge of it was *derived from hearing her husband speak of it, and from conversation with him and the child, and that it had been usual to keep the birthday of the child on the 7th of February, and there was no other evidence of the age; it was objected that more certain evidence of the age ought to have been produced, and *Reg. v. Wedge*(*z*) was relied upon; Coltman, J., however, observed, "that the evidence in that case was mere hearsay; but this evidence went much farther, and must be submitted to the jury as some evidence, though open to observation, as to the child's age."(*a*)

A boy under fourteen years of age cannot be convicted of this offence, and evidence is not admissible to prove that he has arrived at the full stage of puberty.(*b*)

(*s*) This clause is taken from the 9 Geo. 4, c. 31, s. 17; 10 Geo. 4, c. 34, s. 20 (I.), and 5 Vict. Sess. 2, c. 28, s. 14 (I.). As to counsellors and abettors, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900.

(*t*) This clause is taken from the 14 and 15 Vict. c. 100, s. 29. As to hard labor, &c., see *ante*, p. 900. As to fine and sureties under this and the preceding section, see *ante*, p. 900. The Act extends to Ireland, but not to Scotland.

(*u*) See the section, *ante*, p. 1.

(*v*) *East P. C. c. 10, s. 10, p. 448.*

(*w*) *Id. Ibid.*

(*x*) *Reg. v. Wedge*, 5 C. & P. 298 (24 E. C. L. R.), MS., C. S. G. Taunton and Little-dale, JJ.

(*y*) *Reg. v. Day*, 9 C. & P. 722 (38 E. C. L. R.), Coleridge, J.

(*z*) *Supra.*

(*a*) *Reg. v. Hayes*, 2 Cox C. C. 226.

(*b*) *Reg. v. Jordan*, 9 C. & P. 118 (38 E. C. L. R.), Williams, J.

Upon prosecutions for this offence, it is an important consideration how far the child, upon whom the injury has been committed, is a competent witness. In former times, the competency appears to have been made to depend upon the age of the child: and when the rule prevailed that no children could be admitted as witnesses under the age of nine years, and a very few under ten, *(c)* the testimony of the injured child must have been for the most part excluded. A more reasonable rule has, however, been since adopted; and it appears now to be well established, that a child of any age, if capable of distinguishing between good and evil, may be examined upon oath: but that, whatever may be its age, it cannot be examined unless sworn. *(d)* By such capability of distinguishing between good and evil, must be understood a belief in God, or in a future state of rewards and punishments: from which the Court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood. *(e)*

It appears to have been allowed, that the fact of the child's having complained of the injury recently after it was received, is confirmatory evidence: *(f)* but where the child is not fit to be sworn, it is clear that any account which it may have given to others ought not to be received *(g)*. Thus, on an indictment for a rape on a child of five years of age, where the child was not examined, but an account of what she had told her mother about three weeks after the transaction was given in evidence by the mother; and the jury convicted the prisoner principally, as was supposed, on that evidence; the Judges, on a case reserved, thought the evidence clearly inadmissible; and the prisoner was accordingly pardoned. *(h)*

In all cases of this kind, it is undoubtedly much to be wished that, in order to render the evidence of the child credible, there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of *an infant under years of discretion. *(i)* But no general rule can be laid down on the subject; and as the prisoner may be legally convicted on such evidence, alone and unsupported, the degree of corroboration which the account given by the witness requires is a question exclusively for the jury, from all the circumstances of the case, and especially from the manner in which the child has given its evidence. That evidence may be such as to leave no reasonable doubt of the prisoner's guilt, although it stands unsupported by other witnesses. *(k)*

Where a criminal prosecution was coming on to be tried, and the learned Judge found that the principal witness was a female infant, wholly incompetent to take an oath, he postponed the trial till the following assizes; and ordered the child to be instructed in the meantime, by a clergyman, in the principles of her duty, and the nature and obligation of an oath. *(l)* And at the next assizes the prisoner was put upon his trial, and the infant being found by the Court on examination to have a proper sense of the nature of an oath, was sworn; and the prisoner was convicted upon her testimony, and executed. *(m)* And where a bill was preferred against a prisoner for carnally knowing a girl under ten years of age, and the girl, being examined by Erle, J., before going before the grand jury, appeared to have no notion of religious or moral duties, and therefore was not sworn, and the bill was ignored

(c) *Rex v. Travers*, 1 Str. 700; *Rex v. Dannel*, 1 East P. C. c. 10, s. 5, p. 442; 1 Hale 302; 2 Hale 278.

(d) *Brazier's case*, Reading Spring Ass. 1779; 1 East P. C. c. 10, s. 5, pp. 443, 444; 1 Leach 199, s. c.; *Powell's case*, 1 Leach 110; Bull. N. P. 293; 4 Blac. Com. 214; Anon., Dy. 304 *a*. See per Alderson, B., *Reg v. Perkins*, 2 Moo. C. C. R. 135.

(e) *White's case*, 1 Leach 430, 431, and the cases cited, *Id.* 431, note *(a)*, and see *post*, Book on Evidence.

(f) *Brazier's case*, *ante*, note *(d)*.

(g) 1 Phil. on Evid. 6. See *Reg v. Guttridge*, *ante*, p. 925, note *(i)*.

(h) *Rex v. Tucker*, 1808; 1 Phil. on Evid. 6.

(i) 4 Blac. Com. 214.

(k) 1 Phil. on Evid. 7.

(l) Anon., *cor. Rooke, J.*, at Gloucester, Mr. J. Rooke mentioned the case on a trial at the Old Bailey, in 1795; and added, that upon a conference with the other Judges, on his return from the circuit, they unanimously approved of what he had done. See note *(a)* to *White's case*, 1 Leach 430, and 2 Bac. Abr. 577 in the notes.

(m) *Id.* *Id.*

in consequence; Erle, J., on the authority of the preceding case, directed the prisoner to be detained till the next assizes, and that the girl in the meantime should be duly instructed.⁽ⁿ⁾ But where it appeared that the material witness, though an adult, and of sufficient intellect, had no idea of a future state of rewards and punishments, and the learned Judge had on that account stopped the case, and discharged the jury, in order that the witness might have an opportunity of being instructed upon that subject, before the next assizes; the Judges were of opinion, that the discharge of the jury was improper, and that an acquittal should have been directed.^(o)

Where it appeared on an indictment for abusing a child under ten years of age that the child was only six years of age, and wholly unacquainted with the nature of an oath, Pollock, C. B., refused to postpone the trial in order that the child might be instructed, observing: "I think the safety of public justice would be endangered by the postponement of a trial till a child is taught as to the obligation of an oath. More would probably be lost in memory than would be gained in any other way. Still, I *can easily conceive that there may be cases where the intellect of [933 the child is much more ripened, as in the cases of children of nine, ten, or twelve years old, for example, where their education has been so utterly neglected that they are wholly ignorant on religious subjects. In those cases a postponement of the trial may be very proper; but where the infirmity arises from no neglect, but from the child being too young to have been taught, I doubt whether the loss in point of memory would not more than countervail the gain in point of religious education. I lay down no general rule, as there may be cases where a postponement would be proper."^(p)

Upon an indictment, the first count of which charged the prisoner with carnally knowing and abusing a girl above ten and under twelve years of age; and the second count with an assault with intent carnally to know and abuse, and the third count with a common assault: the jury negatived the first count, as there was no proof of penetration: it was contended for the prisoner, that supposing the fact to have been done by the consent of the prosecutrix, no conviction could take place on the second and third counts. The jury found that the prosecutrix had consented, and Alderson, B., directed a verdict of guilty, on the ground that the prosecutrix was by law incapable of giving her consent to what would be a misdemeanor by statute; but, upon a case reserved, all the Judges thought that the proper charge was of a misdemeanor in attempting to commit a statutable offence, and that the conviction was wrong.^(q) "The ground on which the Judges went in the preceding case was, that although a child between ten and twelve cannot by law consent to have connection, so as to make that connection no offence, yet, where the essence of the offence charged is an assault (and there can be in law no assault, unless it be against consent), this attempt, though a criminal offence, is not an assault; and the indictment must be for an attempt to commit a felony, if the child is under ten years old, and for an attempt to commit a misdemeanor, if the child is between the ages of ten and twelve; for it is perfectly clear that every attempt (not every intention, but every attempt) to commit a misdemeanor is a misdemeanor."^(r)

Where on an indictment containing a count for an assault with intent to commit a rape, and a count for a common assault, the first count was abandoned, there having been so much delay in the disclosure of the transaction that it could not be contended that the child had not consented; but as she was between the ages of

(n) *Reg. v. Baylis*, 4 Cox C. C. 23. In *Rex v. Williams*, 7 C. & P. 320 (32 E. C. L. R.), where on a trial for murder, a child of eight years of age had been visited twice by a clergyman, who had given her some instruction as to the nature of an oath; Patteson, J., said, "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions, confined to the nature of an oath, and communicated to her for the purposes of this trial."

(o) *Rex v. Wade*, R. & M. C. C. 86.

(p) *Reg. v. Nicholas*, 2 C. & K. 246 (61 E. C. L. R.).

(q) *Reg. v. Martin*, 2 Moo. C. C. R. 123; s. c., 9 C. & P. 213 (38 E. C. L. R.).

(r) Per Patteson, J., *Reg. v. Martin*, 9 C. & P. 215 (38 E. C. L. R.).

ten and twelve, it was proposed to go upon the second count only, as it was a misdemeanor to carnally know and abuse a child between those ages, and an imposition of hands for the purpose of committing that misdemeanor was contended to be an assault; it was held that the prisoner must be acquitted, for to support a charge of assault it must be proved that there was such an assault, as could not be justified if an action were brought, and leave and license pleaded.(s)

*934] *The prisoners, who were all under fourteen years of age, were indicted for a common assault upon a girl nine years of age. The prisoners and the girl went into a hay-loft, where each of the prisoners had connection with the girl. When the boys first began to take liberties, the girl showed some unwillingness, but eventually she ceased to offer any opposition, and apparently assented. The verdict was "Guilty, the child being an assenting party, but that from her tender age she did not know what she was about." And a case was reserved upon the question whether, under the peculiar circumstances of the case, the girl, being of the age of nine years only, actually did give, or was competent to give, such assent to the act in question, as to invalidate the conviction of a common assault; and the Judges were unanimously of opinion that the conviction was wrong, as it had been solemnly decided(t) that if the girl assents it is not an assault, and here the jury have found that the girl gave her assent. The Judges could not tell whether that were really so or not; but they must take the verdict as they found it.(u)

Where on a trial for carnally knowing a child under ten years of age, the child was too young to be examined, but a surgeon proved marks of violence which might have been inflicted by any foreign substance, and it was submitted that the prisoner might be convicted of an assault, as the consent of the child could not be presumed, by reason of its tender age; Patteson, J., said: "That is a mistake of the law. My experience has shown me that children of very tender age may have vicious propensities. A child under ten years of age cannot give consent to any criminal intercourse, so as to deprive that intercourse of criminality; but she can give such consent as to render the attempt no assault. We know that a child can consent to that which, without such consent, would constitute an assault."(v)

Where the jury convicted the defendant on a count, which alleged that he unlawfully and indecently did make an assault upon a girl, who appeared to be between ten and twelve years of age at the time, and the jury found that the girl consented to the acts with which the defendant was charged; it was held, on a case reserved, that the conviction could not be supported, as the having connection with a girl of that age was not an offence at common law; and *Reg. v. Martin, &c.*, were considered as binding authorities.(vv)

There is a great difference between consent and submission, especially in the case of a girl of tender years, when in the power of a strong man, and mere submission in such a case by no means shows such a consent as will justify in point of law. Upon an indictment for attempting to abuse a child under the age of ten, containing a count for a common assault, no proof was given of the child being under ten years of age, but it appeared that the prisoner made an attempt on her, without any violence on his part, or actual resistance on hers, and it was contended that as she offered no resistance, it must be taken that she consented, and therefore the prisoner must be acquitted. Coleridge, J.: "There is a difference between consent and submission; every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say, that an adult submitting quietly to an outrage of this description, was not consenting; on the other hand, the mere submission of a child, when in the power of a strong man, *935] a *consent as will justify the prisoner in point of law. You will therefore

(s) *Reg. v. Meredith*, 8 C. & P. 589 (34 E. C. L. R.), Lord Abinger, C. B.

(t) *Reg. v. Martin*, *supra*, note (q).

(u) *Reg. v. Read*, 1 Den. C. C. 377. Lord Denman, C. J., "The case is not satisfactorily stated; we are asked to determine whether this girl *"actually did give such assent as to invalidate the conviction."* How can we determine that? It was one of the questions for the jury."

(v) *Reg. v. Cockburn*, 3 Cox C. C. 543.

(vv) *Reg. v. Johnson*, 10 Cox C. C. 114; L. & C. 632.

say whether the submission of the prosecutrix was voluntary on her part, or the result of fear under the circumstances in which she was placed. If you are of the latter opinion, you will find the prisoner guilty on the second count of the indictment."^(w)

We have seen that where a prisoner is indicted for a misdemeanor, and the evidence proves that he was guilty of a felony, he is not on that account to be acquitted.^(x) But where upon an indictment for having carnal knowledge of a girl above the age of ten years and under the age of twelve years, it appeared that in fact the girl was under the age of ten years; Maule, J., held that this was not a case falling within the 14 & 15 Vict. c. 100, s. 12, as that section only applied to cases of merger; *e. g.* the case of false pretences, where the facts proved that the false pretences had been effected by a forgery. In such a case under this section, a prisoner might, nevertheless, be convicted. But that section only applied to cases where the indictment was proved by facts amounting to a felony. The words in this indictment "being above the age of ten years and under the age of twelve years," were material, constituting the misdemeanor charged, and they had not been proved.^(y)

It had been held before that enactment, that where a prisoner was indicted for carnally knowing a girl between ten and twelve years of age, and it was proved that he had committed a rape upon her, he was not thereby entitled to be acquitted.^(z)

Upon an indictment for having carnal knowledge of a girl between ten and twelve years of age, it appeared that in fact she was under ten years of age; and Maule, J., held that the indictment could not be amended under the 14 & 15 Vict. c. 100, s. 1, as the words were matter of substance.^(a)

On an indictment for an assault with intent to abuse and carnally know, the defendant may be found guilty of the intent to abuse only.^(b)

Where an indictment in the first count charged the prisoner with having assaulted E. R., "an infant above the age of ten and under the age of twelve years," with intent to carnally know and abuse her, and in the second count charged that the prisoner unlawfully did put and place the private parts of him against the private parts of the said E. R., and did thereby then and there unlawfully attempt and endeavor to carnally know and abuse the said E. R.; it was held that the second count was bad, because it did not aver that the said E. R. was between the ages of ten and twelve, and that the word "said" did not help it, as it did not incorporate the description of E. R. contained in the first count; but that if the second count had contained the words, "the said *E. R. then and there being above the age of ten years, and under the age of twelve years," it would have been sufficient.^(c) [*936

By the 4 & 5 Vict. c. 56, s. 6, the crime of carnally knowing and abusing any girl under the age of ten years shall not "be tried or triable before any justices of the peace at any general or quarter sessions of the peace."

Sec. III.—Of procuring the Defilement of Girls under Age.

THE 12 & 13 Vict. c. 76, first provided for the offence of procuring the defilement of young women; but that Act is repealed; and by the 24 & 25 Vict. c. 100, s. 49, "whosoever shall by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of twenty-one years, to have illicit

(w) *Reg. v. Day*, 9 C. & P. 722 (38 E. C. L. R.), Coleridge, J.

(x) See the 14 & 15 Vict. c. 100, s. 12, *ante*, p. 928.

(y) *Reg. v. Shott*, 3 C. & K. 206.

(z) *Reg. v. Neale*, 1 Den. C. C. 36.

(a) *Reg. v. Shott*, 3 C. & K. 206. It is clear that that section gives no power to alter any part of the indictment, except those affected by the variance. If, therefore, the alteration in the statement of the age had been made, the indictment would have been bad on the face of it for want of the word "feloniously," which there is no power to insert. The 14 & 15 Vict. c. 100, s. 1, will be found in *Evidence*.

(b) *Rex v. Dawson*, 3 Stark. N. P. C. 62 (3 E. C. L. R.).

(c) *Reg. v. Martin*, 9 C. & P. 215 (38 E. C. L. R.), Patteson, J. See *Rex v. Cheere*, 4 B. & C. 902 (10 E. C. L. R.); 7 D. & R. 461, that the word "said" does not incorporate a previous description. See *Reg. v. Waters*, 1 Den. C. C. 356.

carnal connection with any man, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor."(*d*)

On the trial of an indictment under this section, the prisoner may be convicted of an attempt to commit the offence, and punished accordingly.(*e*)

Since the passing of the 12 & 13 Vict. c. 76, it has been held that a conspiracy by false pretences to procure a female under the age of twenty-one years to have illicit carnal connection with a man, is an indictable misdemeanor at common law.(*f*)

*937]

*CHAPTER THE SIXTH.

OF SODOMY.

IN treating of the offence of sodomy, *peccatum, illud horribile, inter Christianos non nominandum*, it is not intended to depart from the reserved and concise mode of statement which has been adopted by other writers.¹

It appears from different authors, that in ancient times the punishment of this offence was death :(*a*) but it had ceased to be so highly penal, when the 25 Hen. 8, c. 6, again made it a capital offence. But this Act and the 9 Geo. 4. c. 31. are repealed, and by the 24 & 25 Vict. c. 100, s. 61 : "Whosoever shall be convicted of the abominable crime of buggery, committed either with mankind or with any animal, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than ten years."(*b*)

Sec. 62. "Whosoever shall attempt to commit the said abominable crime, or shall be guilty of any assault with intent to commit the same, or any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."(*c*)

The offence consists in a carnal knowledge committed against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with beast.(*d*) With respect to the carnal knowledge neces-

(*d*) This clause is taken from the 12 & 13 Vict. c. 76, s. 1. As to aiders and abettors, see sec. 67, *ante*, p. 881. As to hard labor, see *ante*, p. 900.

(*e*) See the 14 & 15 Vict. c. 100, s. 9, *ante*, p. 1.

(*f*) *Reg. v. Mears*, 2 Den. C. C. 79. The first counts were framed on the 12 & 13 Vict. c. 76, but no opinion was expressed as to them. *Rex v. Delaval*, 3 Burr. 1434, was referred to by the Court. See this and other cases, *post*, *Conspiracy*.

(*a*) But the books differ as to the mode of punishment. According to Britton, a sodomite was to be burnt: Britt. lib. 6, c. 9. In Fleta it is said, *peccantes et sodomites in terrâ vivi confodiantur*. With this the Mirror agrees; but adds, "*issiant que memoire seint restraine, pur le grand abomination del fait*:" thereby consigning them, with just indignation to shameful and eternal oblivion: *Mirr.* c. 4, s. 14. About the time of Richard the First, the practice was to hang a man, and drown a woman, guilty of this offence: 3 Inst. 58.

(*b*) This clause is taken from the 9 Geo. 4, c. 31, s. 15, and 10 Geo. 4, c. 34, s. 18 (1.); but the punishment is mitigated. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881.

(*c*) This clause is new, except the part in common type, which is from the 14 & 15 Vict. c. 100, s. 29. As to aiders and abettors in these offences, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. This Act extends to Ireland, but not to Scotland.

(*d*) 1 Hale 669; Sum. 117; 3 Inst. 58, 59; 1 Hawk. P. C. c. 4; 6 Bac. Abr. tit. *Sodomy*; 3 Blac. Com. 215; 3 Burn. Jus. tit. *Buggery*; 1 East P. C. c. 14, s. 1, p. 480; Wiseman's case, Fortesc. 91. As to the offence by man with woman, if the case should occur, it may be proper to inquire whether the doctrine in the text is sufficiently supported by the authorities cited.

¹ Fennell v. State, 32 Texas 378.

sary to constitute this offence, as it is the same that is required in the case of rape, it will be sufficient to refer to the preceding chapter.(e)

In this offence as well as in rape, it has been held, since the 9 Geo. 4, c. 31, that the crime is complete on proof of penetration, and even if emission be expressly negatived.(f)

*To constitute this offence, the act must be in that part where sodomy is usually committed. The act in a child's mouth, does not constitute the offence.(g) An unnatural connection with an animal of the fowl kind is not sodomy, a fowl not coming under the term "beast;" and it was agreed clearly not to be sodomy, when the fowl was so small that its private parts would not admit those of a man, and were torn away in the attempt.(h)

Those who are present, aiding and abetting in this offence, are all principals;(i) but if the party on whom the offence is committed be within the age of discretion, namely, under fourteen,(k) it is not felony in him, but only in the agent (l) But where one count charged the prisoner with committing an unnatural crime on J. Wood, and another count charged the prisoner with permitting the said J. Wood to commit an unnatural crime with him, and the facts were that the prisoner induced J. Wood, a boy of twelve years of age, to have carnal knowledge of his person, the prisoner having been the pathic in the crime, and the jury found the prisoner guilty, the Judges, upon a case reserved, were unanimously of opinion that the conviction was right.(m) There may be accessories before and after in this offence, and the statute provides for such accessories.(n)

The indictment must charge that the offender *contra naturam ordinem rem habuit veneream, et carnaliter cognovit*.(o) But it is said, that this alone would not be sufficient; and that, as the statute describes the offence by the term "buggery," the indictment should also charge *peccatumque illud sodomiticum Anglicè dictum buggery autem et ibidem nequitè, felonice, diabolicè, ac contra naturam, commisit, ac perpetravit*.(p)

Where an indictment alleged that the prisoner did attempt to commit an unnatural crime with "a certain animal called a bitch;" it was objected that the description was too uncertain, as it might apply to a bitch fox, a bitch otter, or the bitch of some other animal; but Tindal, C. J., held that the description was sufficient (q)

That which has been before stated with regard to the evidence and manner of proof in cases of rape, ought especially to be observed upon a trial for this still more heinous offence. When strictly and impartially proved, the offence well merits strict and impartial punishment; but it is from its nature so easily charged, and the negative so difficult to be proved, that the accusation ought clearly to be made out. The evidence should be plain and satisfactory, in proportion as the crime is detestable.(r)

Where on an indictment for bestiality the offence was alleged to have been committed on the 17th of December 1842, but no complaint was made to the justices until October 1844, and the *first witness being asked why he did not mention the offence until so long a time had elapsed, said he did so, but it was not to a magistrate, and there was no confession, and nothing offered by the counsel for the prosecution to explain the delay; Alderson, B., told the jury, "I ought not to allow this case to go further. It is monstrous to put a man on his trial after such a lapse of time. How can he account for his conduct so far back? If you

(e) *Ante*, p. 916, *et seq.*

(f) *Rex v. Recksepar*, R. & M. C. C. R. 342; *Rex v. Cozins*, 6 C. & P. 351 (25 E. C. L. R.). *Park, J.* See *Rex v. Cox*, R. & M. C. C. R. 337, *ante*, p. 917.

(g) *Rex v. Jacobs*, R. & M. 331.

(h) *Rex v. Miltreaty*, Hil. T. 1812, MS., Bayley, J.

(i) 1 Hale, 670; 3 Inst. 59; Fost. 422, 423.

(k) *Ante*, p. 8.

(l) 1 Hale 670; 3 Inst. 59; 1 East P. C. c. 14, s. 2.

(m) *Reg. v. Allen*, 1 Den. C. C. 364.

(n) See 1 Hale 670; Fost. 422, 423.

(o) 1 Hawk. P. C. c. 4, s. 2; 3 Inst. 58, 59.

(p) Fost. 424, referring to Co. Ent. 351 *b.* as a precedent settled by great advice.

(q) *Reg. v. Allen*, 1 C. & K. 495 (47 E. C. L. R.).

(r) 4 Blac. Com. 215, *ante*, p. 926.

accuse a man of a crime the next day, he may be enabled to bring forward his servants and family to say where he was and what he was about at the time; but if the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe if such a prosecution were permitted. It would be very unjust to put him on his trial."^(s)

A party consenting to the commission of an offence of this kind, whether man or woman, is an accomplice, and requires confirmation. On the trial of an indictment for an unnatural offence by a man upon his own wife, she swore that she resisted as much as she could. Patteson, J., said, "There was a case of this kind which I had the misfortune to try, and it there appeared that the wife consented. If that had been so here the prisoner must have been acquitted; for although consent or non-consent is not material to the offence, yet as the wife, if she consented, would be an accomplice, she would require confirmation; and so it would be with a party consenting to an offence of this kind, whether man or woman."^(t)

Upon an indictment for an unnatural crime, the prisoner may be convicted, under the 14 & 15 Vict. c. 100, s. 9, of an attempt to commit the same, and thereupon punished in the same manner as if he had been convicted upon an indictment for such attempt.^(u)

It is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him; therefore, in a prosecution for an infamous crime, an admission by the prisoner, that he had committed such an offence at another time, and with another person, and that his natural inclination was towards such practices, ought not to be received in evidence.^(v)

In cases where it is not probable that all the circumstances necessary to constitute this offence will be proved, it may be advisable only to prefer an indictment for an assault with intent to commit an unnatural crime. And it should be observed, that the mere soliciting another to the commission of this crime has been treated as an indictable offence.^(w)

*940]

*CHAPTER THE SEVENTH.

OF THE FORCIBLE ABDUCTION AND UNLAWFUL TAKING AWAY OF FEMALES; AND OF CLANDESTINE MARRIAGES.

It appears to be the better opinion, that if a man marry a woman under age, without the consent of her father or guardian, it will not be an indictable offence at common law.^(a) But if children be taken from their parents or guardians, or others intrusted with the care of them, by any sinister means, either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication, for the purpose of marrying them, it appears that such criminal means will render the act an offence at common law, though the parties themselves may be consenting to the marriage.^(b) And *seduction* may be attended with such circumstances of combination and conspiracy as to make it an indictable offence. A case is reported where

(s) Reg. v. Robins, 1 Cox C. C. 114.

(t) Reg. v. Jellyman, 8 C. & P. 604 (34 E. C. L. R.). Perhaps it may be doubtful whether a wife, who consented, would be a competent witness against her husband. The cases, in which she has been held competent as a witness against him in criminal proceedings, are cases of injuries inflicted upon her against her consent. C. S. G.

(u) See the section, *ante*, p. 1.

(v) Rex v. Cole, Buckingham Sum. Ass. 1810, and by all the Judges, M. T. following. MS., C. C. R. 1; 1 Phil. Evid. 499.

(w) See a precedent of an indictment for such solicitation: 2 Chit. Crim. L. 50. And for the principles and cases upon which such an indictment may be supported, see *ante*, p. 80, *et seq.*

(a) 1 East P. C. c. 11, s. 9, p. 458.

(b) *Id.* *Ibid.* p. 459. And see in 3 Chit. Crim. L. 713, a precedent of an information for a misdemeanor, in procuring a marriage with a minor, by false allegations.

Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried, within the age of eighteen years, one of the daughters of the Earl of Berkeley (she being under the custody, &c., of her father), and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him; and further, the defendants were charged that, in prosecution of such conspiracy, they took away the Lady Henrietta at night from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey, to the ruin of the lady, &c. The defendants were found guilty, though there was no proof of any force; but on the contrary it appeared that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure, and subsequent concealment. It was not shown that any artifice was used to prevail on her to leave her father's house; but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his control.^(c)

The former statutes on this subject are repealed, and by the 24 & 25 Vict. c. 100, s. 53, "Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, *or shall be a presumptive heiress or coheiress or presumptive next of kin, or one of the presumptive next of kin, to any one having such [941 interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person; and whosoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor; and whosoever shall be convicted of any offence against this section shall be incapable of taking any estate or interest, legal or equitable, in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, coheiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the Attorney-General appoint."^(d)

Sec. 54. "Whosoever shall, by force, take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and

(c) *Rex v. Lord Grey*, 3 St. Tri. 519; 1 East P. C. c. 11, s. 10, p. 460.

(d) By the first part of this clause, the 9 Geo. 4, c. 31, s. 19, is extended to Ireland, and by the second part the 10 Geo. 4, c. 34, s. 23 (l.), is extended to England. The words in *italics* in the first branch of the clause were introduced to avoid a doubt which might have been raised, whether the cases they expressly include were within the former enactments. In the second branch, the age of twenty-one is substituted for eighteen in the 10 Geo. 4, c. 34, s. 23 (l.). Under the 10 Geo. 4, c. 34, s. 23 (l.), the girl must have been married or defiled, and by the person taking her away. The clause is so altered as to make it correspond with the 9 Geo. 4, c. 34, s. 19, in both respects. The last part of the clause is framed on the 10 Geo. 4, c. 34, s. 23 (l.), and extended to England. It is enlarged so as to embrace property that may come to the woman after the marriage; and the Court of Chancery is empowered to settle the property in such manner as it deems fit, instead of its being vested in trustees for the separate use of the wife alone, which was all that the 10 Geo. 4, c. 34, s. 23 (l.) directed. The court, therefore, may, in its discretion, settle the property on the issue of the marriage, and in default of such issue, on any relatives of the wife. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900.

being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor.”(e)

It was made a question of considerable doubt, whether persons “receiving wittingly the woman so taken against her will, and *knowing the same,” were *942] ousted of clergy by the statute of Elizabeth, when that statute was in existence.(f) But it was agreed that those who received *the offender*, knowingly, were only accessories after the fact, according to the rule of the common law.(g) With respect to those who were only privy to the marriage, but in no way parties or consenting to the forcible taking away, it was holden that they were not within the statute.(h)

Where the woman had nothing, and was not heir apparent, the case was not within the statute.(i) Thus where a man, worth £5000, in lands and goods, had a son and daughter, and the daughter was enticed from his house, forced into the country, and there married; a bill being exhibited against the husband for this conduct, it was referred to the Chief Justice and Hobart, whether this was within the statute, and so not examinable in the Star Chamber; and, on conference with all the Judges, they held that it was not within the statute; because the daughter had no substance of her own, and was not heir apparent, and it was only to women having substance of their own, or being heirs apparent, that the statute applied.(k)

It was no sort of excuse that the woman was at first taken away with her own consent, if she afterwards refused to continue with the offender, and was forced against her will; for till the time when the force was put upon her, she was in her own power; and she might from that time as properly be said to be taken against her will, as if she had never given any consent.(l) Getting a woman inveigled out by confederates, and then detaining and taking her away, was a taking within the statute. Thus, where a confederate of the prisoner's inveigled a girl of fourteen, having a portion of £5000, to go with her and a maid servant in a coach into the Park, where the prisoner got into the coach, and the two women got out; and the prisoner detained the girl while the coach took them to his lodgings in the Strand; and the next morning he prevailed upon her (having threatened to carry her beyond sea if she refused) to marry him, and (though he was apprehended on the same day) there was evidence that she was deflowered; the prisoner was convicted and executed.(m) The taking alone did not constitute the offence under the repealed statute, and it was necessary that the woman taken away should have been married or defiled by the misdoer, or by some other, with his consent. Where, therefore, an heiress was fraudulently taken away against her will in England, but the marriage took place in Scotland, an indictment upon the repealed statute could not be supported.(n) But the new enactment makes the taking away or detaining a *943] woman, *with intent to marry or carnally know *her*, a complete offence. And under the 3 Hen. 7, c. 2, it was decided, that if the woman were under force at the time of taking, it was not at all material whether she were ultimately married or defiled with her own consent or not; on the ground that an offender should not be considered as exempted from the provisions of the statute, by having

(e) This clause is new in England, and was taken from the 10 Geo. 4, c. 34, s. 22 (I.), and 5 Vict. Sess. 2, c. 28, s. 15 (I.). It provides a very proper protection to women who happen to have neither any present nor future interest in any property. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to sureties, see *ante*, p. 900. As to hard labor, &c., see *ante*, p. 900. The Act extends to Ireland, but not to Scotland.

(f) 1 Hale 661; 1 East P. C. c. 11, s. 2, pp. 452, 453.

(g) 1 Hale 661; 1 Hawk. P. C. c. 41, s. 9; 3 Inst. 61; St. P. C. 44; 1 East P. C. c. 11, s. 2, pp. 452, 453.

(h) Fulwood's case, Cro. Car. 488, 489; 1 Hawk. P. C. c. 41, s. 10.

(i) 12 Co. 100.

(k) Burton v. Morris, Hob. 182, and see Cro. Car. 485.

(l) 1 Hawk. P. C. c. 41, s. 7; Cro. Car. 485.

(m) Rex v. Brown, 1 Vent. 243.

(n) Wakefield's case, 2 Lew. 1. The parties were convicted of a conspiracy to commit a violation of the repealed statutes: 3 Hen. 7, c. 2, and 4 & 5 P. & M. c. 8.

prevailed over the weakness of a woman, whom he got into his power by such base means.^(o) And it was also decided that a marriage would be sufficient to constitute the offence, though the woman was in such fear at the time that she knew not what she did. Sarah Cox, an orphan, having £1300, was forced from her house at Islington into Surrey, and there married. The indictment against the two men who carried her away, and one of whom married her, was in Surrey, and the taking was alleged there. She was examined as a witness, and swore that when she was married she was in such fear that she did not know what she said or did. It was urged, that the taking being in Middlesex, the indictment should not have been in Surrey, no force having been proved there; but the Court said it was a continuing force into Surrey; and therefore a forcible caption there. Then it was said that the marriage was null, because the woman did not know what she said or did; but the Court held, that though this might avoid the marriage, yet it was a marriage *de facto*, and sufficient within the statute. Further it was urged, that an intent to marry or defile was not alleged in the indictment, but the Court said it was not necessary.^(p)

Upon the 3 Hen. 7, c. 2, where a woman was taken away forcibly in one county, and afterwards went voluntarily into another county, and was there married or defiled, with her own consent, it was holden that the fact was not indictable in either county; on the ground that the offence was not complete in either, but that if by her being carried into the second county, or in any other manner, there was a continuing force in that county, the offender might be indicted there, though the marriage or defilement ultimately took place with the woman's own consent.^(q) The enactment of the 7 Geo. 4, c. 64, s. 12, would have applied to this objection.^(r)

The doctrine that there must have been a continuance of the force into the county where the defilement took place, was recognized and acted upon in the following case, by which a great deal of public interest was excited. The prisoners, Lockhart Gordon, a clergyman, and Loudon Gordon, his brother, were indicted upon the repealed statute, for the forcible abduction of Rachael A. Lee, under the following circumstances. The prosecutrix, Mrs. Lee, a natural daughter of Lord Le De Spencer, and entitled by his Lordship's will to a considerable fortune, married, in the year 1794, and when she was about the age of twenty, a Mr. M. A. Lee, from whom she shortly afterwards separated, and continued to live apart from him, [*944 in the receipt of *an income of above 900*l.* per annum, secured to her separate use. In the month of December, 1803, when she was living in Bolton Row, Piccadilly, the prisoner, Loudon Gordon, under the care of whose mother she had been placed for some time when a girl, introduced himself to her by means of her medical attendant, as an old acquaintance, and some short time afterwards the other prisoner, Lockhart Gordon, also called upon her; and both of them being recognized by her, they continued, but more especially Loudon Gordon, occasionally to visit her house. Loudon Gordon called four or five times in the month of December, and several times in the following January, previous to the transaction in question. Mrs. Lee stated that their conversations, on these visits, were chiefly upon books, as her habits were studious; but that upon Loudon Gordon taking leave after his first visit he saluted her; and that on his second visit she warned him against entertaining any attachment for her, which she thought a likely thing to happen, as he was a young man; and that upon her giving this caution, he said he had an attachment, and that his happiness was in her hands. By way of changing the conversation, she then read to him an account of a dream which she had had, and requested him to interpret it, which he afterwards did, by sending to her an interpretation, which was clever and ingenious. The third time he called he proposed a tour into Wales, which she did not agree to, either then or at any time; but she admitted that she

(o) 1 Hale 660; 1 Hawk. P. C. c. 41, s. 8; Fulwood's case, Cro. Car. 485, 493; Swendsen's case, 5 St. Tri. 450, 464, 468.

(p) Fulwood's case, Cro. Car. 482, 484, 488, 493. The prisoners were found guilty, and sentenced to be hanged.

(q) Fulwood's case, Cro. Car. 485, 488; 1 Hale 660; 1 Hawk. P. C. c. 41, s. 11; 1 East P. C. c. 11, s. 3, p. 453.

(r) See the section, ante, p. 753.

did not give such an absolute refusal as to prevent his mentioning the subject again, and that in a letter he wrote to her, about the 12th of January (and which contained strong declarations of attachment), he alluded to the tour; but she expressly stated, that she did not know of any plan for going with him anywhere, nor ever consented to any such plan; though when it was mentioned by him on the same day on which she received his letter, she said, "We will talk of it." A letter from Lockhart Gordon was received by her, together with that from London, in which he also mentioned the proposed tour as likely to conduce to her happiness; described himself as having a head to conceive, a heart to feel, and a hand to execute, whatever might be for her advantage; and declared that if his brother ever deceived her he would blow his brains out. A short time before Sunday, the 15th of January, Mrs. Lee invited Loudon Gordon to dine with her on that day, and requested that he would bring his brother Lockhart with him; and they came accordingly. This was at the time at which the offence was alleged to have been committed. According to Mrs. Lee's account of the material transactions at that time, it appeared that after dinner she said to Lockhart Gordon, "What do you think of the extraordinary plan your brother has proposed?" To which he replied, "If he loves you, and you love him, I think it will tend to your mutual happiness; you will gain two friends." That she did not recollect anything more being said upon the subject till Lockhart Gordon pulled out his watch, said it was near seven o'clock, and that the chaise would soon be there; and said, further, "You must go with Loudon to-night." She *945] thought this a joke, as no mention had been previously made of leaving London, or of any chaise; and she knew of no preparations having been made for her leaving London. About this time Loudon Gordon came towards Mrs. Lee with a ring, and attempted to put it on her finger; but she drew away her hand, and the ring was left upon the table. She then attempted to go up stairs, but Lockhart Gordon said she should not, and placed himself against the door; and either at that time, or soon afterwards, he produced a pistol; she, however, after having rung the bell violently, got out at the door, and went up stairs, where she said to her female servant, "There is a plan to take me out of my house; they are armed with pistols; say no more, but watch." She described herself as having felt quite panic-struck at that time. Soon afterwards the prisoners came up stairs, and Lockhart Gordon said, "I am determined you shall go;" this was not said in a threatening manner; but soon afterwards, upon her saying to him, "What right have you to force me out of my house?" he said, "I am desperate," and looked as if he was so. Mrs. Lee described herself as then getting into a very wretched and confused state of mind, not absolutely stupid, but unable to recollect what passed. But it appeared from the evidence of her servants, that Loudon Gordon first came down stairs, and sent the footman to call a coach, who went accordingly; and that the only servants then in the house were two females; that Loudon returned up stairs, when a scuffle was heard almost immediately, and Mrs. Lee called out, "I am determined not to go out of my own house;" to which Lockhart Gordon replied, "I am desperate, Mrs. Lee." The female servants went immediately up stairs, and found Lockhart pushing Mrs. Lee out of the drawing-room, with his arm round her waist, and Loudon near them. Mrs. Lee was in a thin muslin dress, with a small crape handkerchief about her head, as she was dressed for dinner, and without any hat or bonnet. One of the servants put her arms round Mrs. Lee's waist, to drag her away, but Lockhart Gordon produced a pistol, and swore that he would shoot the servant, by which she was so much alarmed, that she desisted. The other servant then took Mrs. Lee by the hand, but quitted it upon Lockhart Gordon's threatening also to shoot her, and presenting a pistol. Lockhart Gordon then laid hold of one of the servants, and, both of them being so much alarmed as to make no further resistance, Loudon Gordon put his arm round Mrs. Lee's waist, and took her down stairs, and out at the street door; when Lockhart Gordon immediately followed. It appeared by other witnesses that a post-chaise, which the prisoners had ordered in the course of the morning, was at that time waiting at the end of Bolton Row; that Mrs. Lee was taken to it by Loudon Gordon; that Lockhart Gordon followed; and that it drove off immediately on the road to Uxbridge. Mrs. Lee's account was, that though she remembered but imperfectly what took place at the time she was

take away, she was certain she went from the house against her will, but that no material force was used to get her into the chaise. She described herself in a state of partial stupefaction; and several of the witnesses spoke of her as being of a very nervous frame, easily agitated, and subject to a depression of spirits, to such an extent as to be occasionally in a state of great mental misery.

*As soon as Mrs. Lee and the two prisoners had got into the chaise, it drove off at a smart pace towards Uxbridge. Mrs. Lee sitting in the middle between the prisoners; and it appeared that, after changing horses at Uxbridge and at Wycombe, the party arrived at Tetworth, about twelve miles from Oxford, between one and two o'clock in the morning. Mrs. Lee stated, that she frequently remonstrated with the prisoners in the course of the journey; and particularly told Lockhart Gordon that it was "a most infernal measure, and a breach of hospitality;" and repeatedly asked him for a chaise to take her back to London; making the application principally to him, because he seemed to have taken the lead in the whole business. But it appeared as well from her own admissions as from the evidence of the post-boys, that she never called for assistance at the inns, turnpike gates, or other places; and one of the post-boys stated, that, at Wycombe, one of the prisoners asked her whether she would stay there or go on to Tetworth or Oxford, and that her answer was, "I don't care." Mrs. Lee also admitted, that a ring was put upon her finger in the course of the journey by Loudon Gordon; and that during the journey, but whether before they got to Uxbridge or afterwards she could not tell, she took a steel necklace, with a camphire bag attached to it, from her neck, and threw it out of the window of the chaise, saying, "That was my charm against pleasure; I have now no occasion for it." She said, that she used the word "charm," as alluding to the supposed medical property of camphire in quieting the nerves, and calming the passions, particularly the passion which a person of one sex feels for a person of the other; and that she was in the habit of wearing it as a sedative; that at the time she used the expression she gave herself up, but that she afterwards expostulated. And she also admitted, that during the journey she made some inquiries concerning Loudon Gordon's health; and might, perhaps, have inquired how long it was since he had been acquainted with a person of her own sex.

At Tetworth the parties got out of the chaise, and supper and beds were ordered to be prepared. Mrs. Lee stated, that she ate a good supper, and that there was a good deal of cheerful conversation during the repast; the whole of which she did not recollect, but that part of it related, as she believed, to Egyptian hieroglyphics and architecture. A question was then put to her, whether the whole of what passed might not have induced Loudon Gordon to have believed that he might approach her bed; to which she answered, "It might; I was in desperation." She admitted, that she might have told Loudon Gordon to see that the sheets were well aired; but said that if she had had the perfect exercise of her judgment, and her mind had been free from force, she should have been more inclined to have ordered a chaise than to have gone to bed. After she had gone up stairs into the bed room, the chambermaid asked her, when she should be in bed, and when the gentleman should come up; to which she replied, "In ten minutes." Upon this statement of Mrs. Lee's, in her examination, the following question was put to her, "What induced you to send such a message?" and it was objected to by the counsel for the prisoners, on the ground that *it was not a question as to a fact, but to something existing in the mind of the witness. Lawrence, J., overruled the objection; but said, that whether the answer would be evidence or not must depend upon the nature of it; that if Mrs. Lee should answer, "I thought my life in danger; for Lockhart Gordon told me, if I did not let Loudon Gordon come to bed to me, he would blow my brains out;" such answer would certainly be evidence, though the apprehensions of the witness, unsupported by words used by the prisoners, or facts, would not. The question was then put; and Mrs. Lee answered, "I was under the impression that my life was in danger from Lockhart Gordon; and I was apprehensive of some serious scuffle at the inn, in which lives might be lost." Mrs. Lee then stated, that shortly after the chambermaid left the room, Loudon Gordon came to bed to her, and remained with her all the night; and that the intercourse took place between them which usually takes place between husband and wife.

These were the material facts of the case, with the addition, that it was proved by the woman with whom the prisoners lodged in London, that, previous to the time when this transaction took place, Lockhart Gordon was pressed for money, backward in his payments, and that Loudon Gordon had admitted to her that he was in distressed circumstances. The learned counsel for the prisoners was proceeding in his cross-examination of Mrs. Lee, to question her as to her religious principles; and she had just admitted, that she seldom went to any place of worship, and was inclined to doubt the Christian religion, when Lawrence, J., after having inquired of the counsel for the prosecution, whether they had any further evidence to offer of force in the county of Oxford, and been told by them that they had not, said, that he was of opinion the case should not proceed any farther. The learned Judge then addressed himself to the jury, and told them, that, in order to constitute the offence with which the prisoners were charged, there must be a forcible taking, and a continuance of that force into the county where the defilement took place, and where the indictment is preferred; that in the present case, though it appeared clearly to have been force used for the purpose of taking the prosecutrix from her house, yet, it appeared also, that in the course of the journey she consented, as she did not ask for assistance at the inns, turnpike gates, &c., where she had opportunities; and that, as she was unable to fix times or place with any precision, this consent probably took place before the parties came into the county of Oxford; and that they must therefore acquit the prisoners.^(s)

Upon an indictment for abduction on the 9 Geo. 4, c. 31, s. 19, it must have been proved that the prisoner took away the woman from motives of lucre, but his expressions relative to her property were evidence that he was actuated by such motives. Upon an indictment for having feloniously and from motives of lucre taken away and detained M. E. against her will, she having a future interest in certain personal property, containing a count with intent to marry, and a count with intent to defile, it appeared that the prisoner had taught M. E. music, and had paid his addresses to her, which were favorably received by her, but which her relatives insisted upon her breaking off, and by their advice she wrote to the prisoner to tell him that the intimacy must cease for ever. One day when she was walking out the prisoner came in a gig, got out, came behind her, and having placed his hand on her shoulder carried her in his arms to the gig, she struggling and screaming all the time he was doing so. He then drove away with her, but was pursued and overtaken at a distance. She was cross-examined with a view to show that she had consented to the abduction. M. E. would, on her attaining the age of twenty-one, be entitled to the sum of 2100*l.*, and the prisoner had said that he knew she would be entitled to 2000*l.* a year. It was contended that if the prisoner carried her off even against her own consent to make her his wife from affection to her person, and not as the means of getting at her property, the offence was not proved. In *Rex v. Wakefield*,^(t) the parties had no previous intimacy, and therefore all inducement to the act arising from real passion and affection was out of the question; and the abduction in that instance, as well as in almost every other which had been the subject of penal inquiry, could be accounted for on no other grounds than those of cold and sordid calculation, to get possession of a lady's property by first obtaining possession of her person. Parke, B., "I agree with the learned counsel for the prisoner, that there is a great distinction between this case and the case of *Rex v. Wakefield*, as there was not in that case any previous intimacy between the parties. I also agree with him as to his argument, that if all the other requisites of the statute constituting the offence are satisfied, and the evidence of the motive being the base and sordid one of lucre is unsatisfactory or insufficient, it will be your duty to acquit the prisoner of the charge of felony. It is clearly made out that Miss Ellis is entitled to personal property, and that the prisoner took her away with the intention of marrying her; and I think that the other count may be entirely laid out of your consideration, as there is no evidence of it whatever. You

^(s) *Rex v. Lockhart and Loudon Gordon*, *cor. Lawrence, J., Oxford Lent Ass. 1804*. As I find this case frequently referred to in the text-books, I have thought it better to retain it in this edition. C. S. G.

^(t) *Post*, p. 950.

will therefore say, whether the prosecutrix being a lady entitled to property, the prisoner either took her away or detained her against her will, with the intent of marrying her, but for the base purpose of getting possession of her property; and if you come to the conclusion that that was so, it will be your duty to find him guilty of the felony. With respect to the motives of the prisoner, evidence has been given of expressions used by the prisoner respecting the property of Miss Ellis, such as his having told one of the witnesses that he had seen Mr. Whitwell's will, and that she would be entitled to 200*l.* a year. These expressions are important for you to consider, in order to your forming a judgment whether the prisoner was actuated by motives of lucre or not. Unless you are satisfied that such a motive prompted him to take away the prosecutrix against her will, he is entitled to be acquitted of the felony."*(u)*

It was resolved, that an indictment for this offence upon the repealed statute, ought expressly to set forth that the woman taken *away had lands or goods, [*949 or was heir apparent, and that the taking was against her will; and that it was for lucre; and also that she was married or defiled; such statement being necessary to bring a case within the preamble of that statute, to which the enacting clause clearly referred in speaking of persons taking away a woman "so against her will."*(w)* But it was said not to have been necessary to state in the indictment, that the taking was with an intention to marry or defile the party, because the words of the statute did not require such an intention, nor did the want of it in any way lessen the injury.*(x)* In an indictment, however, upon the 24 & 25 Vict. c. 100, the allegation as to the intent will be necessary.

It appears to have been considered as clear, that a woman taken away and married might be a witness against the offender, if the force were continuing upon her till the marriage: and that she might herself prove such continuing force;*(y)* for though the offender was her husband *de facto*, he was no husband *de jure*, in case the marriage was actually against her will.*(z)* It seems, however, to have been questioned how far the evidence of the inveigled woman would be allowed, in cases where the actual marriage was good, by her consent having been obtained after forcible abduction.*(a)* But other authorities appear to agree that it should be admitted, even in that case; esteeming it absurd that the offender should thus take advantage of his own wrong, and that the very act of marriage, which was a principal ingredient of his crime, should (by a forced construction of the law) be made use of to stop the mouth of the most material witness against him.*(b)* And where the marriage was against the will of the woman at the time, there does not seem to be any good ground upon which her competency could be objected to, though she might have given her subsequent assent.*(c)* It also appears to have been ruled upon debate, in one case, that a wife was a competent witness for as well as against her husband, on the trial of an indictment for this offence, although she had cohabited with him from the day of her marriage.*(d)*

And it has since been held that a wife is competent against her husband, in all

(u) Reg. v. Barratt, 9 C. & P. 387 (38 E. C. L. R.).

(w) 1 Hawk. P. C. c. 41, s. 4; 1 Hale 660; 4 Blac. Com. 209; 12 Co. 21, 100.

(x) Fulwood's case, Cro. Car. 488, *ante*, 943. It is said, however, in 1 Hale 660, that the words *câ intentione ad ipsam maritandum* are usually added in indictments on this statute, and that it was safest so to do.

(y) Fulwood's case, Cro. Car. 488; Brown's case, 1 Ventr. 243; Swendsen's case, 5 St. Tri. 456.

(z) 1 Hale 660, 661; 4 Blac. Com. 209.

(a) 1 Hale 661, where the author observes, upon Brown's case, *ante*, note *(y)*, that some of the reasons why the woman was sworn and gave evidence were, that there was no cohabitation, and that there was concurring evidence to prove the whole fact: but that if she had freely and without constraint, lived with the person who married her for any considerable time, her examination in evidence might have been more questionable.

(b) 4 Blac. Com. 209.

(c) 1 East P. C. c. 11, s. 5, p. 454.

(d) Perry's case, Bristol 1794; 1 Hawk. P. C. c. 41, s. 13; and in 1 East P. C. c. 11, s. 5, p. 455, the learned author says, "I conceive it to be now settled, that in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other." And see *post*, Book on Evidence. In Perry's case no force was used, see per Hullock, B., Wakefield's case, 2 Lew. 280.

cases affecting her liberty and person. An heiress was obtained possession of by means of a fraudulent letter, and carried by a circuitous route to Gretna Green, *950] where, by means *of false representations, she was prevailed upon to go through the ceremony of a Scotch marriage, and consent to become the wife of one of the persons who had carried her away. Upon an indictment for conspiring to commit a violation of the 3 Hen. 7, c. 2, and 4 & 5 Ph. & M. c. 8 (now repealed), it was proposed to call her as a witness for the prosecution, and she was objected to on the ground that the marriage was valid, and consequently she was incompetent.^(e) She was, however, examined, and afterwards a member of the Scotch bar, who stated that it was a valid marriage according to the law of Scotland. Hullock, B.: "A wife is competent against her husband, in all cases affecting her liberty and person. This was decided in *Lord Aulley's case*,^(f) having been before that time for a long while doubted; but it has since been established, by a long series of cases, that she may prosecute, exhibit articles of the peace," &c. "I am not convinced, by what has been said, that this marriage is valid in Scotland. If it is not, the witness is admissible, of course. If not, I still think her so."^(g)

The unlawful abduction of a girl under the age of sixteen from her parents, or persons having the charge of her, is an offence of the degree of misdemeanor. By the 24 & 25 Vict. c. 100, s. 55, "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labor."^(h)

The construction upon some parts of the repealed statutes, 4 & 5 Ph. & M. c. 8, and 9 Geo. 4, c. 31, may still be worthy of observation.

It was decided, that the taking away a *natural daughter* under sixteen years of age, from the care and custody of her putative father, was an offence within the 4 & 5 Ph. & M. c. 8.⁽ⁱ⁾ It was also holden that a mother retained her authority, notwithstanding her marriage to a second husband; and that the assent of the second husband was not material.^(k) In the last case it was also ruled, that the fourth section of the statute extended only to the custody of the father, or to that of the mother where the father had not disposed of the custody of the child to others.^(l) In a case where a widow, fearing that her daughter, who was a rich heiress, might be seduced into an improvident marriage, placed her under the care of a female *951] friend, who sent *for her son from abroad, and married him openly in the church, and during canonical hours, to the heiress, before she attained the age of sixteen, and without the consent of her mother, who was her guardian; it was holden, that in order to bring the offence within the statute, it must appear that some artifice was used; that the elopement was secret; and that the marriage was to the disparagement of the family.^(m) But on this case it has been remarked, that no stress appears to have been laid upon the circumstance of the mother having placed the child under the care of the friend, by whose procuration the marriage was effected; and that it deserves good consideration before it is decided that an offender, acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or guardian did not consent, was not within the statute; for that then every schoolmistress might dispose, in the same

(e) It was contended that her incompetency might be shown either by examining her on the *voir dire*, or by other witnesses, and for the defendant it was proposed to show her incompetency by other witnesses. Hullock, B., ruled that as this was a point of practice, and he saw some inconvenience in not calling her, which would not exist if she were called, she should be called.

(f) 3 How. St. Tr. 413.

(g) Wakefield's case, 2 Lew. 279, Hullock, B.

(h) This clause is taken from the 9 Geo. 4, c. 31, s. 20, and 10 Geo. 4, c. 34, s. 24 (1.). As to hard labor, &c., see *ante*, p. 900. As to counsellors and aiders, see sec. 67, *ante*, p. 881. The Act extends to Ireland, but not to Scotland.

(i) Rex v. Cornforth, 2 Str. 1162; 1 Hawk. P. C. c. 41, s. 14; Rex v. Sweeting, 1 East P. C. c. 11, s. 6, p. 457.

(k) Ratcliffe's case, 3 Co. 39.

(l) Id. Ibid.

(m) Hicks v. Gore, 3 Mod. 84; 1 Hawk. P. C. c. 41, s. 11.

manner, of the children committed to her care.(n) It has been said that there must be a continued refusal of the parent or guardian; and that if they once agree it is an assent within the statute, notwithstanding any subsequent dissent;(o) but this was not the point in judgment; and it has been observed that it wants further confirmation.(p)

It seems that it was no legal excuse for this offence that the defendant, being related to the lady's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover, to induce the lady secretly to elope and marry him, if it appeared that the father intended to marry her to another person, and so that the taking was against his consent.(q)

And the prohibition being general, the want of a corrupt motive was no answer to the criminal charge.(r) It seems that if an indictment or information upon this statute stated, that the defendant, "*being* above the age of fourteen years, took one A., then being a virgin unmarried, possessed of moveable goods, and seised of lands of great value, out of the custody of her mother," &c., the word *being* was a sufficient averment of the facts which follow.(s)

On an indictment for the abduction of a girl under sixteen years of age, it appeared that the prisoner pretended that he had heard of a place for the girl; the mother said that the child was too young, being only between ten and eleven years of age; but the prisoner said she was quite old enough, for he only wanted her to go to Southampton with a lady who was ill, to nurse a baby which she had, and to go on errands. The prisoner called the same day and took the child away, saying the lady was too ill to come herself. He did not, however, take her to any lady, but kept her with him from Monday to Friday, and slept with her every night, and then took her home. The father proved that he parted with *the* child on [952 the representation that she was to go to live with a lady, which he believed to be true. On the part of the crown, it was urged that the consent of the father having been obtained by the fraudulent representations of the prisoner, was no consent at all; for the prisoner, it was urged that the abduction was not complete, for the child was brought back; if this were an abduction, any seducing away of a girl for an hour would be an abduction; there was no intention shown to deprive the parents of the child. Gurney, B., left it to the jury to say whether the father was induced to part with the possession of the child by the fraudulent representations made by the prisoner.(t)

Where, on the trial of a similar indictment, it appeared that the girl was in service and had been sent by her mistress to the work-house for bread, and as she was coming back she saw the prisoner, whom she had known before, as they had been to school together, and she asked her if she would go to London with her, the prisoner stating that her (the prisoner's) mother wanted a servant, and would give her (the girl) 5*l.* wages; there was a little boy; she said, I, and the boy, and herself were to go under the name of Davis, and to pass for brother and sisters. She took a piece off the loaf. I went with her to Bilston because she cut the loaf, and I dared not go home, and she afterwards accompanied the prisoner towards London; it was urged that as the child was induced to go with the prisoner by the false representation that the prisoner's mother would employ her as a servant, this was a constructive taking within the Act. Parke, B.: "It is quite evident that the Legislature made a distinction between an offence under sec. 20 of the 9 Geo. 4. c. 31, and under sec. 21;(u) and I am inclined to think, that to bring a case within sec.

(n) 1 East P. C. c. 11, s. 6, p. 457.

(o) *Calthrop v. Axtel*, 3 Mod. 169.

(p) 1 East P. C. c. 11, s. 6, p. 457.

(q) *Rex v. Twisleton and others*, 1 Lev. 257; s. c., 1 Sid. 387; 2 Keb. 32; 1 Hawk. P. C. c. 41, s. 10.

(r) 1 East P. C. c. 11, s. 9, p. 459. And see the principles stated, *ante*, p. 80, *et seq.*

(s) *Rex v. Moor*, 2 Lev. 179, s. p.; *Rex v. Boyal*, 2 Burr. 832; 1 Hawk. P. C. c. 41, s. 9.

(t) *Reg. v. Hopkins, C. & M.* 254 (41 E. C. L. R.), Feb. 1842. The prisoner was convicted, and the point would have been reserved had not the prisoner been convicted and sentenced on another indictment. The mother proved that she would have let the child go with the prisoner if he had told her that she was to go and live with him as his servant; but Gurney, B., held that this could not affect the case.

(u) Secs. 55 and 56 of the new Act correspond with secs. 20 and 21 of the 9 Geo. 4, c. 31, see p. 950 and p. 966.

20, there must be an actual taking or causing to be taken away; and a mere decoying or enticement away, which would be an offence within sec. 21, would not constitute one under sec. 20."^(v)

But where, on a similar indictment, it appeared that a girl between fifteen and sixteen years of age, residing in her father's house, went to the window of a loft, to which she had access from her bedroom window, and there found a ladder reared up against the window, and went down the ladder, which the prisoner held for her to descend, and which she expected to find at the window, as she had previously arranged with the prisoner to bring the ladder and to elope with him, but he had never proposed it to her; she went away with the prisoner, who was eighteen years old, and cohabited with him for three weeks: it was submitted that there was no taking or causing to be taken within the meaning of the Act, and the previous case *953] was relied on; Atcherley, *Sert., "It is said here that there was no taking, because the girl was willing to go; to support that view of the case it must be contended that there never can be a taking within this enactment where the girl is a consenting party. But it appears to me that if a man takes a girl under sixteen from her father's house, under the circumstances that have been proved here, that is an unlawful taking within the meaning of this Act." It was then contended that the prisoner probably did not know that the girl was under sixteen years, as her appearance led to the supposition that she was older; but Atcherley, Sert., told the jury, "With respect to the prisoner not knowing that the girl was under sixteen, I hold that the case is within the Act if the girl was, in fact, not sixteen years of age, and that a person taking her away does so at his peril. By her appearance and her forwardness—for she made the proposal to elope—the prisoner might have taken her for more than sixteen, but that is no ground of defence, however it may be matter of mitigation. My opinion is, that if this girl was under sixteen years of age, and the prisoner knew her to be under the care of her father, and made a bargain with her to take her away, and did so, this is a case within the Act."^(w)

Where, on a similar indictment, it was proved that the prisoner was in the service of the prosecutor, and that having had connection with his daughter, a girl under sixteen, she became in the family way, and told the prisoner of it, saying that she was ashamed to face her father any more, and that it was her intention to leave her home; the prisoner said, if she quitted the house he would do the same, and it was thereupon agreed between them that they should go together; and they accordingly both quitted the house, the girl taking nothing with her except her clothes: it was objected that there was no such taking away by the prisoner as to bring the case within the Act: for the girl was the moving party, and the prisoner only assented to her proposal. Alderson, B.: "I am of opinion that the case is within the Act, and that the prisoner has been guilty of the offence of taking this girl from the possession of her father, even though the proposal for their flight may have emanated from, and been suggested to him by, the girl. Under these circumstances, I think the requisites of the section have been complied with. Whenever a man and girl, within the statutable age, go away together from the house and possession of the father of the girl, I am of opinion that there is a taking away of the girl on the part of the man, no matter whether the proposal to leave the house emanated from the man or the girl in the first instance."^(x)

Where on a similar indictment it appeared that the girl was between fifteen and sixteen years of age, and the prisoner had for several months corresponded with her, and paid her the attentions of a lover, though he was a married man, and had

(v) Reg. v. Meadows, 1 C. & K. 399 (47 E. C. L. R.), Spr. Ass. 1844. Coleridge, J., agreed with Parke, B., in this decision. It is to be observed that in this case the girl was out at service; but there was a count alleging the taking away to be from her mistress. The statement of this case is framed from the report in C. & K., and the note of Parke, B., Dears. C. C. 161 (a).

(w) Reg. v. Robins, 1 C. & K. 456 (47 E. C. L. R.), Sum. Ass. 1844. Atcherley, Sert., afterwards stated that he had mentioned the case to Tindal, C. J., and that he was of opinion that the direction to the jury was right, and that there was a taking of the girl within sec. 20.

(x) Reg. v. Biswell, 2 Cox C. C. 279, Sum. Ass. 1847.

endeavored to persuade her to leave her home, where she was living with her parents, and ultimately prevailed upon her to meet him at a place *in the village [*954 where they were both living, which accordingly she did, when they left the village together. There was no suggestion of any force or fraud used by the prisoner in inducing the girl to consent to elope with him. It was urged that there was no taking within the meaning of the Act, as the girl went voluntarily with the prisoner, and *Reg. v. Meadows*(y) was relied upon; for the crown, *Reg. v. Robins* and *Reg. v. Biswell*(z) were cited. Maule, J.: "If the construction apparently put upon the statute in *Reg. v. Meadows* be the right construction, the Act can hardly ever be violated, except in the case of children in arms. It rarely or never happens that the abductor takes away a girl of fourteen or fifteen in his arms, or upon his back; so that such an interpretation would make the statute inoperative. The law throws a protection about young persons of the sex and within the age specified by the statute. It has been determined by the Legislature, that at that age young females are not able to protect themselves, or give any binding consent to a matter of this description. It is therefore quite immaterial whether the girl abducted consent or not; if her family, that is to say, those who under the statute may lawfully have the possession and control over her, do not consent to her departure, the offence is completed."(a)

Upon a similar indictment, it appeared that the prisoner had stated to the father that he intended to emigrate to America, and a short time before his departure he had privately persuaded the girl, who was between twelve and thirteen, to go with him to America, and on the morning of his departure he had secretly told her to put her things in a bundle, and to walk to a place where he would meet her; she did so, and the prisoner, having parted with her father in a road, met her at the place appointed, and they travelled together to London, where he was apprehended, and then said he had paid the girl's passage to London, and was going to take her to America. For the prisoner it was urged that as the girl went voluntarily there was no taking within the meaning of the statute, and *Reg. v. Meadows* was cited.(b) *Reg. v. Robins*(c) was cited on the other side, and it was stated that Maule, J., at a previous assize, had declined to act on *Reg. v. Meadows*. Coleridge, J., overruled the objection, and told the jury that the girl was in the father's possession while in his house, although he was not actually in it; that the taking need not be by force, nor against the girl's will; and that if the prisoner by persuasion induced her to leave her father's roof against his will, in order to her going with him to America, the case was within the statute; and, upon a case reserved, it was held that the conviction was right. In a case like the present the taking need not be by force, actual or constructive, and it is immaterial whether or not the girl consents. The Act was passed to protect parents and others having the lawful charge or custody, and it is therefore immaterial whether the taking be with or without the consent of the girl. And as to the taking of the girl out of the possession of the father, a manual possession is not necessary; if the girl be a *member of the family, [*955 and under the father's control, there is a sufficient possession. If a girl leaves her father's house for a particular purpose, with his sanction, she cannot legally be said to be out of his possession. Here the father had possession until the very act of taking.(d)

(y) *Supra*, p. 952.

(z) *Supra*, p. 953.

(a) *Reg. v. Kipps*, 4 Cox C. C. 167, Spr. Ass. 150. See *infra*, note (d).

(b) *Supra*, p. 952.

(c) *Supra*, p. 953.

(d) *Reg. v. Mankletow*, Dears. C. C. 159, Spr. Ass. 1853. Supposing the girl to have abandoned her father's possession, and the prisoner then to take her away, it would not come within the statute. But supposing she conditionally abandoned the possession of her father under the impression that the prisoner would be at a certain point to take her away, that would not be a determination of the father's possession. Per Parke, B., *Ibid.* On *Reg. v. Meadows* being cited, Jervis, C. J., observed that "the girl, by voluntarily going from her father's house, may have severed the possession of the father, and so could not be said to be taken out of the possession of her father. I do not find that in *Reg. v. Kipps* that point was brought before my brother Maule's mind; and at the end of his judgment he added, "I do not think the case of *Reg. v. Kipps* interferes at all with the decision in *Reg. v. Meadows*."

Where on a similar indictment against a man and a woman, it appeared that the girl had become acquainted with the female prisoner, and at her house met the male prisoner, and she and the prisoners met frequently, and at last she left her father's house, as she said, to go for a walk, at the same time saying that she should return in an hour, but she did not return; and the same evening her brother went to the house of the female prisoner, who denied having seen her; and it was afterwards discovered that she had left the same night, and she was afterwards found in a low lodging together with the male prisoner; the girl had taken some wearing apparel to the house of the female prisoner the day before she left home, and she had advised her to go away with the male prisoner; it was contended that there was nothing to show that the girl's going away was not entirely voluntary. Wightman, J., told the jury, that "this offence is complete under the statute which creates it without any reference to the object for which the girl may be taken. You must be satisfied that the girl was under sixteen years of age, and that her father was unwilling that she should go away, and it must be assumed to be so, if it appears that, had he been asked, he would have been refused his consent. You must also be satisfied that the prisoners, or one of them, took the girl out of the possession of her father. For this purpose a taking by force is not necessary; it is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's house. If, however, the going away was entirely voluntary on the part of the girl, the prisoners would not be guilty of any offence under this statute." (c)

An indictment charged that F. Burrell fraudulently allured, took away, and detained Jane Burrell out of the possession of her mother, and W. S. Hyder, he then having the lawful care and charge of her, she being under the age of twenty-one years, and having a present legal interest in real estates, with intent to marry, &c., and H. R. Burrell was charged with feloniously aiding, &c., to commit the felony. The prisoners were paternal uncles of Jane Burrell, who was sixteen years old, and entitled to real estates of the value of £50 a year. Her mother had first married the brother of the prisoners, and after his death she had married W. S. Hyder. Jane lived with her mother and stepfather till she went to school in January, 1862, where she remained till August, 1862, when she returned to her mother's, and in October she went to another school, whence she returned to her mother's on December 20, in the afternoon; she stayed half an hour, and then left the house alone. About nine o'clock that evening she returned, and stayed till ten, when she again left without her mother's knowledge or consent. She returned the next morning, and stayed with her mother about two hours, and then went away without her mother knowing whither. In fact, she went to the house of her uncle, H. R. Burrell, and she continued there till January 19, 1863. She continued to pay visits to her mother for an hour or two nearly every day till the 19th of January. In the interval between her coming home from the first and going to the second school, it had been arranged, at her own desire, in consequence of her not living happily with her stepfather and mother, that she should live with her mother's mother and brother. When she came back for the Christmas holidays, she wished to remain with her mother, but the latter insisted on her abiding by her own choice to go to her grandmother's for the holidays, and would not consent to her staying with her at her stepfather's house. On this she went to the house of H. R. Burrell. Her mother, as soon as she discovered that her daughter was there, desired her to come to her house, and refused to let her have her clothes unless she did so. On the 19th of January F. Burrell and Jane Burrell left together by railway, and were married the next day at Plumstead. These occurrences took place under such circumstances as fully warranted the jury in finding that Jane Burrell was allured and taken away by F. Burrell, with intent to marry her, and that H. R. Burrell aided in the committing of this act. It was objected—1, that there was no evidence that F. Burrell had *fraudulently* allured away Jane Burrell; 2, that there was no evidence that she was taken out of the possession of her mother; 3, that the indictment charged that she was taken out of the possession of her mother and W. S. Hyder, he having then the lawful charge of her, and that it was necessary to prove that she was in his possession as thus

(c) Reg. v. Handley, 1 F. & F. 648, Sum. Ass. 1859.

alleged, as well as of her mother; but the only proof was that the guardianship of her person and copyhold estate had been granted to him when she was admitted as tenant of her copyhold estate. Upon a case reserved it was urged—1, that there was no fraudulent alluring away, and that the mere alluring away was not sufficient; 2, there was no evidence that she was taken out of the possession of her mother; 3, that the stepfather had not the lawful care of the girl; he had no general guardianship of her person. In *Ratcliff's case*, 3 Rep. 396, it was held that the consent of the stepfather was wholly immaterial; but here the indictment alleged the stepfather to have the lawful custody. [Pollock, C. B., "We are all of opinion that the indictment would be supported by showing that the girl was taken out of the possession and against the will of the mother. The rest might be struck out as surplusage."] For the Crown it was urged, 1, that in this case the statute did not require any evidence of fraud, but, if it did, there was sufficient evidence of fraud; 2, the girl was in the possession of the mother; she had never abandoned the possession, and the mere right of possession was sufficient. Pollock, C. B., "The Court is divided in opinion on the facts of the case. The opinion of the majority is that the facts do not bear out the prosecution, or, in other words, that the crime has not been established against the prisoners. There is no difference of opinion as to the law of the case."(*cc*)

On an indictment for taking A. Pollard, a girl under sixteen, out of the possession of her father, it appeared that the prisoner lived near them, and had known her a considerable time. Six months previously the father, hearing that the girl went to the prisoner's house, remonstrated with him for encouraging her to go there; the prisoner replied that he did not want girls for the purpose of intercourse, as he was old and under medical treatment. One Sunday she left her father's house to go, as she said, to the Sunday-school, but did not return. In fact, she went to the prisoner's house, and was found there a month afterwards. A youth proved that the prisoner had told him to bring that young girl if he could. He had told a policeman that he had the girl to do his work, as he had no servant. The girl stated that she had for two years been in the habit of going to his house occasionally, and that he had tried to persuade her to come and live with him, and had promised her a new dress if she came, and that when she came he promised to provide for her in his will, and persuaded her to sleep with him. Pollock, C. B., directed the jury that if they believed that the prisoner by promises or persuasion enticed the girl away from her father, and so got her out of his possession, and into his own, they should find him guilty, otherwise if she came without any such previous inducement or enticement.(*ff*)

Where on a similar indictment the prisoner was proved to have lodged in the house of the girl's father, and he and the girl became engaged, and he induced her to go with him to a Roman Catholic chapel, where they were married; but she immediately returned to her father's house, and continued to live there as before; and the marriage had never been consummated; the father did not know of the marriage till two or three weeks afterwards; it was urged that the girl had never been taken out of her father's possession within the meaning of the Act; it was answered that the marriage without the father's consent was an abduction within the meaning of the Act, and after the marriage the father had no legal control over the girl. It was held that the case was within the Act; the girl could not be considered to be in the father's possession, although she was in his house; because she was in the lawful possession of her husband, and the father never could have the custody of her in the same sense as before her marriage. The distance she was taken, and the time she was kept away, were immaterial, her husband having power to take her away, whenever he liked, and her whole relationship to her father being altered by the marriage.(*ff*)

Where on a similar indictment it appeared that the prisoner was well known to the girl, and she had on a former occasion slept with him a whole night; and that he asked her if she would mind going out with him on the Sunday, and she answered "no;" and on the Sunday, in fulfilment of the engagement, she went

(*cc*) Reg. v. Burrell, L. & C. 354.

(*ff*) Reg. v. Robb, 4 F. & F. 59.

(*f*) Reg. v. Baillie, 8 Cox C. C. 238, Jul. 1859. The Common Serjeant and Recorder.

and met the prisoner, and they went to London together, and spent three days in visiting places of public entertainment, sleeping together at night, and on Wednesday morning, on getting up, the prisoner said to her, "I'll go to work, and you go home:" they separated, and the girl went home; the father swore that his daughter was absent without his knowledge and against his will. The jury found that the father did not consent, and that the prisoner knew he did not consent, and that the prisoner took the girl away with him in order to gratify his passions, and then allow her to return home, but not with a view of keeping her away permanently; and upon a case reserved upon the question, whether, on the facts so found, any offence had been committed under the statute, Erle, C. J., delivered judgment: "We are of opinion that the conviction must be affirmed. The statute was passed for the protection of parents, and for preventing unmarried girls from being taken out of the possession of their parents against their will; and it is clear that no deception or forwardness on the part of the girl in such cases can prevent the person taking her away from being guilty of the offence created by this section. The difficulty which we have is to say what constitutes a taking out of the possession of the father. The taking away might be consistent with the possession of the father, if the girl went away with the party intending to return in a short time; but when a person takes a girl away from the possession of her father, and keeps her away against his will for a length of time, as in this case, keeping her away from her home for three nights, and cohabiting with her during that time, we think the evidence justified the jury in finding the taking to be a taking out of the possession of the father within the meaning of the statute. The prisoner took the girl away from under her father's roof, and placed her in a situation quite inconsistent with the father's possession. In our judgment, therefore, the jury were justified in their verdict by the evidence before them, which we consider to be the point submitted to us, although the prisoner did not intend the taking to be permanent, but when his lust was gratified intended to cast the girl from him. We limit our judgment to the facts of this particular case. It may be that a state of facts might arise upon *957] which the offence would be complete in law when the girl passed her father's threshold, *as where she is taken away with the intention of keeping her away permanently; but we mean it to be understood, that although we affirm this conviction, we do not intend to say that a person would be liable to conviction under the section if it should appear that the taking was intended to be temporary only, or for a purpose not inconsistent with the relation of father and child. It is sufficient for us to say that in this case the conviction was justified by the evidence."(*g*)

Where on a similar indictment it appeared that the girl was the younger sister of the prisoner's deceased wife, and had lived in his house up to the time of his wife's death, but on that occasion another married sister had caused her to be placed under the care of another woman, and no improper motive was alleged against the prisoner, he having alleged as his reason for taking the child away that he had promised her father on his death-bed to take care of her; Cockburn, C. J., told the jury that it was clear that the prisoner had no right to take the child out of the woman's custody. But as no improper motive was suggested, it might be concluded that the prisoner wished the child to live with him, and that he meant to discharge the promise he had made to her father, and that he did not suppose he was breaking the law when he took the child away. If the jury should take this view of the case, and be of opinion that the prisoner honestly believed that he had a right to the custody of the child, then, although the prisoner was not legally justified, he would be entitled to be acquitted.(*h*)

Where on a similar indictment it appeared that the girl was more than fifteen, but in appearance three years older and very prepossessing, and lived with her mother, a widow; on the evening of the alleged abduction she left her mother's house at nine o'clock to spend the night at a married sister's, but, joining company with another girl, they went to a public-house and met the two prisoners, and from

(*g*) Reg. v. Timmins, Bell C. C. 276. Only argued for the crown, Nov. 1860.

(*h*) Reg. v. Tinkler, 1 F. & F. 513, Spr. Ass. 1859.

thence went to another public-house, where they met the prisoners again by appointment, and thence to the farming premises of one of the prisoners, where they remained till four o'clock in the morning; it was then proposed that they all should go to London, which they did, and stayed the day there, and one of the prisoners slept with the girl and the other with her companion, and returned the next day. The mother swore that it was not by her consent that the girl had gone away, and that she had inquired everywhere for her without success; but the girl stated that she occasionally went to dances at public-houses, and was occasionally out late at night without any one to look after her, and that her mother on these occasions left the door on the latch, or came down and let her in; that the prisoner who slept with her was not the first man who had connection with her. Cockburn, C. J., directed the jury that there was no case against the other prisoner; and as to this prisoner, if they thought that the mother had by her conduct countenanced the daughter in a lax course of life, by permitting her to go out alone at night and to dance at public-houses, this was not a case that came within the intent of the statute; but *was one where what had occurred, though unknown to her, could not be [*958 said to have happened against her will.(i)

On a similar indictment it appeared that the prisoners persuaded the girl and another, above the age of sixteen, to meet them at the railway station, and accompany them to London, where they stayed a few days, and then returned, the girl going back to her father's house; she accompanied the men very readily, and had been in the habit of staying out late at night, and her conduct was generally bad; it did not appear that the father had taken such care of her, as might have been expected. It was contended that, the words of the Act being "unlawfully take," some taking must have been intended which was unlawful before the Act passed; something in the nature of a trespass must have been intended; and further, that a mere temporary absence was not sufficient. Pollock, C. B., held that it was not necessary to prove such a taking as was suggested, and that the taking proved was sufficient to satisfy the statute, and that the second objection was answered by *Reg. v. Timmins*; (k) but he had considerable doubt whether the statute was intended to apply to a case where so much profligacy on both sides was shown. A father is bound to take reasonable care of his child, and this man's conduct in regard to the management of his daughter caused a doubt whether she was really taken away against the will of her father.(l)

Where on a similar indictment it appeared that the girl, who was fourteen years old, lived with her father, but the prisoners saw her in the streets by herself, and invited her to go with them, giving her drink to induce her, which made her dizzy and sick; and they took her to a lonely house, and there one of them had criminal intercourse with her, keeping her there all night; and the next morning the child was found there crying; Martin, B., said: "There must be a taking out of the possession of the father. Here the prisoners picked up the girl in the streets, and, for anything that appeared, they might not have known that the girl had a father. The essence of the offence was taking the girl out of the possession of the father. The girl was not taken out of the possession of any one." (m)

It is clearly settled that a father is entitled to the custody of his child until it attains the age of sixteen, unless there be some sufficient reason to the contrary. Writs of *habeas corpus* had issued to J. Howse and R. Hopkins to bring up the body of a young lady, aged fifteen years; she left her father's house, and Howse alleged that, at the request of the girl's stepmother, he took charge of her, and kept her at his house for some days; that the girl left his house to go to the house of her aunt, and that he had since learned that she had left her aunt's by direction of her stepmother, to go to the house of her stepmother's sister; and it was held that the father was entitled to the custody of the child, she being fifteen years of age, when that child, without any adequate or justifying cause, desired to withdraw herself

(i) *Reg. v. Primelt*, 1 F. & F. 50, Spr. Ass. 1858.

(k) *Supra*, p. 957.

(l) *Reg. v. Frazer*, 8 Cox C. C. 446, Spr. Ass. 1861. Pollock, C. B., after consulting Williams, J.

(m) *Reg. v. Green*, 3 F. & F. 274, Sum. Ass. 1862.

from his parental care and control. The Court must lay down a general rule as to *the age when the minor might be left to freedom of choice. The Legislature had thrown light on this subject, by which the Court might safely be guided. The age of sixteen had been pointed out as the age up to which the consent of a female child should not justify her withdrawal from the father's roof without its being considered a misdemeanor. The Court might, therefore, safely act upon the rule, that the age of sixteen is that up to which a female child ought to be subject to parental control. If the persons, who in this case had done their best to baffle the exertions of this Court, had been indicted under the 9 Geo. 4, c. 31, s. 20, no one could doubt that they would have been liable to be convicted of the offence. The Court ordered the girl to be restored to her father.⁽ⁿ⁾

Many of the provisions of the Marriage Act, 4 Geo. 4, c. 76, have been already stated.^(o) The twenty first section enacts, "That if any person shall, after the first day of November, 1823, solemnize matrimony in any other place than a church or such public chapel wherein banns may be lawfully published, or at any other time than between the hours of eight and twelve in the forenoon, unless by special license from the Archbishop of Canterbury; or shall solemnize matrimony without due publication of banns, unless license of marriage be first had and obtained from some person or persons having authority to grant the same: or if any person falsely pretending to be in holy orders, shall solemnize matrimony according to the rites of the Church of England, every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported^(p) for the space of fourteen^(q) years, according to the laws in force for transportation of felons, provided that all prosecutions for such felony shall be commenced within the space of three years after the offence committed."^(r)

By the Marriage Act, 6 & 7 Will. 4, c. 85, s. 39, "every person who after the said first day of March (1837), shall knowingly and wilfully solemnize any marriage in England, except by special license, in any other place than a church or chapel in which marriages may be solemnized according to the rites of the Church of England, or than the registered building or office specified in the notice and certificate as aforesaid, shall be guilty of felony (except in the case of a marriage between two of the Society of Friends, commonly called Quakers, according to the usages of the *960] said society, or between two persons professing the Jewish religion, according to the usages of the Jews), and every *person who in any such registered building or office shall knowingly and wilfully solemnize any marriage in the absence of a registrar of the district in which such registered building or office is situated, shall be guilty of felony:^(t) and every person who shall knowingly and wilfully solemnize any marriage in England after the said first day of March (except by license), within twenty-one days after the entry of the notice to the superintendent registrar as aforesaid, or if the marriage is by license, within seven days after such entry, or after three calendar months after such entry,^(s) shall be guilty of felony."^(t)

(n) Ex parte Barford, 8 Cox C. C. 405. The girl had been privately examined by Cockburn, C. J.

(o) *Ante*, p. 277, *et seq.*

(p) Penal servitude by the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(q) And not less than three years by the 9 & 10 Vict. c. 24, s. 1, *ante*, p. 3, and the 20 & 21 Vict. c. 3, s. 2, *ante*, p. 4.

(r) This section seems incidentally repealed by the 6 & 7 Will. 4, c. 85, except as to the offence of pretending to be in holy orders, and solemnizing matrimony according to the rites of the Church of England. See Lonsd. Cr. L. 140. The 4 Geo. 4, c. 76, contains no provisions for the punishment of principals in the second degree and accessories. But the principals in the second degree are punishable like the principals in the first degree, and as to the accessories, see *ante*, p. 67, *et seq.* The Act does not extend to the marriages of any of the royal family (s. 30), nor to any marriages amongst Quakers or Jews, where both the parties to any such marriage shall be Quakers or Jews (s. 32). And it extends only to that part of the United Kingdom called England (s. 33). And see further as to the provisions of this Act, *ante*, p. 277, *et seq.*

(s) See the 19 & 20 Vict. c. 119, s. 9, &c.

(t) This is a felony for which no punishment is provided; it is therefore punishable under the 7 & 8 Geo. 4, c. 28, s. 8, and 1 Vict. c. 90, s. 5, *ante*, p. 3. The principals in second degree are punishable in the same manner as the principals in the first degree; as to accessories, see *ante*, p. 67, *et seq.*

Sec. 40. "Every superintendent registrar who shall knowingly and wilfully issue any certificate for marriage after the expiration of three calendar months after the notice shall have been entered by him as aforesaid, or any certificate for marriage by license before the expiration of seven days after the entry of the notice, or any certificate for marriage without license before the expiration of twenty-one days after the entry of the notice,(u) or any certificate, the issue of which shall have been forbidden as aforesaid by any person authorized to forbid the issue of the registrar's certificate, or who shall knowingly and wilfully register any marriage herein declared to be null and void, and every registrar who shall knowingly and wilfully issue any license for marriage after the expiration of three calendar months after the notice shall have been entered by the registrar as aforesaid, or who shall knowingly and wilfully solemnize in his office any marriage herein declared to be null and void, shall be guilty of felony."(v)

Sec. 41. "Every prosecution under this Act shall be commenced within the space of three years after the offence committed."

Sec. 42. "If any person shall knowingly and wilfully intermarry after the said first day of March, under the provisions of this Act, in any place other than the church, chapel, registered building, or office, or other place specified in the notice and certificate aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without license, in case a license is necessary under this Act, or in the absence of a registrar or superintendent registrar, where the presence of a registrar or superintendent registrar is necessary under this Act, the marriage of such persons, except in any case hereinafter excepted, shall be null and void: provided always, that nothing herein contained shall extend to annul any marriage legally solemnized according to the provisions of an Act passed in the fourth year of his late Majesty George the Fourth, intituled, "An Act for amending the laws respecting the solemnization of marriages in England."

Sec. 43. "If any valid marriage shall be had under the provisions of this Act, by means of any wilfully false notice, certificate, or declaration made by either party to such marriage, as to any *matter to which a notice, certificate, or [*961 declaration is herein required, it shall be lawful for his Majesty's Attorney-General or Solicitor-General to sue for a forfeiture of all estate and interest in any property accruing to the offending party by such marriage; and the proceedings thereupon and consequences thereof shall be the same as are provided in the like case with regard to marriages solemnized by license before the passing of this Act according to the rites of the Church of England."

By the 1 Vict. c. 22, s. 3, "Every superintendent registrar, who shall knowingly and wilfully issue any license for marriage after the expiration of three calendar months after the notice shall have been entered by the superintendent registrar, as provided by the said Act for marriages,(w) or who shall knowingly and wilfully solemnize, or permit to be solemnized in his office any marriage in the last recited Act declared to be null and void, shall be guilty of felony."(x)

The 12 Geo. 3, c. 11, confirms the prerogative of the crown to superintend and approve of the marriages of the royal family.(y) The first section enacts, "That no descendant of the body of King George the Second, male or female (other than the issue of princesses who may have married, or may hereafter marry, into foreign families), shall be capable of contracting matrimony without the previous consent of his Majesty, his heirs, or successors, signified under the great seal, and declared in council (which consent, to preserve the memory thereof, is hereby directed to be set out in the license and register of marriage, and to be entered in the books of the privy council); and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever."(z) Provision is then made for a marriage, with-

(u) See the 19 & 20 Vict. c. 119, s. 9, &c.

(v) See note (t) *supra*, and see the other provisions of this Act, *ante*, p. 283, *et seq.*

(w) 6 & 7 Will. 4, c. 85.

(x) See note (t) *supra*, p. 960, for the punishment.

(y) 1 East P. C. c. 13, s. 7, p. 478.

(z) See the *Sussex Peerage* case, 11 Cl. & F. 85.

out the royal consent, of any such descendant, being above twenty-five years of age, after notice to the privy council, and the expiration of twelve months after such notice; in case the two Houses of Parliament do not before that time expressly declare their disapprobation of the marriage.^(a) The third section of the statute enacts, "That every person who shall knowingly or wilfully presume to solemnize, or to assist, or to be present at the celebration of any marriage, with any such descendant, or at his or her making any matrimonial contract, without such consent as aforesaid first had and obtained, except in the case above-mentioned, shall, being duly convicted thereof, incur and suffer the pains and penalties, ordained and provided by the statute of provision and *præmunire* made in the sixteenth year of the reign of Richard the Second."

Upon the trial of any offence mentioned in this chapter the defendant may, under the 14 & 15 Vict. c. 100, s. 9, be convicted of an attempt to commit the same, and thereupon may be punished as if he had been convicted on an indictment for such attempt.^(b)

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*CHAPTER THE EIGHTH.

OF KIDNAPPING, AND CHILD-STEALING.

Sec. I.—Of Kidnapping.

THE stealing and carrying away, or secreting of any person, sometimes called *kidnapping*, is an offence, at common law, punishable by fine and imprisonment.^(a)

The forcible abduction or stealing and carrying away of any person, by sending him from his own country into some other, or to parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is properly called kidnapping, and is an offence of a very aggravated description. Its punishment at common law is, however, no more than fine and imprisonment; though, as has been remarked concerning it, the offence is of such primary magnitude that it might well have been substituted upon the roll of capital crimes, in the place of many others, which are there to be found.^(b)

The 31 Car. 2, c. 2 (the celebrated *Habeas Corpus* Act), makes provision against any inhabitant of Great Britain being sent prisoner to foreign countries. The twelfth section enacts, that no subject of this realm, being an inhabitant or resident of England, Wales, or the Town of Berwick-upon-Tweed, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, within or without the dominions of his Majesty. Such imprisonment is then declared to be illegal; and an action for false imprisonment is given to the party, with treble costs, and damages not less than five hundred pounds. The section then proceeds thus:—"And the person or persons who shall knowingly frame, contrive, write, seal or countersign, any warrant for such commitment, detainer or transportation, or shall so commit, detain, imprison, or transport, any person or persons, contrary to this Act, or be any ways advising, aiding, or assisting therein," being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within England, &c., or the dominions thereunto belonging, and shall incur the pains, &c., of the statute of *præmunire*, 16 R. 2, and shall be incapable of any pardon from the King of such forfeitures or disabilities. There are some exceptions in the Act relating to the transportation of felons: and the

*963] sixteenth section provides, that offenders may be sent to be tried where their offences were committed, and where they ought to be tried. The seventeenth section enacts, that prosecutions for offences against the Act must be within two

(a) Sec. 2.

(b) See *ante*, p. 1.

(a) 1 East P. C. c. 9, s. 3, pp. 429, 430; *Rex v. Grey*, T. Raym. 473; Comb. 10. The pillory was also part of the punishment before the 56 Geo. 3, c. 138. The 43 Eliz. c. 13, was repealed by the 7 & 8 Geo. 4, c. 27.

(b) 1 East P. C. c. 9, s. 4, p. 430.

years after the offence committed, if the party grieved be not then in prison; and if he be in prison, then within two years after his decease, or delivery out of prison, which shall first happen.

By the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 206, "If the master or any other person belonging to any British ship, wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind, in any place, on shore or at sea, in or out of Her Majesty's dominions, any seaman or apprentice belonging to such ship before the completion of the voyage for which such person was engaged or the return of the ship to the United Kingdom, he shall for each such offence be deemed guilty of a misdemeanor."

Sec. 207. "If the master of any British ship does any of the following things; (that is to say)

- (1.) Discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped), without previously obtaining the sanction in writing indorsed on the agreement of some public shipping master or other officer duly appointed by the local government in that behalf, or (in the absence of any such functionary) of the chief officer of customs resident at or near the place where the discharge takes place;
- (2.) Discharges any seaman or apprentice at any place out of Her Majesty's dominions without previously obtaining the sanction so indorsed as aforesaid of the British consular officer there, or (in his absence) of two respectable merchants resident there;
- (3.) Leaves behind any seaman or apprentice at any place situate in any British possession abroad on any ground whatever, without previously obtaining a certificate in writing so indorsed as aforesaid from such officer or person as aforesaid, stating the fact and the cause thereof, whether such cause be unfitness or inability to proceed to sea, or desertion or disappearance;
- (4.) Leaves behind any seaman or apprentice at any place out of Her Majesty's dominions, on shore or at sea, on any ground whatever, without previously obtaining the certificate indorsed in manner and to the effect last aforesaid of the British consular officer there, or (in his absence) of two respectable merchants, if there is any such at or near the place where the ship then is:

He shall for each such default be deemed guilty of a misdemeanor, and the said functionaries shall and the said merchants may examine into the grounds of such proposed discharge, or into the allegation of such unfitness, inability, desertion, or disappearance as aforesaid, in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction or certificate as appears to them to be just."

*Sec. 208. "Upon the trial of any information, indictment, or other proceeding against any person for discharging or leaving behind any seaman or apprentice, contrary to the provisions of this Act, it shall be upon such person either to produce the sanction or certificate hereby required, or to prove that he had obtained the same previously to having discharged or left behind such seaman or apprentice, or that it was impracticable for him to obtain such sanction or certificate."

Sec. 518. In all places, except Scotland, the offences are to be punishable as follows:—1. "Every offence by this Act declared to be a misdemeanor, shall be punishable by fine or imprisonment." (c) 2. "Every offence by this Act declared to be a misdemeanor, shall also be deemed to be an offence hereby made punishable by imprisonment for any period not exceeding six months, with or without hard labor, or by a penalty not exceeding one hundred pounds, and may be prosecuted accordingly in a summary manner instead of being prosecuted as a misdemeanor." (d)

Sec. 520. "For the purpose of giving jurisdiction under this Act, every offence shall be deemed to have been committed, and every cause of complaint to have

(c) The Court is also empowered to grant costs in the same manner as if the misdemeanor had been mentioned in the 7 Geo. 4, c. 64.

(d) 3. The offence just mentioned may be prosecuted before two justices in England under the 11 & 12 Vict. c. 43, and in Ireland under the 14 & 15 Vict. c. 93.

arisen, either in the place in which the same actually was committed or arose, or in any place in which the offender or person complained against may be."(*e*)

Where on an indictment on the 5 & 6 Will. 4, c. 19, against a master of a vessel for leaving one of his crew at Quebec, in Lower Canada, for the defence a certificate stating that the defendant appeared before E. B. a commissioner for carrying into effect the imperial Act of the 5 & 6 Will. 4, c. 19, respecting merchant seamen, and being duly sworn, said that the seaman in question did desert from the vessel while at Quebec, and was then absent without leave, it was held that this certificate was insufficient. It did not state the facts as ascertained by the proper authority, but merely proved that the captain swore certain things before him. The Act required the proper officer to certify that the truth is so, not that another deposed to it. (*f*)

The indictment alleged that the defendant was master of a merchant ship called the Sarah Charlotte, belonging to a subject of the United Kingdom, namely, J. H., and that E. W. and H. G. were persons belonging to the crew, and on board the said ship, duly engaged to serve in a voyage, which was not then completed; and that one E. P. was Her Majesty's consul at Bahia, and that the defendant at Bahia unlawfully, wilfully, and wrongfully did leave the said E. W. and H. G. behind on shore, before the completion of their voyage, on the plea that they were not in a condition to proceed on the voyage, he not having obtained a previous certificate in writing of the said consul or of any such functionary of their not being in such *965] condition, there being time to obtain *such certificate. (*g*) It appeared from the evidence for the prosecution, that E. W. and G. H. were both ill when the vessel put into Bahia on her voyage, and went ashore, and saw the doctor, who said they were not sick enough to be left on shore, and go to the hospital, as they wished; they then went to the English consul, who said he could do nothing without the doctor's certificate, and the captain then said they might take his boat and fetch their things ashore, and keep out of the consul's sight till the ship had sailed. They did so, and the captain sent them some dollars by a passenger. For the defence it was shown that E. W. and H. G. asked the captain's leave to go ashore to see the doctor or consul, as they did not wish to stay in the ship, not being able to do their duty, and that the captain said he could not put them on shore till he had seen the consul; that they went ashore, and came again and asked for their clothes, and the mate believing that they had got their discharge, though they did not say so, let them have them; that they were very ill, and if they had not gone on shore at Bahia and got medical advice, one of them would have died; that the consul refused them a certificate, and the passenger, thinking it was a cruel refusal on his part, gave them the dollars out of his own pocket, to relieve them on shore, and did not pay them as the agent of the captain. The collector of customs of the port of Harwich produced a certificate of the registry of the ship with the name James Howard in it, which he knew to be his signature, but did not see him write it: the declaration was signed by him. He knew Howard personally. He lived near Harwich, and was the proprietor of several ships. He did not know where he was born: he was a British subject; he knew he was so by the declaration which he had made. He believed him to be an Englishman. Cresswell, J., and Coleridge, J., were of opinion, first, that the allegation of ownership was a material allegation, and must be proved as laid; secondly, that the 41st(*h*) and 42d sections of the 5 & 6 Will. 4, c. 19, did not create separate offences, but that they should be taken together, and were intended to show that certain conduct on the part of the seamen will not excuse the captain, unless he produce the required certificate; and therefore, thirdly, that on this indictment, which charged the defendant with wrongfully and wilfully leaving behind him two persons belonging to his crew, the only answer

(*e*) The Act contains other provisions for service of summons, levying and application of penalties, limitation of summary proceedings, and for legal procedure in Scotland.

(*f*) *Reg. v. Smison*, 1 Cox C. C. 188, Commr. Bullock after consulting the Recorder.

(*g*) The count concluded with an averment that the defendant was found within the jurisdiction of the Central Criminal Court.

(*h*) *Quære*, 40th.

he could give would be either to prove the certificate, or show the impossibility of obtaining it; and not having done either of these things, if the jury believed the evidence, he must be found guilty.⁽ⁱ⁾

**Sec. II.—Of Child Stealing.*

[*966

By the 24 & 25 Vict. c. 100, s. 56, "Whosoever shall *unlawfully*, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of *fourteen* years, with intent to deprive any parent, *guardian*, or other person having the lawful care or charge of such child, or the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbor any such child, knowing the same to have been, by force or fraud, led, taken, decoyed, enticed away, or detained as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping: provided that no person who shall have claimed any right to the possession of such child, or shall be the mother or shall have claimed to be the father of an illegitimate child, shall be liable to be prosecuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof."^(k)

By sec. 70, "Whenever whipping may be awarded for any offence under this Act, the Court may sentence the offender to be once privately whipped, and the number of the strokes and the instrument with which they shall be inflicted shall be specified by the Court in the sentence."^(l)

Upon the trial of any offence contained in the preceding section, the defendant may, under the 14 & 15 Vict. c. 100, s. 9, be convicted of an attempt to commit the same, and thereupon may be punished as if he had been convicted on an indictment for such attempt.^(m)

***CHAPTER THE NINTH.**

[*967

OF CONSPIRACIES AND ATTEMPTS TO MURDER; OF MAYMEM, OR MAIMING; AND OF DOING OR ATTEMPTING SOME GREAT BODILY HARM.

Sec. I.—Of Conspiracies to Murder.

By the 24 & 25 Vict. c. 100, s. 4, "All persons who shall conspire, confederate, and agree to murder any person, *whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not*, and whosoever shall solicit, encourage, persuade, or endeavor to persuade, or shall propose to any person, to murder any other person, *whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not*, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not more than ten and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor^(a)

(i) Reg. v. Dunnett, 1 C. & K. 425 (47 E. C. L. R.).

(k) This clause is taken from the 9 Geo. 4, c. 31, s. 21, and 10 Geo. 4, c. 34, s. 25 (1). The word "unlawfully" is substituted for "maliciously," which was inaccurately used in the former enactments. The age of the child is extended from ten to fourteen years, and "guardian" is introduced; and in the proviso words are added to include the mother of an illegitimate child. As to counsellors and aiders, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to fine and sureties, see *ante*, p. 900.

(l) The Act extends to Ireland, but not to Scotland.

(m) See *ante*, p. 1.

(a) The Act extends to Ireland, but not to Scotland. As to hard labor, see *ante*, p. 900. As to fine and sureties, see *ante*, p. 900. As to offences on the sea, see *ante*, p. 762.

This clause is new in England, but in Ireland, under the 10 Geo. 4, c. 34, ss. 8, 9, the offences mentioned in it were capital felonies; and in the bill, as it passed the House of Lords, the offences were continued as felonies, but liable to penal servitude for life; the House of Commons, however, altered them to misdemeanors, punishable with ten years' penal servitude, and as all the offences specified in this clause appear to be misdemeanors at common law, (b) the effect of this clause is merely to alter the punishment of them.

Conspiracies to murder have very rarely come before any tribunal in England: but there is one very notorious case, where a number of persons, in order to procure the rewards given by Acts of Parliament for apprehending robbers on the highway, concocted a pretended charge of robbery against one Kidden, who was convicted and executed for it upon the evidence of two of them, and these persons were afterwards tried for his murder and convicted, but not punished under this indictment; (c) but they were convicted on an indictment for a conspiracy, and sentenced to be set in the pillory twice, imprisoned for seven years, and, until they found sureties for their good behavior for three years afterwards. (d)

*968] The words "whether he be a subject of Her Majesty or not, and whether he be within the Queen's dominions or not," were introduced in order to make it perfectly clear that this clause included a case where the conspiracy was to murder a foreigner in a foreign country. The words were introduced *ex abundanti cautela* only, and this clause must never be cited as any legislative declaration that a conspiracy in England to murder a foreigner in a foreign country is not a conspiracy indictable at common law, or that the killing of a foreigner in a foreign country, under such circumstance as would amount to murder if the killing were in England, is not murder in contemplation of the law of England. (e)

There is no doubt that it is not essential that the conspiracy should have been formed in England or Ireland. The Act, by sec. 68, includes conspiracies on the seas; and even if that section did not exist, British subjects who conspire on the high seas are triable by the common law in any county in England where any act in furtherance of such conspiracy is done by any one of them, or by their innocent agent; for the crime of conspiracy, amounting only to a misdemeanor, may, like high treason, be tried wherever one distinct overt act of conspiracy is in fact committed. Where the only acts personally done by the defendants were done either on the high seas at Brassa Sound, or in the Isle of Shetland, and the only acts done in Middlesex, where they were indicted, were done by innocent agents in

(b) *Rex v. Higgins*, 2 East R. 5.

(c) See *ante*, p. 687.

(d) *Rex v. McDaniel*, Forst. 121. It is not clear whether the indictment was for a conspiracy to murder Kidden, or another person, or to pervert the course of justice.

(e) The introduction of the words in question makes it unnecessary to discuss either of those questions; but, having with no small care examined all the authorities to be found on the subject, I may be pardoned for saying that it is perfectly clear to me that the killing of any person anywhere in the world, whether on land or sea, under such circumstances that if the killing had been in England it would have amounted to the crime of murder, has ever been murder in contemplation of the law of England. Wherever a murder has taken place in England or on the narrow seas, the Court of King's Bench, or Courts of Oyer and Terminer or Gaol Delivery, have had jurisdiction to try it by a jury. Wherever a murder has taken place on the high seas, the Court of Admiralty had jurisdiction to try it according to the civil law; and wherever a murder has taken place on land abroad, the Court of the Constable and Marshal had jurisdiction to try it according to the civil law. By sundry statutes in and since the time of Hen. 8, the jurisdiction to try murders committed on the high seas and on land abroad, has been conferred on certain tribunals with the aid of a jury; but none of these statutes either alters, or professes to alter, the nature of the offence; on the contrary, they all treat it as murder, and only provide a different mode of trial. The doubt which has arisen, and not unnaturally, seems to have sprung from supposing that, because the Common Law Courts, trying all offences by the aid of a jury, had only jurisdiction over offences committed in England or on the narrow seas, therefore murder and other offences against the law of nature and nations were no offences at all in the eye of the law of England. The answer is that the Courts of Admiralty and of the Constable and Marshal did try such offences from the earliest times; and, therefore, it is clear that they always were offences in the eye of the law of England.

furtherance of the conspiracy of the defendants, it was held that they were properly tried in Middlesex.^(f) So where the individual actings of some of the conspirators were wholly confined to other counties than Middlesex, but the conspiracy against all was proved from the community of criminal purpose, and by their joint co-operation in forwarding the objects of it in different counties, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of them in prosecution of the conspiracy in Middlesex, where the trial was had.^(g) Now, at common law, the criminal jurisdiction of counties was local. They were like *different kingdoms;^(h) yet in conspiracy the jury could, as we have seen at common law take cognizance of acts done on the high seas or in another county, provided there were an overt act done in the county where the indictment was preferred: and it would therefore seem that if there were a conspiracy on land abroad, a jury might try it in any place in England where any overt act in pursuance of it was done. Lastly, suppose A. in England conspired with B. abroad to commit a murder, and A. did some overt act in England, it would seem that both A. and B. might be tried in England, if B. was a British subject; and that if B. was not a British subject, A. might, nevertheless, be tried where he did that overt act; for such an act would be an act coupled with a criminal intent, and as such indictable, within the principle laid down in *Rex v. Higgins*,⁽ⁱ⁾ even if it should be objected that a conspiracy between A. in England and B., a foreigner, abroad, was not a conspiracy within the criminal law of England. And as a letter written and sent, but intercepted, is an overt act in treason;^(k) so a letter may be an overt act in conspiracy. In consequence of some doubts that have been uttered, it may be well to add that every foreigner, except an ambassador, whilst in England, is quite as much amenable to our criminal law as a native subject. By the 32 Hen. 8, c. 16, s. 9, every alien, who shall come into this realm, "shall be bounden by and unto the laws and statutes of this realm, and to all and singular the contents of the same;"^(l) and where a statute speaks of the King's subjects, it extends to aliens; for though they are not the King's natural-born subjects, they are the King's subjects when in England by local allegiance.^(m)

The 32 Hen. 8, c. 16, s. 9, is repealed by the 26 & 27 Vict. c. 125. This repeal is extremely to be regretted, as no one can foresee how many points may be raised in consequence of it. There is no doubt that the clause was introduced to do away with questions which had previously arisen. See the Year Book, 13 Edw. 4, p. 9, pl. 5, as to some of such questions.

If a question should be raised whether, if one of the conspirators were to commit the murder, and the others were indicted as accessories before the fact, it might not be objected that they could only be tried for a misdemeanor under this clause; the answers are, first, that this clause has only altered the punishment, and created no new offence; and at common law the power to prosecute for a misdemeanor was not only never suggested as in any way preventing a prosecution for felony, but the best authorities always held that the misdemeanor merged in the felony. But, secondly, nothing can be clearer than that if a statute create a misdemeanor, and something be done in pursuance of, and in addition to, that misdemeanor, which amounts to a felony, all persons who have done acts which would make them accessories before the fact to that felony, may be indicted as such (putting aside merger altogether), on the plain ground that they are totally different offences. It has never been suggested, that because wounding with intent to murder is made a felony, therefore a man who killed another by wounding him could not be indicted for murder. There is no such thing as merger of one felony by another; and when, as is often the case, the same acts constitute several felonies, either at common law or by statute, the prosecutor may indict for any of them. Thus, in cases of real murder, *indictments for manslaughter have often been preferred, and so also indictments for administering poison where death has ensued. [*970]

(f) *Rex v. Brisac*, 4 East R. 163. (g) *Rex v. Bowes*, cited in *Rex v. Brisac*, *supra*.

(h) *Rex v. Weston* under Penyard, 4 Burr. R. 2507, per Lord Mansfield, C. J.

(i) 2 East R. 5; and see *Reg. v. Bull*, *ante*, p. 54.

(k) *Rex v. Hensey*, 1 Burr. 442.

(l) And see *Ex parte Barronet*, 1 E. & B. 1 (72 E. C. L. R.).

(m) 1 Hale P. C. 54; *Courteen's case*, Hob. 270.

Upon an indictment for soliciting A. B. to murder C. D., the evidence was that the prisoner gave poison to A. B. to administer to C. D., and which A. B. accordingly did; but C. D. having taken part of it, discovered the fact in time to save his life; the jury found him guilty, believing that the poison had been delivered to C. D. with intent to poison him, and that the solicitation was to that effect: the Judges held both indictment and conviction proper, in treating the prisoner as a principal soliciting, and not as an accessory before the fact.⁽ⁿ⁾

Where on an indictment against three prisoners and others unknown, for a conspiracy to murder, one of them was tried first, because they severed in their challenges, and the evidence tended to affect him and the others named in the indictment, and made a case to go to the jury as to a conspiracy by the three: but there was no evidence to show that any other person was engaged in the conspiracy: and the jury found the prisoner guilty, and on his being brought up for judgment it was objected that the prisoner ought not by law to have been tried alone: the Court overruled the objection, and passed sentence on the prisoner: and, upon a case reserved, it was contended that the judgment was irregular: for if the others were acquitted, the prisoner could not be guilty of conspiracy: that there was a contradiction on the face of the record, for the others had not been found guilty, until they were his guilt was not proved; and that the judgment ought to have been respited. But it was held that there were no grounds on which the judgment should be respited or arrested.^(o)

Sec. II.—Of Attempts to Murder; of Mayhem or Maiming; and of doing or attempting some great bodily harm.

ATTEMPTS to commit murder appear to have been considered as felonies in the earlier ages of our law; but that doctrine did not long prevail; and such attempts become, and still remain, at common law, punishable only as high misdemeanors.^(p)¹

*971] ¹Where an indictment is preferred for an assault with an intent to murder it seems that the attempt as laid must be fully established, in order to support the indictment: thus, where a defendant was so charged in the first count of the indictment, Lord Kenyon, C. J., being of opinion, upon the facts given in evidence, that if death had ensued it would only have been manslaughter, directed the jury to acquit the defendant upon that count.^(q)

⁽ⁿ⁾ Reg. v. Murphy, Jebb C. & P. C. 315; Hayes' Dig. 631.

^(o) Reg. v. Ahearne, 6 Cox C. C. 6; Rex v. Cooke, 5 B. & C. 538 (11 E. C. L. R.), was much relied upon in this case; see my note, 3 vol. [146] on that case. It has always appeared to me perfectly clear that even if on a subsequent trial the others were acquitted, it would in no way affect the previous verdict or judgment. The jury who convict a prisoner who is tried alone for conspiracy, must have been satisfied both that he conspired with the other, and that the other conspired with him, and the subsequent acquittal is in no respect necessarily inconsistent with that verdict; for it may have proceeded on the want or failure of evidence. Suppose a defendant pleaded guilty, or was convicted on his own written confession, it might well be that the person with whom he had admitted he had conspired might be acquitted, and it would be absurd that he should thereby be exonerated. It is a fallacy to suppose that there is any inconsistency on the face of a record in such a case; there never is any inconsistency on the face of a record containing an indictment, verdict, and judgment, where any state of facts can be suggested which is consistent with the statements in that record.

^(p) Staund. 17; 1 East P. C. c. 8, s. 5, p. 411; Rex v. Bacon, 1 Lev. 146; 1 Sid. 230, where the defendant, having been convicted for lying in wait to kill Sir Harbottle Grimstone, the Master of the Rolls, was sentenced to fine and imprisonment, the finding surety for his good behavior for life, and acknowledging his offence at the bar of the Court of Chancery: 16 C. 2 B. R. And see two precedents of indictments at common law, for misdemeanors in attempting to murder by poison: 3 Chit. Crim. L. 796.

^(q) Rex v. Mitton, Adjourned Sittings at Westminster, Oct. 1788; 1 East P. C. c. 8, s. 5, p. 411. And see Stark. Evid. tit. "Assaults," and the cases there cited.

¹ To sustain a verdict of guilty on an indictment for an assault with intent to commit murder, the evidence must show that if death had ensued it would have been murder: McCoy v. State, 3 Eng. 451. To support an indictment for an assault with intent to murder, positive proof that the defendant actually intended to kill at the time of the assault need not be proved; but the jury may infer such intent when the evidence shows that had death ensued the crime would have been murder: Cole v. State, 5 Eng. 318; Sharp v. State, 19 Ohio 369.

Mayhem, or the maiming of persons, was probably at one time an offence at common law of the degree of felony; as the judgment was *membrum pro membro*.^(r) But this judgment afterwards went out of use; partly because the law of retaliation is at best an inadequate rule of punishment; and partly because, upon a repetition of the offence, the punishment could not be repeated.^(s) The offence, therefore, appears to have been considered, in latter times, as in the nature of an aggravated trespass; and the only judgment which now remains for it at common law is fine and imprisonment.^(t) It is, however, a misdemeanor of the highest kind, and spoken of by Lord Coke as the greatest offence under felony.^(u)

A bodily hurt whereby a man is rendered less able in fighting, to defend himself or to annoy his adversary, is properly a maim at common law.^(v) Therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eyes or foretooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be maims; but the cutting off his ear, or nose, or the like, are not held to be maims at common law; because they do not weaken a man, but only disfigure him.^(w) In order to found an indictment of mayhem the act must be done maliciously, though it matters not how sudden the occasion.^(x)¹

It is laid down that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted; and, on conviction, fined and imprisoned.^(y) For as the life and members of every subject are under the safeguard and protection of the King; so they are said to be *in manu regis*, to the end that they may serve the King and country when occasion shall require.^(z)

*It should seem that there can be no accessories before the fact in mayhem, [972 at common law; though there appears to have been some difference of opinion, or rather misapprehension, upon the subject.^(a) For, supposing the offence to be in the nature of an aggravated trespass only, the rule will apply, that in crimes under the degree of felony there can be no accessories, but that all persons concerned therein, if guilty at all, are principals.^(b) It does not appear to have been anywhere supposed, that there can be accessories after the fact in mayhem.^(c)

(r) 3 Inst. 118; 1 Hawk. P. C. c. 55, s. 3; 4 Blac. Com. 206.

(s) 4 Blac. Com. 206.

(t) Id. *ibid.*; 1 Hawk. P. C. c. 55, s. 3; 1 East P. C. c. 7, s. 1, p. 393. But it is observed that perhaps mayhem by castration might have continued an offence of higher degree, as all our old writers held it to be felony: 4 Blac. Com. 206.

(u) Co. Lit. 127 a.

(v) Staund. P. C. 3; Co. Lit. 126; 3 Inst. 62, 118; 1 Hawk. P. C. c. 55, s. 1; 4 Blac. Com. 205; 1 East P. C. c. 7, s. 1, p. 393.

(w) 1 Hawk. P. C. c. 55, s. 2; 4 Blac. Com. 205, 206; 1 East P. C. c. 7, s. 1, p. 393; Bac. Ab. *Mayhem* (A.).

(x) 1 East P. C. c. 7, s. 1, p. 393.

(y) 1 Hawk. P. C. c. 55, s. 4, and Co. Lit. 127 a, where Lord Coke says, "In my circuit anno 1 Jacobi regis, in the county of Leicester, one Wright, a young, strong, and lustie rogue, to make himself impotent, thereby to have the more colour to begge, or to be relieved without putting himself to any labour, caused his companion to strike off his left hand; and both of them were indicted, fined, and ransomed."

(z) Co. Lit. 127 a; Bract. lib. 1, fol. 6; Pasch. 19 Edw. 1. cor. Reg. Rot. 36, Northt.

(a) Lord Hale states that there are no accessories before in mayhem, but that they are in the same degree as principals: 1 Hale 613. Hawkins, on the contrary, says, that it seems there may be accessories before the fact in mayhem: 2 Hawk. P. C. c. 29, s. 5. In 1 East P. C. c. 7, s. 7, p. 401, there is a learned argument, to show that the latter opinion proceeded on a mistake.

(b) *Ante*, p. 61.

(c) 1 Hawk. P. C. c. 55, s. 13, and 2 Hawk. P. C. c. 29, s. 5; 1 East P. C. c. 7, s. 7, p. 401.

¹ The offence of mayhem may be committed without an entire mutilation of the member; but the biting off a small portion of the ear, which does not disfigure the person, and could only be discovered on close inspection or examination, when attention was directed to it, is not mayhem under the statute: *State v. Abram*, 10 Ala. 928. The putting out an eye is mayhem: *Chick v. State*, Humph. 164. On an indictment for an assault with intent to commit mayhem, the defendant may be convicted of the assault and acquitted of the intent charged: *McBride v. State*, 2 Eng. 374. See *United States v. Scroggins*, 1 Hemp. 478; *Benham v. State*, 1 Clarke 542.

Attempts to murder, maiming, and the doing or attempting great bodily harm, were made highly penal by the enactments of several statutes now repealed. The 9 Geo. 1, c. 22, commonly called the *Black Act*, and which made the maliciously shooting at any person a capital offence, and the 26 Geo. 2, c. 19, s. 1, relating to the beating or wounding persons shipwrecked with intent to kill them, &c., or putting out false lights to bring a ship into danger, were repealed by the 7 & 8 Geo. 4, c. 27. The 5 Hen. 4, c. 5, relating to cutting tongues and putting out eyes; the 22 & 23 Car. 2, c. 1, called the *Coventry Act*, by which malicious maiming was made a capital offence; the 9 Anne, c. 16, which made it capital to attempt to kill, assault, wound, &c., a privy counsellor, and the 43 Geo. 3, c. 58, commonly called *Lord Ellenborough's Act*, were repealed by the 9 Geo. 4, c. 31, which, as well as the 1 Vict. c. 85, is now repealed.

By the 24 & 25 Vict. c. 100, s. 11, "Whosoever shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing, or shall by any means whatever wound or cause any *grievous* bodily harm to any person, with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."(*d*)

*Sec. 12. "Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building with intent to commit murder, [973 shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."(*e*)

Sec. 13. "Whosoever shall set fire to any ship or vessel, or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."(*f*)

Sec. 14. "Whosoever shall attempt to administer to or shall attempt to cause to

(*d*) This clause is framed from the 7 Will. 4, and 1 Vict. c. 85, s. 2. As the general term "wound" includes every "stab" and "cut," as well as other wounds, that general term has alone been used in these Acts. All, therefore, that it is now necessary to allege in the indictment is, that the prisoner did wound the prosecutor; and that allegation will be proved by any wound, whether it be a stab, cut, or other wound. Under the 1 Vict. c. 85, it was held that a wound must be inflicted by some instrument in order to come within that statute. The terms by "any means *whatsoever*" in that Act applied only to causing bodily harm; by this clause they are applied to wounding, in order to render it immaterial by what means the wound is inflicted, provided it be inflicted with the intent alleged: *Rex v. Harris*, 7 C. & P. 446 (32 E. C. L. R.); *Rex v. Stevens*, R. & M. C. C. 409; *Jennings' case*, 2 Lew. 130; and *Rex v. Murrow*, R. & M. C. C. 456; and other similar cases cannot therefore be considered as authorities under the present clause. The words "any grievous bodily harm" are inserted instead of "any bodily injury dangerous to life," in order to render the clause more comprehensive. If in any case it be doubtful whether the facts bring it within this clause, but there is evidence that the acts were done with intent to murder, a count on sec. 15, *post*, p. 973, alleging an attempt to murder, should be added. As to the introduction of the words, "cause to be administered to," see note to s. 14, *infra*. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900. The Act extends to Ireland, but not to Scotland.

(*e*) This clause is taken from the 9 & 10 Vict. c. 25, s. 2. In this and the next section the words "unlawfully and maliciously" are omitted as unnecessary, and "intent to commit murder" substituted for "intent to murder any person." As to the principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900.

(*f*) This clause is taken from the 7 Will. 4 and 1 Vict. c. 89, s. 4. The words in *italic* were introduced for the same reason as it was made felony to set fire to goods, &c., in buildings. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900.

be administered to or to be taken by any person any poison, or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.”(g)

Sec. 15. “*Whosoever shall, by any means other than those specified in any of the preceding sections of this Act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years—* [*974 *or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.”*”(h)

Sec. 16. “*Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping.”*”(i)

Sec. 17. “*Whosoever shall unlawfully and maliciously prevent or impede any person, being on board of or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavor to save his life, or shall unlawfully and maliciously prevent or impede any person in his endeavor to save the life of any such person as in this section first aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.”*”(k)

(g) This clause is taken from the 7 Will. 4 and 1 Vict. c. 85, s. 3. Where the prisoner delivered poison to a guilty agent, with directions to him to cause it to be administered to another in the absence of the prisoner, it was held that the prisoner was not guilty of an attempt to administer poison within the 7 Will. 4 and 1 Vict. c. 85, s. 3; *Reg. v. Williams*, 1 Den. C. C. 39, *post*, p. 989; and the words “attempt to cause to be administered to or to be taken by,” were introduced in this section to meet such cases. The words “whether any bodily injury be effected or not,” are substituted for “although no bodily injury be effected,” in order to prevent an objection which might possibly have been raised on an indictment under the former clause, if it had appeared that any bodily injury had been effected. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900.

(h) This section is entirely new, and contains one of the most important amendments in these Acts. It includes every attempt to murder not specified in any preceding section. It will therefore embrace all those atrocious cases where the ropes, chains, or machinery used in lowering miners into mines have been injured with intent that they may break and precipitate the miners to the bottom of the pit. So also all cases where steam engines are injured, set on work, stopped, or anything put into them, in order to kill any person, will fall within it. So also cases of sending or placing infernal machines with intent to murder. See *Rex v. Mountford*, R. & M. C. C. 441; 7 C. & P. 242 (32 E. C. L. R.), *post*, p. 979. Indeed every attempt to murder, which perverted ingenuity may devise, or fiendish malignity suggest, will fall within some clause of this Act, and may be visited with penal servitude for life. In any case where there may be a doubt whether the attempt falls within the terms of any of the preceding sections, a count framed on this clause should be added. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900.

(i) The observations and cases bearing on this clause will be found in the Chapter “*Of Threats and Threatening Letters.*”

(k) This clause is taken from the 7 Will. 4 and 1 Vict. c. 89, s. 7. The words “unlawfully and maliciously” are substituted for “by force” in the former Act. Under the 7 Will. 4 and 1 Vict. c. 89, s. 7, if A. were pulling B. out of the water, and C. prevented A.

Sec. 18. "Whosoever shall unlawfully and maliciously *by any means whatsoever* wound or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not *975] less than three years—or to be imprisoned for any *term not exceeding two years, with or without hard labor, and with or without solitary confinement."(*l*)

Sec. 19. "Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this Act, although the attempt to discharge the same may fail from want of proper priming or from any other cause."(*m*)

Sec. 20. "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years—or to be imprisoned for any term not exceeding two years, with or without hard labor."(*n*)

Sec. 23. "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding ten years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor."(*o*)

Sec. 24. "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years—or to be imprisoned for any term not exceeding two years, with or without hard labor."(*p*)

from doing so, C. would have been guilty of no offence, except an assault; the words in *italics* were introduced to meet this and similar cases. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900.

(*l*) This clause is taken from the 7 Will. 4 and 1 Vict. c. 85, s. 4. The words in *italics* at the beginning of this section were introduced to make it correspond with s. 11, *ante*, p. 972. As to the word "wound," see the note to that section. The word "any" is substituted in two places for "such," in order to provide for cases where the prisoner wounds, &c., A., when he intends to wound B., and the like. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900.

(*m*) This clause is new, and is introduced to meet every case where a prisoner attempts to discharge a gun, &c., loaded in the barrel, but which misses fire for want of priming, or of a copper cap, or from any like cause. See *post*, p. 978.

(*n*) This clause is taken from the 14 & 15 Vict. c. 19, s. 4; and see the 10 Geo. 4, c. 34, s. 29 (*l*). The word "wound" has been so placed in this clause that the words "either with or without any weapon or instrument," may apply to it. As to counsellors and aiders, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to fine and sureties, see *ante*, p. 900.

(*o*) This clause is taken from the 23 & 24 Vict. c. 8, s. 1. As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to sureties, see *ante*, p. 900.

(*p*) This clause is taken from the 23 & 24 Vict. c. 8, s. 2. As to counsellors and aiders, see sec. 67, *ante*, p. 881. As to hard labor, sureties, &c., see *ante*, p. 900. Upon an indictment on the 23 & 24 Vict. c. 8, s. 2, for administering cantharides to a female, with intent to injure, aggrieve, and annoy her, it appeared that the prisoner, unknown to the prosecutrix, put cantharides into a cup of tea which she drank, and was very ill in consequence, and the jury found that the prisoner administered the cantharides with intent to

*Sec. 25. "If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor."(*q*)

An attempt to commit suicide is not an attempt to commit murder within the 24 & 25 Vict. c. 100, s. 15, and remains a common law misdemeanor triable at sessions. (*qq*)

The following cases, which were decided upon the former statutes, may be here mentioned.—It was said, that upon an indictment on the 9 Geo. 1, c. 22, it was necessary to show that the instrument was loaded with gunpowder, and also with a bullet, slug, or other deadly substance; but that it was sufficient if such facts appeared from the general circumstances of the case. (*r*) Where it did not appear whether the wounds which the prosecutor had received in his neck and chin were given by the wadding, or by a ball from a pistol, except that the prisoner, who was endeavoring to effect an escape at the time, exclaimed with an oath, "Let me pass, or I will blow your brains out," and immediately fired, and the prosecutor said, that he apprehended the wounds must have been given by a ball from the sensation he felt at the time, and because it took him in one place; and another witness said that the report was very strong for so small a pistol; it was contended that there was not sufficient evidence that the pistol was loaded with a leaden bullet. But the Court thought that there was sufficient evidence of that fact to go to the jury: and the jury found the prisoner guilty. (*s*) It was necessary also, under the same Act, that the shooting should be with an instrument levelled at the party. So that where the prosecutor, who was landlord of the premises occupied by the prisoner, had come in the night to bring provisions for a man whom he had put into possession of the prisoner's goods under a distress for rent, and had got over the pales of the garden for that purpose, but, upon being met by the prisoner and severely beaten, was making his retreat, in the dark, over another part of the pales, more than five yards distance from the place at which he entered, when the prisoner levelled a gun at the place where the prosecutor got into the garden, and immediately fired it off; the gun being thus fired in a different direction from that in which the prosecutor was going, the Court held that it was not a shooting at the prosecutor within the meaning of the statute. (*t*)

Shooting was within the 43 Geo. 3, though the instrument was loaded with powder and paper only, if it was fired so near the person, and in such a direction, as to be likely to kill, &c. In a *case where the prisoner was indicted for shooting at the prosecutor with a loaded pistol, and Le Blanc, J., had told the jury, that if it was loaded with powder and paper only, but fired so near, and in such a direction, that it would probably kill or do other grievous bodily harm, and with intent that it should do so, the case was within the Act; and the jury had convicted, saying, they were satisfied that the pistol was loaded with some other destructive material besides powder and paper; there was a petition to the Crown, on the ground that the pistol was loaded with powder and paper only: and the opinion of the Judges being asked, whether, if that were so, the direction was right, they held that it was. (*u*)

If all the counts of an indictment under the 9 Geo. 4, c. 31, s. 11, for shooting

excite the sexual passion and desire of the prosecutrix, in order that he might obtain connection with her, and, on a case reserved, after a verdict of guilty, on the question whether the intent above stated was an intent to injure, aggrieve, or annoy within the statute, the conviction was affirmed: *Reg. v. Wilkins*, 1 Leigh & C. 89.

(*q*) This clause is taken from the 23 & 24 Vict. c. 8, s. 3.

(*qq*) *Reg. v. Burgess*, L. & C. 258.

(*r*) 1 Hawk. P. C. c. 55. *Of Shooting*, &c., s. 9, citing *Rex v. Elliott*, Old Bailey, 1787.

(*s*) *Weston's case*, 1 Leach 247.

(*t*) *Empson's case*, 1 Leach 224; 1 Hawk. P. C. c. 55. *Of Shooting*, &c., s. 10. See *Rex v. Lovell*, 2 Moo. & Rob. 39, *post*, p. 1007.

(*u*) *Rex v. Kitchen*, MS., Bayley, J., and R. & R. 95.

at a person with intent to murder, alleged that the pistol was loaded with powder and a leaden bullet, it must have been proved that the pistol was loaded with a bullet. Upon an indictment against a man as principal in the first degree, for shooting at a woman with intent to murder her, and against her as principal in the second degree, in which all the counts alleged that the pistol was loaded with powder and a leaden bullet, it appeared that a person being awakened by the report of fire-arms in the room where the prisoners were, went into the room, and discovered both prisoners lying on the floor bleeding: on their being asked what was the matter, and who fired, the man said, "I fired one pistol at her, and the other at myself." He afterwards said, "he could feel the ball somewhere in his cheek." The woman had said she wished the man to shoot her. A surgeon proved that both prisoners were bleeding from the ear, the bones of which were shattered; but no bullet could be found internally or externally, either in the man or the woman, and he thought the wound was either from a ball or the wadding of a pistol, and that wadding, if rammed down tight, might have produced the effect without any ball; search was made in the room, but no ball found. Bolland, B., having consulted Park, J. A. J., and Park, J., who were present, said to the jury: "The offence is charged in every count of the indictment as having been committed with a pistol, loaded with a leaden bullet. If the question had arisen with respect to the pistol fired by the man at himself, I should have felt it my duty to leave it to you, on his declaration that he thought he felt a ball in his cheek; but he might have intended to kill himself, being weary of life, though he might not have intended to kill the woman, notwithstanding her request. I have consulted with my learned brothers, and it is our opinion that the indictment is not sufficiently proved to justify you in a verdict of guilty." (v)

So where a similar indictment on the same statute, in different counts, alleged a gun to have been loaded with shot and various destructive materials, and it appeared that a watcher of game being out in the night, saw the prisoner crouching under a wall, and said he knew him, when he instantly raised a gun to his shoulder, and *978] levelled it at him; he stooped to avoid it, the gun *went off, and the charge, whatever it was, struck a hairy cap he had on his head, and singed the hair. There was evidence of previous ill-will, and the prisoner after his apprehension had said, "I did it, and I rued it the instant I pulled the trigger." A small bag of shot was found in the prisoner's pocket after he was apprehended. It was objected that there was no evidence to show that the gun was loaded with shot, or any of the destructive materials charged in the indictment, and Patteson, J., was strongly of opinion that the objection ought to prevail; and, after consulting Alderson, J., he directed an acquittal. (w)

Where an indictment for treason alleges that the prisoner discharged a pistol loaded with powder and a bullet, the jury must be satisfied that the pistol was a loaded pistol, and had something in it beyond powder and wadding; but it seems that it is not necessary for them to be satisfied that it was actually loaded with that which is generally known by the name of a bullet. An indictment for treason stated that the prisoner "discharged a certain pistol loaded with gunpowder and a certain bullet" at the Queen; it appeared that the prisoner had discharged two pistols at the Queen, and two witnesses proved that at the time the pistols were discharged they heard something whizz by them; the prisoner had bought caps and balls before, and balls and bullet-moulds were found in his box; and he had said to a person, "If your head had come in contact with the ball, you would have found there was a ball in the pistol." Lord Denman, C. J., told the jury: "The questions for your consideration are, whether the prisoner did fire the pistols, or either

(v) *Rex v. Hughes*, 5 C. & P. 126 (24 E. C. L. R.). The two prisoners had apparently agreed to commit suicide together.

(w) *Whitley's case*, 1 Lew. 123. In *Blake v. Barnard*, 9 C. & P. 626 (38 E. C. L. R.), where a count in trespass for an assault, stated that the defendant presented a pistol "loaded with gunpowder, ball, and shot" at the plaintiff, and there was no evidence that the pistol which the defendant presented at the plaintiff was loaded; Lord Abinger, C. B., said, "It is stated in the declaration that the pistol was loaded with gunpowder, ball, and shot, and it is for the plaintiff to make that out, and he has not done so."

of them, at Her Majesty, and whether those pistols, or either of them, were or was loaded with ball at the time when they were so fired." "One witness says, 'The prisoner was about five or six yards from the carriage when he discharged the pistol, and on the right side of it; the report of the pistol attracted my attention, and I had a distinct whizzing or buzzing before my eyes, between my face and the carriage.' And another witness says, 'It seemed something that whizzed past my ear; as I stood, it seemed like something quick passing my ear, but what I could not say.' This is the only direct evidence; I have no means of furnishing you with any observation on that evidence; it is not matter of law, and you must bring your experience to bear upon it and couple it with the other facts of the case." "You will consider whether the prisoner discharged a loaded pistol." A Juryman: "Loaded with a bullet?" Lord Denman, C. J.: "Or a ball." Alderson, B.: "Not with powder and wadding only."(x)

But to constitute the offence of attempting to discharge loaded fire-arms, they must have been so loaded as to be capable of doing the mischief intended. So that if part of the loading had fallen out, though without the prisoner's knowledge, and that which remained was inadequate to effect the mischief, the case was not within the Act. And it seems that a case was not within the Act, *if there was [*979 not such a loading at the time as was likely to produce a discharge, though it was possible it might produce it. The prisoner was indicted for attempting to discharge a loaded blunderbuss at J. S. The evidence was, that it had been loaded and *primed* a fortnight before, and that the prisoner levelled it at J. S., and drew the trigger; that the flint struck fire in the pan, but that nothing caught fire there. The blunderbuss was afterwards discharged without any fresh priming: but the powder might in the interim have been shaken through the touch-hole from the barrel into the pan. The prisoner was convicted: but the jury found that the blunderbuss was not primed at the time. Upon a case reserved, the great majority of the Judges considered this equivalent to a finding that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn; and if not, that it was not loaded within the meaning of the Act: and a pardon was recommended.(y) In a case prior to this decision, it appeared that the prisoner had a loaded gun; but that, in his struggle with the prosecutor, it was probable all the powder had fallen out: he afterwards levelled it at the prosecutor, and drew the trigger. Abbott, J., told the jury, that if they thought the powder was all out before the prisoner drew the trigger, the gun could not be considered as loaded at the time; and on that ground, though with reluctance, the prisoner was acquitted.(z)

A pistol loaded with powder and balls, but its touch-hole so plugged up that it could not possibly be fired, was not "loaded arms," within the 9 Geo. 4, c. 31, ss. 11 & 12. Upon an indictment charging the prisoner with attempting to discharge a loaded pistol, by drawing the trigger, with intent to murder, it appeared that the prisoner pointed the pistol, which was loaded to within half an inch of its muzzle with gunpowder, paper, and two balls, at the head of the prosecutor, within four inches of his ear, and pulled the trigger; the lock went down, and the prosecutor saw a single spark from it; no mischief was done; there was no priming found in the pan, but it might have dropped out in the struggle to take the pistol from the prisoner. The prisoner's defence was, that he always kept a piece of paper in the pan, and another piece of paper twisted tightly and run into the touch-hole, so as to prevent its being fired, and the prisoner's son was called to prove that it had been in that state the day before. Patteson, J., (in summing up): "If you think that the pistol had its touch-hole plugged, so that it could not by possibility do mischief, I think that the prisoner ought to be acquitted, because I do not think that a pistol so circumstanced ought to be considered as loaded arms, within the meaning of this Act."(a)

And there had been several similar decisions,(b) and these cases caused the intro-

(x) Reg. v. Oxford, 9 C. & P. 525 (38 E. C. L. R.).

(y) Reg. v. Carr, MS., Bayley, J., and R. & R. 377.

(z) Anon., 1817, MS., Bayley, J.

(a) Rex v. Harris, 5 C. & P. 159 (24 E. C. L. R.).

(b) Reg. v. James, 1 C. & K. 530 (47 E. C. L. R.); and Reg. v. Baker, 1 C. & K. 254.

duction of sec. 19,(c) by which, if the barrel be loaded, the case is within the statute, although the attempt to discharge may fail "from want of proper priming, or from any other cause."

*980] A tin box, filled with gunpowder and peas, was not a loaded *arm within the meaning of the 9 Geo. 4, c. 31, s. 11. The prisoner sent to the prosecutor a package, of the shape and size of a cigar-box, containing a tin box with three pounds of powder and some peas in it. The box had a lid to it, to put on and pull off. The object of the prisoner was, that the prosecutor should set fire to the powder in the act of opening the box, by exploding two fulminating matches which were fixed to the top and bottom of the box. Upon a case reserved upon the question whether the thing in question came within the description of loaded arms, the Judges were unanimously of opinion that the means used were not loaded arms within the Act.(d)

It was sufficient "shooting" within the 9 Geo. 4, c. 31, to discharge the barrel of a gun, when separated from the stock, by means of striking the percussion cap with a knife. Upon an indictment for shooting with intent to murder, it appeared that the prisoner, being caught poaching, ran away and was pursued by the prosecutor, who caught him, and took the stock and locks of a gun from one of his pockets: the prisoner then took the barrels from another pocket, and struck the percussion cap with something, which the prosecutor supposed to be a knife, and thereby fired one of the barrels and shot the prosecutor: it was objected that the Act only applied to shooting with a complete fire-arm; that the statute first provided for the actual shooting, and secondly against all attempts to discharge loaded arms, and as the latter clause was limited to attempts with loaded arms, which could only apply to *complete* arms, so must the former clause; but it was held that the case was within the statute.(e)

Upon an indictment under the 1 Vict. c. 85, for attempting to discharge loaded fire-arms at a person, there must have been some act shown to have been done by the prisoner to prove that he did attempt to discharge the fire-arms, and merely presenting them was not sufficient. Upon an indictment for attempting to discharge a blunderbuss with intent to murder, &c., it appeared that the prisoner went to the house of the prosecutor, and asked him for some title-deeds which he held as a security. The prosecutor told him he could not let him have them; the prisoner said, "Then you are a dead man;" unfolded a great coat, which he had on his arm, and took out a blunderbuss. A person who was near him seized him by the two arms, and he was secured; the muzzle of the blunderbuss was towards the side of the room where the prosecutor was, but was not pointed at him; the prisoner's intention, whatever it was, was prevented by the person laying hold of him; the blunderbuss was primed, and very heavily loaded, but it had no flint in it; the flint was found beneath the lining of the coat, from which the prisoner took the blunderbuss. Arabin, *Serjeant, after consulting Patteson, J., told the jury that *981] they were both of opinion that, to sustain the indictment, there must be something more than the mere presenting of the blunderbuss, and that some act must be shown to have been done by the prisoner, to satisfy the jury that he did in fact attempt to discharge the blunderbuss.(f)

The object of the Act was to punish *proximate* attempts; that is, those attempts which immediately lead to the discharge of loaded arms. The words, "in any other

(c) *Ante*, p. 975.

(d) *Rex v. Mountford*, R. & M. C. C. R. 441; 7 C. & P. 242 (32 E. C. L. R.). A further question, which was not decided by the Judges, was whether as the explosion was intended to have been, and must have been effected (if at all) by the agency of another, it was an attempt to discharge loaded arms at the prosecutor within the meaning of the Act; upon this Alderson, B., said, "The principle is laid down by *Holroyd, J.*, in *Hott v. Wilks*, 3 B. & A. 315. If one person makes use of another, who is a mere instrument to do an act, the thing done is the act not of him who is merely the instrument, but of the person who uses him as an instrument."

(e) *Rex v. Coates*, 6 C. & P. 394 (25 E. C. L. R.), and *MS.*, C. S. G., *Patteson, J.* His lordship consulted several other Judges, who agreed with him in opinion, otherwise the case would have been reserved.

(f) *Reg. v. Lewis*, 9 C. & P. 523 (38 E. C. L. R.).

other manner," mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off. Upon an indictment on the 1 Vict. c. 85, ss. 3 & 4, for attempting to discharge a pistol loaded with powder and ball, with intent to murder, &c., some counts of which charged the attempt to have been made by drawing the trigger, others by putting the finger and thumb upon the trigger, and others simply charged that the prisoner did attempt to discharge the pistol; a witness said, "The prisoner took out a small pistol, and said, 'I will settle you,' or 'I will do you;' the prisoner either half or full cocked the pistol, and pointed the muzzle at my brother, and against his trowsers. I rushed at the pistol, and put my right hand over the muzzle of the pistol, and my other hand over the cock; I found the prisoner's finger pulling; his finger was on the trigger; I plainly felt the finger of his right hand on the trigger, and my hand did not allow the trigger to go back; the people interfered, and they were separated." Parke, B.: "It appears to me that the charge of felony cannot be supported, as it is not proved that the prisoner drew the trigger. The words 'in any other manner,' in the statute, mean something analogous to drawing the trigger, which is the proximate cause of the loaded arm going off. Suppose, for instance, you had a matchlock, and put a match to it, and the gun did not go off, that would be a case within the Act of Parliament; but here there is no proof that the prisoner drew the trigger, though he put his finger to it; and he cannot, therefore, be convicted on those counts which charge him with so doing, or which charge him with a felonious attempt to discharge the pistol, for it must be an attempt *ejusdem generis*; the consequence is, he cannot be convicted of a felony." It was then urged for the prosecution that the clause in this Act said, that if a party should attempt, by drawing the trigger, or in any other manner, to discharge the loaded arm, he should be guilty of the offence. If, therefore, a man put his hand on the trigger, in order to fire the pistol, and could not do it, because the pistol happened to be at half cock, that would be within the meaning of the statute. Parke, B.: "Here was a trigger to be drawn, and it is not drawn. It seems to me that the object of this Act was to punish proximate attempts, that is, those attempts which immediately lead to the discharge of loaded arms; therefore, if a person drew the trigger, and the gun was loaded, in that case the offence would be complete, though the gun did not go off, and though it did not happen to strike the percussion cap; and the Act also provides for the case of fire-arms which do not go off with the ordinary lock. Suppose, therefore, a [*982 man was to come with a matchlock, and attempt to discharge it, *by putting a fusee or a brimstone match to the touch-hole, that would be an attempt to discharge it within the meaning of this Act; and so since the newly-invented fire-arms, if a man with a hammer were to strike the cap, that would be a felony under this Act of Parliament; and, as I thought a point of this kind would be taken, I have availed myself of an opportunity which I had of consulting my brother Williams, who agrees with me in opinion." (g)

If a cutting were inflicted, the case was within the statute, though the instrument were not intended for cutting, nor ordinarily used to cut, but generally used to force open drawers, doors, &c.; and though the intention was not to cut, but to inflict some other mischief. The prisoner was indicted for cutting and stabbing. It appeared that he was seized for a robbery; and in order to escape, struck the prosecutor on the head with an iron crow, which cut out part of his skull. The instrument was sharp at one end so as probably to cut. A case was reserved, because this was an instrument to force open doors, drawers, &c., and not to cut; and because the prisoner meant to break or lacerate the head, not to cut it; but the conviction was held right. (h)

Cutting a child's private parts, so as to enlarge them for the time, may be considered as doing her grievous bodily harm; and as done with that intent, though the hymen is not injured, the incision is not deep, and the wound eventually is not dangerous. The prisoner cut a female child, ten years old, in her private parts, probably to enlarge them to admit his entrance, but he was interrupted and fled; the wound was small, but bled a good deal; and when a surgeon saw it, four days after-

(g) Reg. v. St. George, 9 C. & P. 483 (38 E. C. L. R.).

(h) Rex v. Hayward, MS., Bayley, J., and R. & R. 78.

wards, he found it near an inch in length, not deep nor dangerous, because below the hymen; but if it had entered the hymen it would have been dangerous. Graham, B., left it to the jury to say, whether this was not a grievous bodily injury; and if so, then, though there might have been an ulterior intention to commit a rape, yet, if there was an intent to do grievous bodily harm, the case was within the Act; and that the intention might be inferred from the cutting. The jury found the prisoner guilty, and the Judge held the conviction right.⁽ⁱ⁾

In order to obviate the difficulties which arose under the 43 Geo. 3, c. 58, upon the construction of the words "cut or stab," the 9 Geo. 4, c. 31, introduced the word "wound," which was also contained in the 1 Vict. c. 85; and as every cut or stab is included in the term "wound," the new Act has used that word only.

In order to constitute a wound, the continuity of the skin must be broken, and it is not sufficient that bones are broken, the skin not being broken. Upon an indictment for wounding, under the 9 Geo. 4, c. 31, s. 12, it appeared that the prisoners had struck the prosecutor with an iron bar and an iron hammer, and that the collar-bone had been broken, and the end of the bone much injured by violence; *983] and upon a case reserved, all the Judges, *except Bayley, B., and Park, J. A. J., thought that there was no wound within the Act.^(k)

A great Judge has said, that "the definition of a wound, in criminal cases, is an injury to the person, by which the skin is broken. If the skin is broken, and there was a bleeding, it is a wound."^(l) Upon an indictment for cutting and wounding, with intent to murder, it appeared that the prisoner threw a hammer at the prosecutor, and hit him over his right eye and nose, and made a wound on the eye, and by the side of the nose; his head was very bloody; the hammer was a blacksmith's finishing-hammer; one end of it round, and the surface flat, the other end sharp, to draw out with. Upon a case reserved, the Judges were unanimously of opinion that the injury stated in the case amounted to a wound within the statute.^(m)

There must be a division of the external surface of the body to make a wound; therefore a scratch is not a wound. Upon an indictment for wounding, it appeared that the prisoner attacked the prosecutor with a butcher's knife, and, drawing him backwards, attempted to cut his throat, and an injury (which the prosecutor described as a slight scratch) was inflicted on the throat. Parke, B.: "Nothing which can properly be called a wound has been inflicted in this case. A scratch is not a wound within the statute; there must, at least, be a division of the external surface of the body."⁽ⁿ⁾

There must be a separation of the whole skin; a separation of the cuticle, or upper skin, only is not sufficient. Upon an indictment for wounding, a medical man stated that there was a slight abrasion of the skin, not exactly a wound, but an abrasion of the cuticle; it did not penetrate farther than that; the cuticle is the upper skin; blood would issue, but in a different manner, if the whole skin was cut. Coleridge, J. (Bosanquet, J., and Coltman J., being present), told the jury: "It is essential for you to be quite clear that a wound was inflicted. I am inclined to understand, and my learned Brothers are of the same opinion, that if it is necessary to constitute a wound that the skin should be broken, it must be the whole skin; and it is not sufficient to show a separation of the cuticle only. You will, therefore, have to say on the first three counts, whether there was a wounding in the sense in which I have stated, viz., was there a wound—a separation of the whole skin?"^(o)

If the skin be broken internally, and not externally, it is a wound. Upon an indictment on the 1 Vict. c. 85, for wounding, a surgeon stated, "That the lower jaw on the left side was broken in two places; the skin was broken internally, but not externally; there was not a great deal of blood; one fracture was near the chin, and the other near the ear." The prisoner had struck the prosecutor with a hammer on the left side of the face, but there was no wound on the outside of the face. It was

(i) *Rex v. Cox*, MS., Bayley, J., and R. & R. 362.

(k) *Rex v. Wood*, 1 R. & M. C. C. R. 278; 4 C. & P. 381 (19 E. C. L. R.).

(l) Lord Lyndhurst, C. B., in *Moriarty v. Brooks*, 6 C. & P. 684 (25 E. C. L. R.).

(m) *Rex v. Withers*, 1 R. & M. C. C. R. 294; s. c., 4 C. & P. 446 (19 E. C. L. R.).

(n) *Rex v. Beckett*, 1 Moo. & R. 526.

(o) *Reg. v. M'Loughlin*, 8 C. & P. 635 (34 E. C. L. R.).

objected that there was not a wounding. Park, J. A. J.: "When I first read the deposition I thought there might be some doubt. In consequence of this, I consulted with my Lord Chief Justice, and considered *the question very much [*984 in my own mind, and we are of opinion that it is a wounding within the meaning of the Act." Lord Denman, C. J.: "If it is the immediate effect of the injury, we think we cannot distinguish this from the cases which have been already decided." Park, J. A. J., in summing up: "A question was very properly put to us, as to whether we thought there was a wound within the meaning of the statute. We were of opinion that there was a wound; and upon consideration, I am more strongly of that opinion than I was at the outset. There must be a wounding; but if there be a wound (that is, if the skin is broken, whether there be an effusion of blood or not), it is within the statute, whether the wound is internal or external."(*p*)

On an indictment for wounding with intent to do grievous bodily harm, it appeared that the prisoner had given the prosecutrix a violent kick in the private parts, and that it had been followed by an occasional discharge of blood mingled with urine, but the surgeon could not say from what precise vessels the blood originally flowed; and Patteson, J., held that the charge was not sustained; there might have been no lesion of any vessels at all; but the blood might have been discharged simply from natural causes.(*q*) But where on a similar indictment it appeared that a policeman had received a violent kick on his private parts, and the external skin was unbroken, but the lining membrane of the urethra was ruptured, which caused a small flow of blood, mingled with urine, for two days; Cresswell, J., held that this case was very different from the preceding, and that there was a wounding within the statute.(*r*)

It was evidently the intention of the Legislature, according to the words of the repealed statute, that the wounding should be inflicted with some instrument, and not by the hands or teeth.(*s*) Where, therefore, a prisoner had bit off the end of a finger, it was held, on a case reserved, that this was not a wounding within the statute.(*t*) So it was held that biting off the nose was not a wounding.(*u*) So it was ruled, on an indictment under the 1 Vict. c. 85, s. 4, that biting off the prepuce of a child three years of age was not a wounding, because the word "wound" was used concurrently with "cut and stab," and inasmuch as a stab or cut must be made by an instrument, the Legislature intended by the word "wound," an injury (not being a stab or cut) which was made by an instrument also.(*v*) So where on an indictment under the 9 Geo. 4, c. 31, s. 12, for maliciously wounding, it was proved *that the prisoner had thrown a quantity of concentrated sulphuric acid, [*985 commonly called oil of vitriol, into the face of the prosecutor; and the jury found, upon the evidence of the surgeons, that the effect of such act was a wound upon the face of the prosecutor; it was held, on a case reserved, that there being no instrument used, nor any immediate wound produced, the conviction was wrong.(*w*)

But any kind of instrument whatever was sufficient, as a bludgeon,(*x*) a black-

(*p*) Reg. v. Smith, 8 C. & P. 173 (34 E. C. L. R.), Lord Denman, C. J., and Park, J. A. J.

(*q*) Reg. v. Jones, 3 Cox C. C. 441.

(*r*) Reg. v. Waltham, 3 Cox C. C. 442. See Reg. v. Warman, 1 Den. C. C. 183, where there was no external breach of the skin, but a collection of blood between the scalp and the cranium just above the spot where within the cranium there was an extravasation of blood pressing upon the brain, and the surgeon called it a contused wound with effusion of blood; the internal part of the skin was broken; medically the breaking of the skin, whether internally or externally, is a wound; and it was held that this internal wound was a sufficient wound to support the allegation of a wound in an indictment for murder, whether it would have been so or not on an indictment on the statute for wounding with intent, &c.

(*s*) Per Patteson, J., Rex v. Harris, 7 C. & P. 446 (32 E. C. L. R.).

(*t*) Rex v. Stevens, R. & M. C. C. R. 409, decided on the 9 Geo. 4, c. 31, s. 12.

(*u*) Rex v. Harris, 7 C. & P. 446 (32 E. C. L. R.), Patteson, J., decided on the 9 Geo. 4, c. 31, s. 12.

(*v*) Jennings's case, 2 Lew. 130, Alderson, B.

(*w*) Rex v. Murrow, R. & M. C. C. R. 456. See Rex v. Owens, R. & M. C. C. R. 205, as to maiming a mare with nitrous acid.

(*z*) Rex v. Payne, 4 C. & P. 558 (19 E. C. L. R.), Patteson, J.

smith's finishing hammer,(y) an iron hammer,(z) a stone bottle,(a) a hedge stake, or half a rail,(b) a gun,(c) a stick or club,(d) and even a shoe, whether off or on the foot.(e)

And it made no difference that there was some part of the clothing intervening between the body and the instrument with which the injury was inflicted. Upon an indictment for wounding, it appeared that the prisoner struck the prosecutor with an air-gun twice on the left side of a thick hat that he had on his head; the prosecutor had a contused wound on the left side of his head, which was made by the hard rim of the prosecutor's hat, by the violence with which the hat was struck by the prisoner, and was not occasioned by the gun alone, as the prosecutor said the gun had never come directly in contact with his head: and upon a case reserved upon a doubt whether, as the wound must in fact have been caused by the hat, and not by the gun barrel, the prisoner ought to have been convicted, the conviction was held right (f)

But in the new Act, the words "by any means whatsoever" are placed immediately before the word "wound;" and it is therefore perfectly immaterial whether the wound be inflicted with or without a weapon.

The wound must be inflicted by the prisoner; if, therefore, the prosecutor, in attempting to defend himself from an attack made upon him with a knife, strike his hand against the knife, and thereby receive a wound, it is not within the Act. Upon an indictment on the 9 Geo. 4, c. 31, s. 11, for wounding, it appeared that the prisoner attacked the prosecutor with a butcher's *knife; the prosecutor succeeded in warding off all hurt except a slight scratch on his throat, by lifting his two hands up to his throat, but in doing this his hands struck against the knife and were cut. Parke, B.: "A scratch is not a wound within the statute; there must at least be a division of the external surface of the body; the cuts on the hands are indeed wounds; but it appears that they were inflicted by the prosecutor himself in the attempt to defend himself from the prisoner's attack; those cuts, therefore, cannot be considered wounds inflicted by the the prisoner with intent to murder or maim the prosecutor." (g) So where on an indictment for wounding with intent to maim, &c., the prosecutor proved that he endeavored to persuade the prisoner to leave a public-house, and that the prisoner knocked him over a form with his fists, in one of which he appeared to have some instrument; when the prosecutor recovered his legs, he put forth his hand to ward off the attack of the prisoner, and in doing so he pushed it against the right hand of the prisoner, in which was a penknife, which ran into the prosecutor's finger just deep enough to bring blood. The prisoner seemed to hold the knife in his hand, and to use it as if he was attempting to cut the frock of the prosecutor, and the frock bore three long marks as if it had been slit downwards by cuts from the knife, and there were several scars through which the knife had not penetrated. Parke, B., held that there was an end to the charge of felony, as the prosecutor's hand came in contact with a knife

(y) *Rex v. Withers*, R. & M. C. C. R. 294, *supra*, note (m), p. 983.

(z) *Reg. v. Smith*, 8 C. & P. 173 (34 E. C. L. R.), *supra*, note (p), p. 984.

(a) *Reg. v. M'Loughlin*, 8 C. & P. 635 (34 E. C. L. R.), *supra*, note (o), p. 983.

(b) *Rex v. Briggs*, R. & M. C. C. R. 318.

(c) *Rex v. Sheard*, 7 C. & P. 846 (32 E. C. L. R.), *infra*, note (f).

(d) *Rex v. Lancaster*, 2 Stark. Ev. 692, note.

(e) *Rex v. Shadbolt*, 5 C. & P. 504 (24 E. C. L. R.), Lord Denman, C. J., and Vaughan, B.; *Reg. v. Duffell*, 1 Cox C. C. 49; *Rex v. Briggs*, R. & M. C. C. R. 318. And per Lord Tenterden, C. J., a wound from a shoe in the hand would be within the Act; and a blow from a shoe on the foot would be likely to inflict a more deadly wound than a blow from a shoe in the hand: *Rex v. Briggs*, 3 Burn. J., D. & W. 542. It does not seem settled whether the teeth of a dog, which has been set to bite a person, can be considered as instruments within these statutes. In *Elmsly's case*, 2 Lew. 126, Alderson, B., thought that the bite of a dog would be within the 9 Geo. 4, c. 31; it did not, however, become necessary to decide the point, otherwise the case would have been reserved. In *Rex v. Hughes*, 2 C. & P. 420 (12 E. C. L. R.), Park, J. A. J., held that severe wounds inflicted on a sheep by a dog which the prisoner had set at it, was not a wounding within the 4 Geo. 4, c. 54, s. 2.

(f) *Rex v. Sheard*, 7 C. & P. 846 (32 E. C. L. R.).

(g) *Rex v. Beckett*, 1 M. & Rob. 526.

at a moment when no intention existed in the mind of the prisoner to inflict any wound on his person.^(h) And where on an indictment for wounding with intent to do grievous bodily harm, it appeared that the prisoner knocked the prosecutor down with a stick on a tram-road; and it was contended that the wound was caused by the fall on the iron trams; Talfourd, J., told the jury, that in order to convict the prisoner the wound must be direct, and if they should be of opinion that the injury was the result of a fall, although occasioned by a blow from the prisoner, that would not be sufficient.⁽ⁱ⁾

The 9 Geo. 4, c. 31, s. 12, contained a proviso, that if it appeared that the acts of shooting, attempting to discharge loaded arms, or stabbing, cutting, or wounding, with intent to maim, &c., were committed under such circumstances, that if death had ensued, the same would not have been murder. the prisoner should be acquitted, and a similar proviso was contained in the 43 Geo. 3, c. 58. The introduction of this proviso caused many persons, who deserved very severe punishment, to escape, and in order to remedy that mischief the proviso is entirely omitted in the latter Acts.

Under the 1 Vict. c. 85, therefore, it was no defence that the offence would not have been murder if death had ensued. Upon a case reserved upon the question, whether since the 1 Vict. c. 85, it was a defence to an indictment for wounding with intent to maim, &c., that if death had ensued the offence would not have been murder but manslaughter; all the Judges thought that it was no defence, except Lord Denman, C. J., and Littledale, J., who doubted.^(k) So where [937 on an indictment for wounding, it appeared that the prisoner had wounded the prosecutor under such circumstances, that if he had died it would only have been manslaughter; Alderson, B., held the case within the Act, saying, "If this had been a case under the former Act of Parliament, the prisoner would have been entitled to his acquittal, because if death had ensued there would only have been a bad case of manslaughter; but under the law as it now stands, it is only necessary that the offence should have been committed maliciously, and with some of the intents laid in the indictment: however, by the term 'maliciously,' is not meant with malice aforethought; that would constitute a still more grave offence, as that would show an intent to murder."^(l)

It has been held, that upon an indictment for attempting to drown, it must be shown clearly that the acts were done with intent to drown. An indictment on the 9 Geo. 4, c. 31, s. 11, alleged, that the prisoner assaulted G. T. and J. C., and with a boat-hook made holes in a boat in which they were, with intent to drown them. G. T. and J. C., two little boys, were attempting to land out of a boat they had punctured across the Ouse, across which there was a disputed right of ferry; the prisoner attacked the boat with his boat-hook in order to prevent them, and by means of the holes which he made in it caused it to fill with water, and then pushed it away from the shore, whereby the boys were put in peril of being drowned. If he had wished it, the boat was so near he might easily have got into the boat and

(h) Reg. v. Day, 1 Cox C. C. 207.

(i) Reg. v. Spooner, 6 Cox C. C. 392.

(k) Anonymous, 2 Moo. C. C. R. 40.

(l) Reg. v. Griffiths, 8 C. & P. 248 (34 E. C. L. R.). It does not appear that in either of these cases any authorities on any previous statutes were referred to: but in Reg. v. Nicholls, 9 C. & P. 267 (38 E. C. L. R.), where Gurney, B., expressed a similar opinion; the cases on the Black Act, the 9 Geo. 1, c. 22, were relied upon as in point. It was held that the words of that Act, "If any person or persons shall wilfully and maliciously shoot," &c., made malice an essential ingredient in the offence; and, therefore, that no act of shooting amounted, under that Act, to a capital offence, unless the crime would have been murder if death had ensued: Gastineaux's case, 1 Leach 417, where the Court said the word "maliciously" constituted the very essence of the crime: 1 Hawk. P. C. c. 55, s. 7, where the learned author says, "For otherwise the absurdity might follow, that the offender might be convicted of a capital crime, although the party is living, and of a single felony, viz., manslaughter, though the party were killed." 1 East P. C. c. 8, s. 6, p. 412; 4 Bl. Com. 207, note (2). It is worthy of observation, that the words "unlawfully and maliciously," are omitted in the new clauses, where the intent is to commit murder. They are in the subsequent clauses, which provide for acts done with intents other than an intent to murder, and in which it is clear that an intent to murder cannot be necessary. See the sections, *ante*, p. 972. C. S. G.

thrown them into the water; instead of which he confined his attack to the boat itself, as if to prevent their landing, but apparently regardless of the consequences. Coltman, J., stopped the case, being of opinion, that an assault in fact upon the two boys ought to have been proved, seeing that the prisoner had the opportunity of attacking them personally, which he did not do, and the means by which he attacked the boat, indicating an intention rather to prevent their landing than to do them any injury. (m)

A mere delivery into the hand did not constitute an administering of poison within the 43 Geo. 3, c. 58; and it seems that taking it into the mouth was not sufficient, but that some part of the poison must have been actually swallowed. The prisoner was indicted under the 43 Geo. 3, c. 58, for administering white arsenic *and sulphate of copper, with intent to murder. It appeared that the *988] prisoner pulled a white bread cake out of his pocket, and pinched off a bit from the outside of it, and gave it the prosecutrix to eat, and she took it and put it into her mouth, but spit it out again, and did not swallow any part of it; it was proved that the cake contained arsenic and sulphate of copper: it was objected that it ought to be proved that the poison was swallowed by, or taken into the stomach of, the person intended to be poisoned; and upon a case reserved, the Judges seemed to think swallowing not essential; but they were of opinion that a mere delivery to the woman did not constitute an administering; and that upon a statute so highly penal they ought not to go beyond what was meant by the word "administering," and a pardon was therefore recommended. (n)

If a person mix poison with coffee, and tell another that the coffee is for her, and she take it in consequence, it seems that this is an administering; and, at all events, it is a causing the poison to be taken. Upon an indictment under the 9 Geo. 4, c. 31, s. 11, some counts of which charged that the prisoner "administered," and others, that she "caused to be taken," poison, with intent to murder, &c., it appeared that a coffee-pot, which was proved to contain arsenic, mixed with coffee, was standing by the side of the grate: the prosecutrix was going to put out some tea, but on the prisoner telling her that the coffee was for her, she poured out some for herself, and drank it, and in about five minutes became very ill. It was objected that the mere mixing of poison, and leaving it in some place for the person to take it, was not sufficient to constitute an administering; and *Rex v. Cadman* (o) was relied on, as showing that the delivery of the poison by the hand of the prisoner is the main ingredient of the offence: that there was no count which did not require an agency on the part of the prisoner. A "causing to be taken" included an act, and so did an "attempt to administer." Park, J. A. J.: "There has been much argument whether, in this case, there has been an administering of this poison. It has been contended that there must be a manual delivery of the poison, and the law, as stated in Messrs. Ryan & Moody's Reports, goes that way; but as my note differs from that report, and also from my own feelings, I am inclined to think that some mistake has crept into that report. It is there stated that the Judges thought the swallowing of the poison not essential; but my recollection is, that the Judges held just the contrary. I am inclined to hold that there was an administering here; and I am of opinion that, to constitute an administering, it is not necessary that there *989] should be a delivery by the hand. With respect to the question, whether the prisoner 'did cause the poison to be *taken' by Mrs. S., it has been proved that she said that she put the coffee-pot down for Mrs. S., and that upon this Mrs. S. drank some of the coffee: and if you believe the evidence of Mrs. S., I

(m) Sinclair's case, 2 Lew. 49.

(n) *Rex v. Cadman*, R. & M. C. C. R. 114. But in Carr. Supp. 237, where the same case is reported, it is said, that the Judges held that it was no administering, unless the poison was taken into the stomach; and in *Rex v. Harley*, 4 C. & P. 369 (19 E. C. L. R.), Park, J. A. J., said, that his note of this case was, "that the Judges were unanimously of opinion that the poison had not been administered, because it had not been taken into the stomach, but only into the mouth;" and this, certainly, is confirmed by the fact, that a pardon was recommended, which would be correct according to this view of the decision; but incorrect, if it was sufficient to prove that the poison was taken into the mouth, as that was proved to have been done. C. S. G.

(o) *Supra*.

am of opinion that this is a 'causing to be taken,' within the Act of Parliament."(*p*)

On an indictment for attempting to administer poison it appeared that the prisoner had bought some salts of sorrel, and put it in a sugar-basin in order that the prosecutor might take it with his tea, and the prosecutor and his wife took some of it with their tea, and discovered that something was wrong, and this led to a discovery of the poison; Wightman, J., held, that if the prisoner put the poison in the sugar intending that it should be taken, that was an attempt to administer it.(*q*)

If A. delivered poison to B. for the purpose of his administering it to C. in A.'s absence, A. was not liable to be convicted under the 1 Vict. c. 85, s. 3, of an attempt to administer poison to C., if B. were a guilty agent. The prisoners were indicted for attempting to administer poison to T. Vaughan with intent to murder him. The prisoners had procured arsenic, and gave it in a paper to one Edwards, telling him that it was poison, and that they wanted to kill Vaughan and his wife; they directed him to keep it in the palm of his hand, and to go to Vaughan's house, two or three miles distant, and call for a pint of beer, which he and the Vaughans were to drink together, and after having done so he was to call for another pint, and take an opportunity of slipping the arsenic into it unobserved by the Vaughans, to whom he was to hand it, that they might drink it and be poisoned. Edwards went to the Vaughans, told them what had passed, and gave up the poison. The jury having convicted, a case was reserved on the point whether the facts warranted the conviction of the prisoners of an attempt to administer poison. Edwards would have been the sole principal, and the prisoners would have been accessories before the fact. The question was, whether the delivery of poison to an agent with directions to him to cause it to be administered to another under such circumstances that, if administered, the agent would have been the sole principal, was an attempt to administer within the 1 Vict. c. 85, s. 3; and the Judges were unanimously of opinion that it was not, and that the conviction was wrong.(*r*)

Where upon an indictment on the 14 & 15 Vict. c. 19, s. 4, for unlawfully and maliciously inflicting grievous bodily harm, it appeared that the prisoner was about to leave his situation as manager of a shop, and that he put a quantity of croton oil into the sugar-basin which was to be used by the prosecutor, his successor, who took some of the sugar and immediately became ill, and for some hours suffered dreadful pain and agony, so much so as to alarm the medical man who attended him for his life; and the prisoner had stated that he gave the croton oil to the prosecutor because he was determined to give him a good scourging, for that *he had told so many stories of him. Croton oil is a very acrid poison, and highly dangerous, but occasionally administered as a medicine. It was contended that the section did not apply unless there was an assault committed, but no judgment was delivered, as the prisoner died.(*s*)

Where the prisoner put into a cup of tea, which the prosecutrix was about to drink, a quantity of cantharides, and she drank the contents of the cup, and was very ill in consequence. Cantharides taken in large quantities is poisonous; but it is administered by medical men as a stimulant to the kidneys and bladder. It is also administered to procure abortion, and to excite sexual passion and desire. The jury found that the prisoner administered the cantharides to, and caused it to be taken by, the prosecutrix, with the intent to excite her sexual passion and desire, in order that he might obtain connection with her; and upon a case reserved upon the question whether the intent above stated was an intent to injure, or to aggrieve or to annoy within the 23 Vict. c. 8, the conviction was affirmed.(*t*)

(*p*) *Rex v. Harley*, 4 C. & P. 369 (19 E. C. L. R.). (*q*) *Reg. v. Dale*, 6 Cox C. C. 14.

(*r*) *Reg. v. Williams*, 1 Den. C. C. 39; 1 C. & K. 589 (47 E. C. L. R.). The prisoners were afterwards convicted on an indictment for the misdemeanor of doing the acts with a criminal intent. See *Dears. C. C. 547*. The new clause is framed so as to include all such cases as this, *ante*, p. 973.

(*s*) *Reg. v. Heppinstall*, 8 Cox C. C. 111. There was also a count at common law for administering the croton oil with intent to injure and do bodily harm, and it was urged that this was no offence at common law. See now the 24 & 25 Vict. c. 100, ss. 23, 24, *ante*, p. 975.

(*t*) *Reg. v. Wilkins*, 1 L. & C. 89; *Reg. v. Walkden*, 1 Cox C. C. 282; *Reg. v. Hanson*,

Mr. Starkie, in his excellent work on Evidence,^(u) makes the following observations: "Upon an indictment for shooting or cutting another, with intent to murder or maim him, or to do him some grievous bodily harm, whether the act was done by the prisoner, with the particular intention wherewith it is charged to have been done, is, as in other cases of specific malice and intention, a question for the jury. Their inference upon this important point, as in other cases of malicious intention, must be founded upon a consideration of the situation of the parties, the conduct and declarations of the prisoner, and, above all, on the nature and extent of the violence and injurious means he has employed to effect his object. In estimating the prisoner's real intention, it is obviously of importance to consider the quantity and quality of the poison which he administered, the nature of the instrument used, and the part of the body on which the wound was inflicted, according to the plain and fundamental rule, that a man's motives and intentions are to be inferred from the means which he uses, and the acts which he does. If, with a deadly weapon he deliberately inflicts a wound upon a vital part, where such a wound would be likely to prove fatal, a strong inference results, that his mind and intention were to destroy. It is not, however, essential to the drawing such an inference, that the wound should have been inflicted on a part where it was likely to prove mortal; such a circumstance is merely a simple and natural indication of intention, and a prisoner may be found guilty of a cutting with an intention within the statute, although the wound was inflicted on a part where it could not have proved mortal, provided the criminal intention can be clearly inferred from other circumstances."^(w)

*991] *The cutting must be expressly laid with the intent stated in the Act: as it has been holden that an indictment for cutting with intent to do some grievous bodily harm, without saying, "in so doing," or "by means thereof," was not sufficient.^(x) Thus, if the intent be to prevent the prisoner's lawful apprehension, and be so found by the jury, an indictment stating a different intent will not be supported. A sexton and others surprised two body-stealers, and attempted to take them; one of them cut the sexton's assistant with a sabre: and was indicted on the 43 Geo. 3, c. 58, for cutting, with the intent to murder, disable, or do some other grievous bodily harm. The jury found, that he cut with the intent to resist and prevent their apprehension, and for no other purpose. Upon a case reserved, the Judges held, that the case would not have been within the Act unless the apprehension would have been lawful; and that if the cutting was to resist or prevent a lawful apprehension, it should have been so stated, this being one of the intents mentioned in the Act; and that, as the jury had negatived the intent stated, the conviction could not be supported.^(y) If the intent laid be to disable, it will be understood as of a permanent disability, and not merely one which may be temporary, as a disability until an offender likely to be apprehended may escape. The prisoner had broken into a shop in the night; and, in order to prevent a watchman apprehending him there, gave the watchman two severe cuts with the sharp part of a crow-bar. The indictment was for cutting, with intent to murder, maim, and disable: and there was no count charging the prisoner with the intent of preventing his own lawful apprehension: and the jury found that he cut to disable till he could effect his own escape. Upon a case reserved, ten Judges held the conviction wrong; for, by the finding of the jury, the prisoner intended to produce only a temporary disability, till he could escape, not a permanent disability.^(z)

Where on an indictment for wounding with intent to murder, maim, disable, or do some grievous bodily harm, it appeared that the prisoner's goods had been dis-

2 C. & K. 912 (61 E. C. L. R.), *ante*, p. 170; and *Reg. v. Vaughan*, 8 Cox C. C. 256, which were similar cases, would all fall within sec. 24, *ante*, p. 975.

^(u) 2 Vol. 691, *et seq.*

^(w) *Rex v. Case*, York Sum. Ass. 1820; 2 Stark. Ev. 692, note (A), *cor.* Park, J., who said that it had been so held by the Judges. It is obvious that a case may fall both within the letter and the spirit of the statute, although from accident or from ignorance the prisoner has not succeeded in reaching a vital part.—Note by Mr. Starkie.

^(x) *Anon.*, *cor.* Dallas, C. J., and Burton, J., at Chester; 5 Evans' Col. Stat. Pt. v., Cl. iv. p. 334, note (3).

^(y) *Rex v. Duffin*, MS., Bayley, J., and R. & R. 365.

^(z) *Rex v. Boyce*, MS., Bayley, J., and R. & M. C. C. 29.

trained for rent, and one of the broker's men turned out of the room, and the broker said, "Break the door open and go in and take possession again;" and the prisoner said, "he would split open the head of any person who opened the door;" the door was then forced open, and as the prosecutor was entering the room, the prisoner, who had an axe in his hand, struck him on the head with it and inflicted a cut of about a quarter of an inch, and a graze of about half an inch on the forehead; the axe had cut through the skin and flesh, but very little below the surface of the skin; Parke, B., told the jury there was no proof of an intent to maim and disable, as the blow was aimed at the head of the prosecutor; it would have been otherwise, if it had been aimed at his arm to prevent him being able to use it. The question, therefore, was, whether there was *a wounding with intent either to murder the prosecutor or to do him some grievous bodily harm." (a) [*992]

But although the intent laid be that of doing grievous bodily harm, and upon the evidence it appears that the prisoner's main and principal intent was, to prevent his lawful apprehension, yet he may be convicted, if, in order to effect the latter intent he also intended to do grievous bodily harm. The prisoner was engaged in poaching, and had fired his gun at one of three keepers, who, being on the watch for poachers, suddenly sprung up, and were rushing forwards to seize him. The jury were of opinion that the prisoner's motive was to prevent his lawful apprehension; but that, in order to effect that purpose, he had also the intention of doing the keeper some grievous bodily harm. Upon objection taken the learned Judge was of opinion, that if both intents existed, the question, which was the principal, and which was the subordinate intention, was immaterial: and, upon a case reserved, it was held, that if both the intents existed, it was immaterial which was the principal, and which the subordinate one; and that the conviction was therefore proper. (b)

So if a person wounded for the purpose of accomplishing a robbery, he might be convicted under the 9 Geo. 4, c. 31, s. 12, if the jury found that he intended to disable or do grievous bodily harm. Upon an indictment containing counts for wounding with intent to prevent his lawful apprehension, to disable, and to do grievous bodily harm, it appeared that the prisoner threw the prosecutor down, tried to take his watch by pulling at the chain, the prosecutor put down his hand to prevent him, the prisoner kicked him in the mouth several times with violence; he bled very much from the mouth and nose, and the skin of his face was cut near the lips. Lord Denman, C. J. (Vaughan, B., being present), left it to the jury to say, whether the prisoner's intent was either to disable the prosecutor, or to do him some grievous bodily harm by the violence which he used. Nothing was more likely to accomplish the robbery which he had in view than the disabling which such violence would produce. The intent in the first count could hardly be said to be proved, as no endeavor to apprehend was made at the time. (c) So where upon an indictment for wounding with intent to do grievous bodily harm, it appeared that the prosecutor received a blow, and was severely wounded, and immediately robbed of his money, and there was evidence that there were two persons present, but no evidence to show which of them struck the prosecutor; Coleridge, J., directed the jury, that if they believed that the prisoner inflicted the wound on the prosecutor with an intent to rob him, but had at the same time an intent to do him some grievous bodily harm in order to effectuate such his intention of robbing, then in point of law, the prisoner ought to be convicted on this indictment, although his ultimate object might have been to rob the prosecutor. And that even if the prisoner did not with his own hand inflict the wound, he might be convicted upon this indictment, if the jury were satisfied that the prisoner and the other person were *engaged in a common purpose of robbing the prosecutor, and that the other person's was the hand that inflicted the wound. (d) [*993]

On an indictment for shooting at Mr. Mahon, with a gun loaded with powder and blood, with intent to do grievous bodily harm, it appeared that Mr. Mahon was

(a) Reg. v. Sullivan, C. & M. 209 (41 E. C. L. R.).

(b) Rex v. Gillow, R. & M. C. C. 85; Rex v. Davis, 1 C. & P. 306 (12 E. C. L. R.), s. P., Garrow, B.

(c) Rex v. Shadbolt, 5 C. & P. 504 (24 E. C. L. R.).

(d) Reg. v. Bowen, C. & M. 149 (41 E. C. L. R.).

preaching in church when the gun was fired through a hole previously cut in the window: he was struck on the temple, knocked back, and stunned; his face, surplice, and Bible being sprinkled with blood; there was no wound, but grains of powder were imbedded in the forehead; the eye was weak, and the effect of the blow felt for two months after. The surgeon said that had the charge struck the eye, or a place nearer to the eye, the result would have been much more serious; Willes, J., told the jury, "You must be satisfied that the prisoner had an intent to do grievous bodily harm: it is not necessary that such harm should have been actually done, or that it should be either permanent or dangerous; if it be such as seriously to interfere with comfort or health, it is sufficient."^(e)

On an indictment for shooting at a person with intent to maim, &c., it appeared that the prosecutor was hunting small birds, when the prisoner, a gamekeeper, came up with his gun, and ordered him off; the prosecutor ran away, but had not got more than forty or fifty yards off when he heard the report of a gun, and at the same moment felt several shots rattling against his back and arms, one of which lodged in his finger; the prisoner afterwards said, "He had warmed their tails a goodish bit for them;" Parke, B.: "There can be no doubt that this is an assault, but I think the felonious part of the charge cannot be supported on these facts. In order to do so, it must appear clearly that the prisoner discharged the gun at the prosecutor with the intent laid in the indictment; but he seems to have waited till the prosecutor had attained such a distance from him as not to be injured by the shot. He would rather appear to have fired at the prosecutor with a view of frightening him than with any serious intention of inflicting any injury on his person. This conduct, though very reprehensible, is not sufficient to bring the case within the Act, and he ought, therefore, to be acquitted of the felony."^(f)

On an indictment for feloniously wounding, it appeared that the prosecutor and his companion came up to the prisoner, who was fighting with his brother, and the prosecutor's companion said they were very quarrelsome people; whereupon the prisoner knocked him down, and said he would do the same to the prosecutor, if he would fight; the prosecutor refused, and threatened to take the law, and then the prisoner struck the prosecutor a blow with his fist, which broke the prosecutor's jaw on both sides of his face; Alderson, B., told the jury that striking a blow, even though grievous bodily harm is done, is not in itself sufficient to show an intent to do such grievous bodily harm; that must be proved by other circumstances.^(g)

*994] On an indictment for wounding with intent, &c., it appeared *that the police ordered some gipsies to remove from a common by the direction of the owner of a neighboring plantation, but not the lord of the manor; they refused to do so, and one of them assaulted one of the police, who thereupon proceeded to take him into custody. The prosecutor took hold of two of the women, and while holding them the prisoner struck him on the back with a scythe, the edge of which was fenced, except two inches at the end, inflicting a wound half an inch deep, and an inch long; it was contended that the prisoner could not be convicted even of wounding; it was like the case where a person inflicted a wound with a nail on a stick, unknown to the person using it. Bramwell, B.: "The police had no right to interfere with the gipsies, except by the order of the owner of the land, and their resistance, without the use of weapons, would have been justifiable. As to the felony charged, a man is generally supposed, by law, to intend the natural consequence of his act; but in this case it is not so, and to find the prisoner guilty of the felony, you must be satisfied of the existence of the actual intent to wound. As to the unlawful wounding, if this case were like that put by the counsel for the prisoner, she would not be guilty. But it is for you to say whether, though the prisoner did not intend to wound, she did not know that the end of the scythe was uncovered, and therefore likely to wound. Suppose you fired a gun loaded with shot, at a person, but at such a distance that you did not think it would reach him, and some of the shots did, that would be an unlawful wounding. You will say

(e) Reg. v. Ashman, 1 F. & F. 88

(f) Reg. v. Abraham, 1 Cox C. C. 208. There might be a conviction of unlawfully wounding in such a case under the 14 & 15 Vict. c. 19, s. 5, *post*, p. 1012.

(g) Reg. v. Wheeler, 1 Cox C. C. 106.

whether the prisoner is guilty of wounding with intent of unlawful wounding, or not guilty."(*h*)

Upon an indictment for maliciously wounding with intent to do grievous bodily harm, it appeared that the prisoner got into an altercation with the prosecutor, and challenged him to fight; that he put down the blade of a scythe, and advanced towards the prosecutor to fight, but was prevented; afterwards the prosecutor challenged the prisoner to fight, but they were again prevented, and the prosecutor and his party left, and some time after the prisoner and two other men followed the prosecutor and passed him. The prosecutor and his party followed, and challenged the prisoner to fight, and used provoking language. The prisoner then took his own road, and the prosecutor followed him, and again challenged him to fight, which the prisoner refused, and said he would go back, and take the peace of him, and actually went back a few steps for that purpose; but the prosecutor got before him, and was making towards him, when the prisoner flourished his scythe, and told him to stand back, or he would cut him down, and himself retreated a few steps; the prosecutor sprang on him, and seized him by the collar; a scuffle ensued, in which the prisoner struck the prosecutor across the shoulder with the scythe, and produced a severe wound. Cresswell, J.: "The recent Act (1 Vict., c. 85), having omitted the proviso contained in the 9 Geo. 4, c. 31, the Judges have determined that the facts will bring a case within this statute, if the offence *would have amounted to manslaughter, in case death had ensued. If the act was done unlawfully and maliciously, that is, without lawful excuse, and intentionally, it is enough. Maliciously does not mean with premeditated malice, as in murder; an intention to do the mischief unlawfully will satisfy the statute. Now, in order to render a case of homicide, committed with a deadly weapon, lawful on the ground of self-defence, it must appear that the party retreated as far as he possibly could, and then only used the weapon to avoid his own destruction. It is impossible to contend that the prisoner was so driven to use the scythe in this case; the offence would have amounted to manslaughter if death had ensued, though certainly not an aggravated one; and therefore you will be bound to say that the prisoner is guilty, if you believe he really intended to do grievous bodily harm."(*i*)

Upon an indictment for wounding with intent to do grievous bodily harm, it appeared that the prosecutor and the prisoner were fellow-servants, and the prosecutor had told the prisoner to cut some grass, which he ought to have done, but did not do, whereupon the prosecutor took a strap, and beat the prisoner with it, when the prisoner, who had lost his right arm, took out a clasp knife, and wounded the prosecutor with it. Platt, B.: "One servant has clearly no right to strike another; and if an under-servant conducts himself in a way in which the upper-servant thinks he ought not, the latter should inform his master, and let him act as he thinks proper, either by dismissing the under servant or otherwise. In an ordinary case, a wrongful beating with a strap would not justify the other party in resorting to a knife, but there is certainly in this case the distinction that the prisoner has lost his right arm. The assault of the prisoner by the prosecutor was clearly illegal and unjustifiable, and if, under all the circumstances, you think that the prisoner acted in self-defence only, you ought to acquit him; but if you think that in defending himself the prisoner used more violence than was necessary, you ought to find him guilty of wounding without the intent mentioned in the indictment."(*k*)

Although upon an indictment for wounding, with intent to maim, disfigure, disable, or do some grievous bodily harm, it is now no defence that the wound was inflicted under such circumstances, that if death had ensued it would not have amounted to the crime of murder, yet as it is usual to insert a count charging an intent to murder, and the sentence on such a count is usually very severe, it may often become very material to decide whether the case would have been murder if death had ensued; in this view the following cases are still important.(*l*)

(*h*) Reg. v. Cox, 1 F. & F. 664. Probably this case is misreported, as it is quite clear that if a person, by unlawful violence, inflicts a wound, he is guilty of unlawful wounding, though he did not intend to wound.

(*i*) Reg. v. Odgers, 2 M. & Rob. 479.

(*k*) Reg. v. Huntley, 3 C. & K. 142.

(*l*) See also the cases collected in the chapter on "*Resisting Officers and others*," *ante*, p. 798, *et seq.*

Where the offence is charged to have been committed with intent to obstruct, &c., a lawful apprehension, it must be shown that the offender had some notification of the purpose for which he was apprehended before he inflicted the wound. Upon an indictment on the 43 Geo. 3, c. 58, it appeared that, in the morning of the day mentioned in the indictment, the prisoner stole some wheat from an out-
 *996] house belonging to one Spilsbury; and the *wheat being soon after found concealed in an adjoining field, Spilsbury, Webb, and others, watched near the spot, expecting that the thief would come to carry it away, and that they should thus be able to discover and apprehend him. In the course of the day the prisoner and another man walked into the field, and lifted up the bag containing the wheat. They were immediately pursued; and Webb seized the prisoner, without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before Webb had spoken, the prisoner drew a knife, and cut him across the throat. Lawrence, J., held that, as Webb did not communicate to the prisoner the purpose for which he seized him, the case did not come within the statute: for if death had ensued, it would only have been manslaughter. But he said, that if a proper notification had been made before the cutting, the case would have assumed a different complexion.(m)

But where, in a case somewhat similar, the goods had been concealed by the thief in an outhouse, and the owner, together with a special constable under the Watch and Ward Act, waited at night to apprehend the thief when he came to take away the goods, and the prisoner and another came at night and removed the goods from the place where they were deposited, and upon an attempt to apprehend them, the prisoner fled, and was pursued by the owner of the goods, who cried out after him several times in a loud voice, "Stop thief!" and on being overtaken, the prisoner drew a knife, with which he cut the hands of the prosecutor, and made many attempts to cut his throat, the prisoner was convicted and executed.(n)

So where upon a count of an indictment which charged the prisoner with maliciously wounding the prosecutor with intent to resist his apprehension for an offence for which he was liable to be apprehended, viz., for wilfully and maliciously committing damage upon certain plants and roots growing in a certain garden, it appeared that the prosecutor, a constable of the Metropolitan Police Force, while on duty, found the prisoner in the night-time in an enclosed garden, stooping down close to the ground, on which the prisoner ran away, and the prosecutor ran after him, and caught him getting over a hedge, and he was then in the garden; he caught him by the collar of the jacket, on which the prisoner drew a knife, and cut the prosecutor on the forehead between the eyes, and in a scuffle which ensued in several other places. The prisoner when found was cutting or plucking some pickatees and carnations. The jury found that the prisoner had wilfully and maliciously plucked and cut flowers from plants or roots in the garden, with intent to steal the flowers, and that he was found by the prosecutor, who belonged to the police force, committing that offence, but that the prosecutor did not inform the prisoner by word of mouth that he did belong to the police force; and that the
 *997] prisoner had the knife in his hand at the time *with which he had been cutting the flowers; and found him guilty on the above count. Littledale, J., reserved the question whether, considering the finding of the jury, the offence committed by the prisoner fell within the 42d or 43d sections of the 7 & 8 Geo. 4, c. 29, or the 22d, 23d, or 24th sections of the 7 & 8 Geo. 4, c. 30. Supposing the offence fell within either of these statutes, there did not appear to the learned Judge much doubt as to the authority of the prosecutor to apprehend him under the 63d section of the one Act, or the 28th of the other, as the case might be, so as to prove this count; and upon consideration the Judges held the conviction right upon this count.(o)

(m) *Rex v. Ricketts*, 3 Camp. 68. The prisoner was afterwards found guilty of larceny in stealing the wheat. It seems to me that this decision may well be doubted, as the facts must have told the prisoner for what he was apprehended. See the cases on this subject, *ante*, p. 835. C. S. G.

(n) *Rex v. Robinson*, *cor.* Wood, B., Lancaster; 2 Stark. Ev. 693, note (k).

(o) *Rex v. Fraser*, R. & M. C. C. R. 419. It should be observed that the count was

Upon an indictment for shooting with intent to do grievous bodily harm, it appeared that the prisoner, being a constable, was employed to guard a copse from which wood had been stolen, and for this purpose he carried a loaded gun. From this copse he saw the prosecutor come out, carrying wood which he was stealing, and called to him to stop. The prosecutor ran away, and the prisoner, having no other means of bringing him to justice, fired and wounded him in the leg. It was alleged that the prosecutor was actually committing a felony, he having been before repeatedly convicted of stealing wood; but these convictions were unknown to the prisoner, and there was no reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences. Erle, J., told the jury, that "shooting with intent to do grievous bodily harm amounted to the felony charged, unless from other facts there was a justification; and that neither the belief of the prisoner that it was his duty to fire, if he could not otherwise apprehend the prosecutor; nor the alleged felony, it being unknown to him, constituted such justification." The jury convicted; and, upon a case reserved, the Judges were unanimously of opinion that the prisoner was not justified in firing at the prosecutor, because the fact that the prosecutor was committing a felony was not known to the prisoner at the time, and therefore the conviction was right. (p)

In a case where a point was made, whether the shooting with which the prisoner was charged was by accident or design, it was held, that proof might be given that the prisoner at another time shot intentionally at the same person. Pearce, the prosecutor, who was a gamekeeper, proved that he met the prisoner sporting upon his manor, and remonstrated with him for so doing; and proposed that the prisoner should go with him to the steward, saying, that if the steward would pardon him he should have no objection. The prisoner assented to go with him, and [*998 they walked together until they came near to the gamekeeper's horse, which was about sixty yards off, when Pearce went on, before him towards the horse; and when he was at a short distance from the prisoner, the prisoner fired at his back, but said nothing. Pearce attempted to turn round, and saw the prisoner running, and attempted to run after him; but his back seemed to be broken, and he could not follow. He then turned back to the horse; and, after getting upon it, was making his way home to a place about two miles off, and had got about half a mile on the road, at a place where there was a hedge on each side, when he saw the prisoner again in the lowest part of one of the hedges; and the moment he looked round at him the prisoner again fired his gun, the discharge from which beat out one of Pearce's eyes and several of his teeth, but did not cause him to fall from his horse. Between the first and second firing was about a quarter of an hour. In the course of the trial it was suggested, that the prosecutor ought not to give evidence of two distinct felonies; but the learned Judge thought it unavoidable in this case, as it seemed to him to be one continued transaction, in the prosecution of the general malicious intent of the prisoner. Upon another ground also the learned Judge thought such evidence proper. The counsel for the prisoner, by his cross-examination of Pearce, had endeavored to show, that the gun might have gone off the first time by accident; and, although the learned Judge was satisfied that this was not the case, he thought that the second firing was evidence to show, that the first, which had preceded it only a quarter of an hour, was wilful; and to remove the doubt, if any existed, in the minds of the jury. The prisoner having been convicted, the matter was submitted to the consideration of the Judges, who were of

framed on the 7 & 8 Geo. 4. c. 30, s. 21, for maliciously committing damage upon the plants, but the jury found that the prisoner cut the flowers with intent to steal them, which is an offence within the 7 & 8 Geo. 4, c. 29, s. 42. It may be doubted, therefore, whether the evidence supported the count. Another question arose on another count as to the construction of the 10 Geo. 4, c. 44, s. 7 (the Metropolitan Police Act), but upon that no opinion was given. C. S. G.

(p) Reg. v. Dadson, 2 Den. C. C. 35. It is not stated, but must be assumed that the prosecutor had cut down the wood he was carrying away, and that he had previously been summarily convicted before justices for a like offence. According to the statement in the case, all the prisoner saw was that the prosecutor was carrying wood away; in fact, was committing a felony; but it must be assumed the evidence showed that the prisoner knew the wood had just been cut down.

opinion, that the evidence was properly received, and the prisoner rightly convicted.(g)

In a case of an attempt to poison, evidence of former and also of subsequent attempts of a similar nature are admissible.(r)

It was also necessary, in proceeding upon the same clause of the 43 Geo. 3, c. 58, to show that the person apprehending acted under proper authority. For, where it appeared that the prisoner having previously cut a person on the cheek, several others, who were not present when the transaction took place, went to his house to apprehend him, without any warrant, and, upon their attempting to take him into custody, he inflicted the wound upon which the indictment was founded; Le Blanc, J., was of opinion, that the prosecution could not be sustained. He said, that to constitute an offence within this branch of the statute, there must be a resistance to a person having a lawful authority to apprehend the prisoner, in order to which the party must either be present when the offence was committed, or he must be armed with a warrant; and that this branch of the statute was intended to *999] *protect officers, and others armed with authority, in the apprehension of persons guilty of robberies or other felonies.(s)

Where the intent charged in three of the counts was, an intent to prevent a lawful apprehension; and, in the fourth, an intent to do the prosecutor some grievous bodily harm; and, from the nature of the facts, the case turned upon the last count only, a point was made on behalf of the prisoner, that no grievous bodily harm was done, as the cut was upon the wrist, and did not appear to have been dangerous, as it got well in about a week; and the prisoner's counsel relied upon a doubt expressed by Bayley, J.,(t) whether the injury done was a grievous bodily harm contemplated by the Act, the wound not being in a vital part. Another objection was also taken upon the facts; from which it appeared, that the prisoner having been apprehended by one Headley, in an attempt to break into his stable in the night, and taken into Headley's house, threatened Headley with vengeance, and endeavored to carry his threats into effect with a knife which had been laid before him, in order that he might take some refreshment; and, in so doing, cut the prosecutor Cambridge, one of Headley's servants, who, with Headley, was trying to take away the knife; the act happened in that struggle, and perhaps not designedly, as against Cambridge. Upon these facts, it was objected that there was no evidence of malice against the prosecutor, but against Headley only; and that upon the 43 Geo. 3, c. 58, general malice was not sufficient, as in the case of murder, and that malice against the particular individual was necessary.(u) A further objection was made, that the prisoner was not lawfully in custody, there being no warrant; and an attempt to commit felony being only a misdemeanor. The jury, who found the prisoner guilty, stated that the thrust was made with intent to do grievous bodily harm to anybody upon whom it might alight, though the particular cut was not calculated to do so. Upon a case reserved, the Judges were of opinion that, if there was an intent to do grievous bodily harm, it was immaterial whether grievous bodily harm was done; that general malice was sufficient under the 43 Geo. 3, c. 58, without any particular malice against the person cut; and that, as the prisoner was detected in the night attempting to commit a felony, he might be lawfully detained without a warrant, until he could be carried before a magistrate.(v)

In a case upon the 43 Geo. 3, c. 58, the prosecutor and some other men had got

(g) *Rex v. Voke*, R. & R. 531.

(r) 2 Stark. Ev. 692. No authority is cited for this position; but see *Rex v. Mogg*, 4 C. & P. 364 (19 E. C. L. R.) where, on an indictment for administering poison to horses with intent to kill them, Park, J. A. J., held other acts of administering admissible to prove the intent, and *Reg. v. Geering* and other cases, *post*, tit. *Evidence*. C. S. G.

(s) *Rex v. Dyson*, *cor. Le Blanc, J.*, York Spr. Ass. 1816; 1 Starkie N. P. R. 246 (2 E. C. L. R.). See the cases as to the authority to apprehend, collected in the chapter on "*Resisting Officers and others*," *ante*, p. 798, *et seq.*

(t) *Rex v. Akenhead*, Holt N. P. C. 470, *post*, p. 1000.

(u) *Curtis v. The Hundred of Godly*, 3 B. & C. 248 (10 E. C. L. R.), was cited, a case upon the Black Act.

(v) *Rex v. Hunt*, R. & M. C. C. 93; *Rex v. Griffith*, 1 C. & P. 298 (12 E. C. L. R.), s. r., as to bodily harm, Park, J. A. J. See *Rex v. Howarth*, *ante*, p. 816.

hold of a woman, who, as they conceived, had been using another person ill, and said that she deserved to be ducked in a trough, which was near; but it did not appear that they intended to duck her. The prisoner, who was at some distance at the time, on being informed that they were using the woman ill, exclaimed, "I have got a good knife," rushed immediately to the place where she was, entered among the crowd, and *instantly struck the prosecutor on the shoulder with the knife. The prosecutor turned round upon him; a struggle ensued between them; and in that struggle the prosecutor received other wounds. After they had fought for some time, the prisoner dropped the knife and ran away. The wound upon the prosecutor's shoulder was about seven inches long, and two deep; and the lap of one of his ears was cut. There was likewise a slight wound on the gland of his neck, and a cut on his left arm. The counsel for the prisoner objected, that the first count of the indictment, which stated an attempt to murder, &c., and the second count, which stated an attempt to maim, disfigure, and disable, could not be supported; and that the only question was upon the third count, which stated an intent to do some grievous bodily harm. And upon this question, he submitted, that the wounds were not of that kind from which grievous bodily harm could ensue; that the transaction was a scuffle, in which a knife was used accidentally, without any settled design to "maim, disfigure, or disable," or to do "other grievous bodily harm" to the prosecutor; and also that the wounds were not inflicted in a part of the body which could produce such a consequence. Bayley, J., entertained some doubts on the case; which appear to have proceeded principally on the grounds that the wounds were not in a vital part; that it was questionable whether the injury done was a grievous bodily harm contemplated by the Act; and whether, if death had ensued, the crime would have been more than manslaughter. And, taking all the circumstances of the case into consideration, he directed the jury to acquit the prisoner.^(w) [*1000]

It was once held on an indictment under the 9 Geo. 4, c. 31, which charged the prisoner with shooting at A. with intent to murder A., that the prisoner could not be convicted if the jury found that he shot at A. intending to shoot at B., and that he did not intend to do A. any harm. An indictment charged the prisoner, in one set of counts, with shooting at Hill, with intent to murder Hill; and in another set with shooting at Lee, with intent to murder Lee; and it appeared that the prisoner having ill will against Lee, went to his house, and called to him to come out and be killed; and Hill, who was in the parlor with Lee, went into the hall, and the prisoner instantly fired a pistol at him, but without doing him any injury; it was objected that the prisoner must have shot at a person with intent to kill that person, and that here there was no intent to injure Hill. On the part of the crown, *Rex v. Hunt*^(x) was cited. Littledale, J.: "If it had not been for the case of *Rex v. Hunt*, I should have felt little difficulty. The question I shall leave to the jury is, whether the prisoner intended to injure Mr. Hill. But I shall tell them, that a man must be taken to intend the consequences of his acts." His lordship said, in summing up, "If this had been a case of murder, and the prisoner intending to murder one person, had, by mistake, murdered another, he would be equally liable to be found guilty. The question, however, may be different on the construction of this Act of Parliament. There is no doubt that the prisoner shot at Mr. Hill, and that, if death had ensued, the offence would have *amounted to murder; and then it will be for you to say, whether the prisoner intended to do Mr. Hill some grievous bodily harm. It certainly appears that he did not so intend in point of fact. However, the law infers that a party intends to do that which is the immediate and necessary effect of the act which he commits." The Foreman of the jury: "We find him guilty of shooting at Mr. Hill, with intent to do Lee some grievous bodily harm." Littledale, J.: "There is no count for that. Do you find him guilty of shooting at Lee?" The Foreman: "No; he fired at Hill, intending to fire at Lee." Littledale, J.: "Do you find that he intended to do harm to Hill?" The Foreman: "We find that he

(w) *Rex v. Akenhead*, 1 Holt's N. P. R. 469 (3 E. C. L. R.).

(x) *Supra*, note (v).

did not intend to do any harm to Hill." Littledale, J.: "A verdict of not guilty must be recorded." (y)

But this case can no longer be considered as an authority. Upon an indictment on the same statute, in the first count for shooting at Lockyer, and in the second for shooting at Hole, it appeared that Hole, who was a gamekeeper, and Lockyer came up to some poachers, when the prisoner levelled his gun at Hole, who was in advance, but missed him and hit Lockyer. The counsel for the prosecution had elected to proceed on the count charging the shooting at Lockyer. The counsel for the prisoner contended, that the prisoner could not be convicted in point of law of shooting at Lockyer with intent to injure him, inasmuch as the person aimed at, according to the evidence, was another, and Lockyer was only struck accidentally. Gurney, B., in summing up, told the jury it was perfectly immaterial for whom the shot was intended. If a man laid poison for one person, and another took it and died, it would be murder; so a blow aimed at one person and killing another, would make the party equally answerable. (z)

On an indictment for wounding with intent to do grievous bodily harm, it appeared that the prisoner had recently had a quarrel with another man in a public-house, and had waited outside for the purpose of attacking him when he should come out: the prosecutor, with whom the prisoner had had no dispute, was the first to leave the house, and being mistaken by the prisoner for his former antagonist, he gave him the wound in question. It was contended that the intent was not proved, and *Rex v. Holt* (a) was cited. Alderson, B.: "If *Rex v. Holt* lays down the position you contend for, I shall certainly overrule it. I do not think it is either law or good sense. I shall direct the jury, that if they think the prisoner did to the prosecutor what he intended to do to another man, they must find him guilty." (b)

Upon an indictment for wounding W. Taylor with intent to murder him, it appeared that the prisoner intended to murder one Maloney; and, supposing Taylor to be Maloney, shot at and wounded Taylor; and the jury found that the prisoner intended to murder Maloney, not knowing that the party he shot at was Taylor, but *1002] supposing him to be Maloney, and that he intended to *murder the individual he shot at, supposing him to be Maloney, and convicted the prisoner; and, upon a case reserved, it was held that the conviction was right, for, though he did not intend to kill the particular person, he meant to murder the man at whom he shot. (c) Where on an indictment for wounding with intent to do grievous bodily harm to the prosecutor, it appeared that the prisoner with a knife struck at Withy, and the prosecutor interfered and caught the blow on his arm; Crowder, J., held that this would not sustain the charge; but the prisoner might be convicted of unlawfully wounding. (d)

Under the 9 Geo. 4, c. 31, s. 11, it was held, that if a party sent poison with intent to kill one person, and another person took that poison, it was just the same as if the poison had been intended for the person who took it. Upon an indictment on the 9 Geo. 4, c. 31, s. 11, for administering poison to E. Davis, it appeared that a parcel of sugar and tea, with poison in it, directed "to be left at Mrs. Daws, Fownhope," was left on a shop counter, and afterwards delivered to a Mrs. Davis, who used some of the sugar, and was made very ill by it. Gurney, B.: "The question is, whether the prisoner laid this poison on the shop counter, intending to kill some one. If it was intended for Mrs. Daws, and finds its way to Mrs. Davis,

(y) *Rex v. Holt*, 7 C. & P. 518 (32 E. C. L. R.). Littledale, J., considered the second set of counts quite out of the question. His Lordship said, in the course of the case, "Suppose this had been laid at common law as an assault, with intent to murder A., would that charge be proved by showing that the prisoner intended to murder B.? Perhaps that is almost *idem per idem*."

(z) *Rex v. Jarvis*, 2 M. & Rob. 40.

(a) *Supra*.

(b) *Reg. v. Lynch*, 1 Cox C. C. 361.

(c) *Reg. v. Smith, Dears. C. C. 559*. This decision fully accords with my note *infra* (g).

(d) *Reg. v. Hewlett*, 1 F. & F. 91. In this case there was no intent to injure the person wounded; it is therefore quite different from the cases where, though there is a mistake as to the person, the injury is intended for the person on whom it falls.

and she takes it, the crime is as much within this Act of Parliament as if it had been intended for Mrs. Davis. If a person sends poison with intent to kill one person, and another person takes that poison, it is just the same as if it had been intended for such other person."^(e)

But the correctness of this ruling has been doubted, and it has been considered, that where an indictment under the 1 Vict. c. 85, states an administering of poison to a person, with intent to murder *such person*, it must be proved that the prisoner did intend to murder such person; but that it is sufficient, under that Act, to state that the prisoner administered poison "with intent to commit murder" generally. An indictment on the 1 Vict. c. 85, charged the prisoner with causing poison to be taken by G. Power, with intent to murder the said G. Power; but it appeared that the prisoner's intention was to murder Catherine Power, and that G. Power had accidentally swallowed the poison, and the prisoner was found guilty. Parke, B., afterwards said he had spoken to Alderson, B., on the subject, and that they both much doubted whether the verdict could be supported, the averment of the intention not being proved as laid. He was aware that there was a case^(f) where, under the old law (9 Geo. 4, c. 31, s. 11), a conviction had taken place, though there was a similar defect in the evidence, but he doubted the propriety of that decision; and, to provide for any such case, the language of the new statute, under which the prisoner was tried (1 Vict. c. 85, s. 2), had been altered; for under that section it was sufficient to allege that the prisoner did the act "with intent to commit murder," generally. The prosecutor had here unnecessarily described the intention more *particularly than he need have done, but having so de- [*1003 scribed it, it appeared to the learned Baron, that the prosecutor was bound to prove the intention as laid. His lordship therefore desired a fresh indictment to be prepared, alleging the intent to have been "to commit murder" generally, under which the prisoner was tried and convicted, and sentenced to be transported for life.^(g)

(e) *Rex v. Lewis*, 6 C. & P. 161 (25 E. C. L. R.).

(f) *Rex v. Lewis*, *supra*.

(g) *Reg. v. Ryan*, 2 M. & Rob. 213. It seems probable that the intention of the Legislature in providing, by the 43 Geo. 3, c. 58, and the 9 Geo. 4, c. 31, for attempts to commit murder, was to punish every attempt where, in case death had ensued, the crime would have amounted to murder; and the proviso in those statutes, that if the acts were committed *under such circumstances* that if death had ensued it would not have amounted to the crime of murder, the prisoner should be acquitted, tends to show that the Legislature so intended. The tendency of the cases, however, seems to be, that an actual intent to murder the particular individual injured must have been shown under those statutes, and also under the 1 Vict. c. 85, where the intent is so laid. Where a mistake of one person for another occurs, the cases of shooting, &c., may, perhaps, admit of a different consideration from the cases of poisoning. In the case of shooting at one person under the supposition that he is another, although there be a mistake, the prisoner must intend to murder that individual at whom he shoots; it is true he may be mistaken in fact as to the person, and that it may be owing to such mistake that he shoots at such person, but still he shoots with intent to kill that person. So in the case of cutting; a man may cut one person under a mistake that he is another person, but still he must intend to murder the man whose throat he cuts. In *Reg. v. Mister*, Salop Spr. Ass. 1841, *cor. Gurney, B.*, the only count charging an intent to murder was the first, and that alleged the intent to be to murder Mackreth; and although on the evidence it was perfectly clear that Mister mistook Mackreth for Ludlow, whom he had followed for several days before, yet he was convicted and executed, and I believe the point never noticed at all. The case of poisoning one person by mistake for another seems different, if the poison be taken in the absence of the prisoner; for in such case he can have no actual intent to injure that person. These difficulties, however, seem to be obviated by the 1 Vict. c. 85, which, instead of using the words "with intent to murder such person," has the words "with intent to commit murder." It may perhaps be doubted whether this alteration was not intended to enable the prosecutor to charge a shooting at one person with intent to murder another person; and doubts may perhaps be entertained, notwithstanding the very great weight due to any opinion of the very learned Barons, who considered this point in *Reg. v. Ryan*, whether a count, stating a shooting with intent to commit murder, would not be bad on demurrer, in arrest of judgment, and on error, for not stating the person intended to be murdered. It is true that it would follow the words of the Act; but in many cases that is not sufficient. Thus in *Reg. v. Martin*, 8 Ad. & E. 481 (35 E. C. L. R.), 3 Nev. & P. 472, it was held that an indictment for obtaining goods

On an indictment for shooting at a person unknown with intent to murder him, it appeared that the prisoner, being irritated at a crowd of boys, who were following him, discharged a loaded pistol among them, and thereby wounded a person who was passing along the street; there was nothing to show any intent to shoot at any particular person, nor was the person injured one of those who were teasing him. Jervis, C. J. (Alderson, B, being present), said, "I do not think that the charge contained in this indictment is proved; doubtless at common law, if the person wounded had been killed, it would have been murder: but this is an offence under the statute, and must be proved strictly in its very terms." It was then proposed to amend the indictment, by charging the prisoner with an intent to murder in the *1004] words of the 1 Vict. c. 85, s. 2. Jervis, C. J.: "That would no doubt be a good indictment after *verdict under the 7 Geo. 4, c. 64, s. 20, being in the words of the statute; but it may be a question whether it would not be demurrable for generality. We think that if we amend, we ought to do it in such a manner as that the indictment shall not be in any way defective. The prisoner has pleaded, and he ought to have an opportunity of demurring, which now of course he cannot do. We must therefore refuse the application." (h)

The prisoner was indicted for shooting at H. Lawton with intent to do him grievous bodily harm. The prisoner had been assaulted and annoyed by several persons, among whom was Lawton. These persons were standing together in a group of about fifteen, and the prisoner fired a pistol into the group, and Lawton received some severe shot wounds in the neck. The jury found that the prisoner did not aim at Lawton, or at any one in particular, but that he fired into the group, intending generally to do grievous bodily harm, and so unlawfully wounded. Upon a case reserved it was held that he was rightly convicted of the felony. (hh)

Upon an indictment for administering poison with intent to murder, it appeared that the prisoner had administered to a child nine weeks old two *cocculus indicus* berries. The child vomited one of them up, and the other passed through her body in the course of nature. Two medical men proved that the *cocculus indicus* berry is classed with narcotic poisons: the poison consists in the presence of an alkaloid, which is extracted from the kernel; all the noxious properties are in the kernel; it has a very hard exterior or pod, to break which much force is required. One of these witnesses added that the berry, if the pod is broken, is calculated to produce death in an adult human subject, though he did not know how many would be required for the purpose: he thought the poison contained in the kernels of two berries, if the pods were burst, and if retained on the stomach, might produce death in a child of nine weeks old, but that the berry could not be digested by the child, and that it would pass through its body without the pod being burst, and so would be innocuous. It was objected that the berries were not poison within the meaning of the statute; for that though the kernel of the berries contained poison, yet the pod rendered the poison innocuous. The objection was overruled, and, upon a case reserved, the Judges were unanimously of opinion that the conviction was right. Wilde, C. J.: "It is admitted that the kernel is poison, though not the pod; part of the berry is therefore admitted to be poison, though not the whole. The whole berry was administered, and with intent to kill. The act, therefore, of administer-

by false pretences was bad on error, on the ground that it did not state that the goods obtained were the property of any person. In all cases of doubt as to the intention, it would be prudent to insert one count for shooting at A. with intent to murder him; another "with intent to commit murder; and a third for shooting at A. with intent to murder the person really intended to be killed; and if the party intended to be killed were unknown, a count for shooting at A. with intent to murder a person to the jurors unknown. C. S. G.

(h) Reg. v. Lallament, 6 Cox C. C. 204. It is clear that after the amendment the jury might have been discharged under the 14 & 15 Vict. c. 100, s. 1, and the Court might then have given the prisoner leave to withdraw his plea and demur to the amended indictment. This case as to the general allegation being insufficient on demurrer, accords with my former note (g). I still venture to submit that it is extremely questionable whether the indictment would not be equally bad after verdict, and I doubt whether any case can occur where an indictment may not be so framed as to meet the facts, and avoid the necessity for such a count; for wherever it is possible to prove an intent to murder any person, it is plain a count may be framed to meet that case.

(hh) Reg. v. Fretwell, L. & C. 443.

ing poison with intent to kill is proved. The effect of that act is beside the question: the act was an administering poison, which failed to produce the intended effect. We all think the conviction right."⁽ⁱ⁾

"It is a very important question, whether on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder had death ensued;"^(k) and this question does not seem to be completely settled. In a case where a man was indicted for inflicting an injury dangerous to life on a child, with intent to murder it, and his wife as principal in the second degree, for aiding and abetting him, where it appeared that the prisoners had inflicted great violence on the child, Patteson, J., told the jury, "Before you can find the prisoner, T. C., guilty of this felony, you must be satisfied that when he inflicted this violence on the child, he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that will not be sufficient, unless he actually intended to commit murder. With respect to the wife, it is essential not only that she should have assisted her husband in the commission of the offence, but also that she should have known that it was her husband's intention to commit murder."^(l) But in another case, where the first count charged the prisoner with shooting with intent to murder, and the facts were such as only to amount to manslaughter, the same very learned Judge said, in summing up, "It is a very important question, whether, on a count charging an intent to murder, it is essential that the jury should be satisfied that that intent existed in the mind of the prisoner at the time of the offence, or whether it is sufficient that it would have been a case of murder if death had ensued; however, if it be necessary that the jury should be satisfied of the intent, I have no doubt that the circumstance, that it would have been a case of murder if death had ensued, would be of itself a good ground from which the jury might infer the intent, as every one must be taken to intend the necessary consequences of his own acts. In the present case, I think you may dismiss the first count from your consideration, as it would be very difficult to say, that if Mr. V. had died, this would have been a case of murder."^(m)

Upon an indictment for feloniously wounding with intent to murder, disable, &c., it appeared that the prisoner, being confined in Abingdon Gaol, pretended that he wanted some water, and, as soon as the turnkey brought him the water, the prisoner knocked him down by a blow on the head with a towel-roller, and thereby wounding him. He did this in order to effect his escape. In summing up, Maule, J., said: "If the prisoner had killed this man it would have been murder, whether he intended to kill him or not; but I think that there is hardly evidence here to support the charge of an intent to murder. A person cannot have an intent to murder, or an intent to do any other thing, without intending to commit murder, or to do that other thing. It would be a contradiction in terms if it were otherwise. You will, therefore, consider whether the prisoner had an intent to kill this man, or only an intent to disable him, or to do him some grievous bodily harm."⁽ⁿ⁾

So where upon an indictment for attempting to suffocate and strangle with intent to murder, it appeared that the prisoner had put a bed over his wife, and pressed it down upon her, and put a rope round her neck with a running noose on it, by which she was nearly prevented from breathing; Maule, J., told the jury, that in many cases a party might be guilty of murder if he caused the

(i) *Reg. v. Cludero*, 1 Den. C. C. 514. In the course of the argument, Alderson, B., said, "Suppose arsenic given in a globule of glass, would that be an administering of a destructive poison?" Williams, J.: "Suppose a child to have a feeble digestion by reason of tender age, and the medical man to say that it could not digest the pod for that reason, could the amount of the digestive power in the particular case affect the question?" Alderson, B.: "Suppose a grown man could digest it, would it be poison? If so, would it cease to be poison because a child is supposed to be incapable of doing so?"

(k) *Verba* Patteson, J., *Reg. v. Jones*, 9 C. & P. 258 (38 E. C. L. R.).

(l) *Reg. v. Cruse*, 8 C. & P. 541 (34 E. C. L. R.).

(m) *Reg. v. Jones*, 9 C. & P. 258 (38 E. C. L. R.), Patteson, J.

(n) *Reg. v. Bourdon*, 2 C. & K. 366 (61 E. C. L. R.).

death by an illegal act, although at the time he did not actually intend to kill, and that in this case the prisoner would have been guilty of murder if his wife had died; but upon this indictment the jury must be satisfied that at the time the prisoner did the acts in question, he did intend to murder his wife.^(o) And in a later case, Coleridge, J., told the jury that the words "with intent to commit murder," meant to kill under such circumstances as would amount to the crime of murder, if death ensued.^(p)

Upon an indictment for wounding with intent to murder, &c., it appeared that the prosecutor had given evidence against some wood-stealers, with whom the prisoner was intimate; the prisoner struck him with a tin can four times on the head, knocked him about, and said he would break his neck; and there were two cuts on the prosecutor's scalp which laid his skull bare. Alderson, B., in summing up, said: "You will have to consider in this case whether, if death had ensued, the prisoner would have been guilty of murder; and in giving your judgment on that question, you will have to consider, whether the instrument employed was, in its ordinary use, likely to cause death; or though an instrument unlikely, under ordinary circumstances, to cause death, whether it was used in such an extraordinary manner as to make it likely to cause death, either by continued blows or otherwise. A tin can, in its ordinary use, was not likely to cause death or grievous bodily harm; but, if the prisoner struck the prosecutor repeated blows on the head with it, you will say whether he did this merely to hurt the prosecutor and give him pain, as by giving him a black eye or a bloody nose, or whether he did it to do him some substantial grievous bodily harm. The former enactments on this subject were confined to cutting instruments, and perhaps wisely: but now the matter is much more vague, and cases ought therefore to be watched carefully. When a deadly weapon, such as a knife, a sword, or gun, is used, the intent of the party is manifest; but with an instrument like the present, you must consider whether the mode in which it was used satisfactorily shows that the prisoner intended to inflict some serious or grievous bodily harm with it."^(q)

Upon an indictment for administering opium with intent to commit murder, it appeared that the prosecutrix had been left in charge of her master's house, and going out into the yard at night the prisoners threw her down, and said they would kill her if she did not swallow some stuff out of a phial which they held to her mouth, and which stuff the evidence tended to prove was a preparation of opium. She struggled, but was compelled to swallow it; they then tied her apron tight over her face, and then left her lying on her back in the yard. She was afterwards found almost insensible and very ill: by proper treatment she recovered in a few days; but there was reason to conclude, that *had she remained much longer undiscovered, her life would have been in very great peril. When her master returned he found the house robbed. For the prosecution it was contended, that if the main object of the prisoners was to steal from the house, and in order to effect that they committed an act in itself unlawful, they must be taken to have intended all the consequences likely to result from such act, and death was one of those consequences: it was immaterial which was the principal and which the subordinate intent. Coltman, J., told the jury that "it would undoubtedly appear probable that one intention of the prisoners was to rob the house; but they might have had that intention and also another, namely, to destroy life; and if a noxious drug is administered, which is likely to occasion death, and the party administering it is indifferent whether it occasion death or not, that party must be looked upon as contemplating the probable results of his own action."^(r)

Firing a gun into a room of A. B.'s house, with intent to shoot A. B., whom the prisoner supposes to be in the room, did not support a charge of shooting at A. B. under the 9 Geo. 4, c. 31, s. 12, if A. B. were not shown to be in the room or within reach of the shot. Upon an indictment for maliciously shooting at G. C.,

(o) Reg. v. Caldecott, Hereford Sum. Ass. 1843, MSS. C. S. G.

(p) Reg. v. Davies, Gloucester Spr. Ass. 1844, MSS. C. S. G.

(q) Rex v. Howlett, 7 C. & P. 274 (32 E. C. L. R.).

(r) Reg. v. Dilworth, 2 M. & Rob. 531. This case would fall within the 24 & 25 Vict. c. 100, s. 22, *post*, p. 1015.

it appeared that the prisoner fired into a room of C.'s house where he supposed C. was; C., however, was in another part of the house, where he could not by possibility be reached by the shot: upon this Gurney, B., asked whether the indictment could be supported? A man could scarcely be said to be shot at, who was not near the place where the gun was fired. *Rex v. Bailey*(s) was cited for the prosecution, where on an indictment for shooting at H. T., who was wounded with grape-shot out of a gun fired at a ship in which he was, Lord Eldon told the jury that he was of opinion, that if they thought the guns were fired at the vessel, and those on board her generally, that the guns might be considered as shot at each individual on board her, and therefore at H. T., the person named in the indictment: Gurney, B., "That case is perfectly distinguishable from the present; cannon-shot fired into a ship more or less endangers every individual in it; every part of the ship may be penetrated by cannon-shot; but that cannot be said of shot fired from a gun into a room where it is proved no individual then was"(t)

Where on an indictment for shooting at the prosecutor with intent to maim, &c., it appeared that the prisoner had at various times been annoyed by night by idle persons attempting to frighten him, and the prosecutor, returning home by night, passed near the prisoner's house with a lantern; the prisoner seeing the light, thought that his nightly visitors had again appeared, reached his gun, and fired in the direction of the light, and wounded the prosecutor in the face: Patteson, J., thought that the facts would hardly bear out the charge in the indictment.(u)

*The prisoner was indicted for maliciously throwing upon P. C. "certain destructive matter (to wit) one quart of boiling water," with intent, [*1008 &c. The prisoner was the wife of P. C., and when he was asleep, she, under the influence of jealousy, boiled a quart of water in a coffee-pot, and poured it over his face and into one of his ears, and ran off boasting she had boiled him in his sleep. The injury was very grievous. The man was for a time deprived of his sight, and had frequently lost for a time the hearing of one ear. The jury having convicted, upon a case reserved on the question whether boiling water was destructive matter within the 1 Vict. c. 85, s. 5, the Judges held that the conviction was right.(v)

Upon an indictment on the 1 Vict. c. 85, s. 2, for causing a bodily injury dangerous to life, it appeared that the prisoner left her infant on a cold wet day lying in an open field, intending that it should die, and it was found there after some hours nearly dead from the effects of such exposure, there being congestion of the lungs and heart caused thereby, which would have been in a short time fatal if relief had not been given. At the time when the prisoner left the child she had not caused any bodily injury to it, and in a few hours after it was found it was restored by care, and then there remained no bodily injury to the lungs, heart, or otherwise; and, upon a case reserved, it was held that there was no bodily injury caused within the meaning of the clause. All that was produced was a mere functional derangement. Congestion is the mere filling the lungs and heart with more blood than there ought to be there. All the other offences created by the clause are cases of bodily injury to the structure of the body, but here the condition of the child's organs was not attended with any lesion.(w)

On an indictment for causing a bodily injury dangerous to life, by casting the prosecutrix out of a window upon the ground, she stated that she fell out of the window accidentally; that the prisoner beat her with his fists, and was about to inflict other injuries upon her, when she went to the window to call for assistance, and fell out of it on to the ground. In opening the case, it was stated that the evidence would be conflicting, whether the prosecutrix was thrown or jumped out of the window, but that it would be immaterial, for if the prisoner, by his violence, compelled her to throw herself out, he would be guilty. Alderson, B.: "I do not think it will be sufficient to prove that she jumped from the window to escape from

(s) R. & R. C. C. R. 1.

(t) *Rex v. Lovell*, 2 M. & Rob. 39.

(u) *Reg. v. Porter*, 5 Cox C. C. 148. The prisoner was convicted of an assault. A question was raised in *Reg. v. Turner*, 2 M. & R. 213, whether the facts showed an intent to maim the prosecutor; but Patteson, J., expressed no opinion on it.

(v) *Reg. v. Crawford*, 1 Den. C. C. 100.

(w) *Reg. v. Gray*, D. & B. C. C. 303.

his violence. You must go farther than that, and satisfy the jury that he intended at the time to make her jump out."(*x*)

If several are out for the purpose of committing a felony, and upon an alarm run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act. The two prisoners, White and Richardson, were breaking into a house in the lower division of Lamb's Conduit-street; but, upon alarm and pursuit, Richardson ran into Ormond-street, and White towards the Foundling. Randall seized White just by the house which they were breaking into, and White cut *him with an iron crow. Graham, B., told *1009] the jury, that if the prisoners came with the same illegal purpose, and both determined to resist, the act of one would fix guilt on both; and that it might be part of the plan to take different ways to divide the force against them. The jury found both the prisoners guilty: but the Judges thought that the conviction as to Richardson was wrong (*y*)

But where a party is present, aiding, &c, it is not necessary that his should be the hand by which the mischief is inflicted. The first three counts of an indictment alleged, in the usual form, that J. T. did shoot at A. B., and went on to state that M. and N. were present aiding and abetting; the second and third counts varying from the first only in the allegations of the intent: the three last counts (varying in like manner as to the intent) stated, that an unknown person shot at A. B., and that the said J. T. and M. and N. were present aiding and abetting the said unknown person in the felony aforesaid, in manner and form aforesaid, to do and commit, but did not charge them with being *feloniously* present, &c. The jury found J. T. guilty; but stated, in answer to a question put to them, that they did not find that J. T. was the man who fired at A. B. Upon which an objection was taken in arrest of judgment, that the three last counts were defective, on account of the omission of the word *feloniously*; and that no judgment could be entered on the three first counts, as the jury had negatived that J. T. was the man who fired. The learned Judge overruled the objection, which he considered as founded upon a supposed difference in the act of shooting, &c., and being present, &c., at the act: whereas the statute had made no such distinction. And he held the plain meaning and necessary construction of the statute to be, that if parties are present, &c., knowing, &c., the charge of feloniously shooting applies to every one of them. And upon a case reserved, the Judges were all of opinion that the conviction was right. (*z*)

It has been suggested, that where an ineffectual exchange of shots took place in a deliberate duel, both the parties might be guilty of the offence of maliciously shooting within the 43 Geo. 3, c. 58, and the seconds be also guilty as principals in the second degree: but this is mentioned as not having been anywhere expressly decided. (*a*)

An indictment under the 9 Geo. 4, c. 31, s. 12, must have stated that the prisoner "unlawfully cut," &c. and it was not sufficient to allege that the prisoner feloniously, wilfully, and maliciously cut, &c. An indictment for maliciously wounding, charged that the act was done "feloniously, wilfully, and maliciously;" it was objected in arrest of judgment that the indictment was bad, as it did not *1010] allege the act to have been done "unlawfully and maliciously," *and, upon a case reserved, the Judges held unanimously that the judgment ought to be arrested. (*b*) An indictment for administering a poisonous or destructive thing,

(*x*) *Rex v. Donovan*, 4 Cox C. C. 399.

(*y*) *Rex v. White*, MSS., Bayley, J., and R. & R. 99. *Ante*, p. 50.

(*z*) *Rex v. Towle*, R. & R. 314; s. c., 2 Marsh. 466. And see *ante*, p. 50.

(*a*) 3 Chit. Crim. L. 848, note (*w*). As it is now immaterial whether, in case death had ensued, the crime would have been murder or manslaughter under the 24 & 25 Vict. c. 100, s. 18, it should seem that the shooting or attempting to shoot in all cases of duels is punishable under that section; and it is presumed that it was on this ground that the indictment was preferred against the Earl of Cardigan, under the 1 Vict. c. 85, s. 4. See *Reg. v. Douglas*, C. & M. 193 (41 E. C. L. R.), a similar indictment against another person engaged in the same duel.

(*b*) *Rex v. Ryan*, 2 Moo. C. C. R. 15; s. c., 7 C. & P. 834 (32 E. C. L. R.). See *Rex v. Turner*, R. & M. C. C. R. 259.

must aver that the thing administered was poisonous or destructive. The prisoner was indicted for having mixed a quantity of sponge, cut into small pieces, with milk, and given it to her husband, with intent to poison him; it was objected that the indictment was bad, as it did not state that the sponge was of a deleterious or poisonous nature, and Alderson, B., held that the objection was good.^(c) An indictment under the 1 Vict. c. 85, s. 2, for causing to a person a bodily injury dangerous to life, need not specify the injury. An indictment charged that the prisoner feloniously did assault C. H., and that he did cause unto the said C. H. a certain bodily injury dangerous to life, by striking and beating her with his hands and fists on her head and back, by kicking her on the back, by seizing and lifting her, and striking her head against a wooden beam of a ceiling, by casting, throwing and flinging her against a brick floor, with intent to murder her. It was proposed to demur to this indictment, on the ground that the nature of the bodily injury dangerous to life should have been stated with certainty. Patteson, J., thought the point well deserving of consideration, but suggested that the prisoner should plead, he reserving to him the same benefit as if he had demurred: which was done, and after a learned argument upon a case reserved, the Judges held the indictment sufficient.^(d)¹

Where an indictment on the 1 Vict. c. 85, s. 2, alleged that the prisoner discharged a gun loaded with gunpowder and ball at S. D., and with the ball so shot forth "feloniously did strike, penetrate, and wound" the said S. D. upon the thigh, with intent to murder him; it was objected that the indictment was bad, because it did not allege that the wound was dangerous to life; but it was held that this averment was not necessary, and that it was as obvious, from the plain intent as from the grammatical construction of the section, that to stab, cut, or wound with intent to murder, though the stabbing, cutting, or wounding were not dangerous to life, was an offence under that section.^(e)

The instrument or means by which the wound is inflicted need not be stated in the indictment, and, if they are stated, the prosecutor is not bound to prove [*1011 a wound by such means. On an indictment which charges a wound to have been inflicted by striking with a stick, and kicking with the feet, proof that the wound was caused either by a blow from a stick, or a kick, will be sufficient, though it be uncertain by which of the two it was caused. Upon an indictment under the 9 Geo. 4, c. 31, s. 12, for wounding with a stick and with the feet, it appeared that one of the prisoners struck the prosecutor with a hedge-stake, or half rail, on the head, and knocked him off his horse, and two other persons struck him with their fists, and kicked him over the head and body, so that he became senseless. He received a cut on the mouth, and a severe contused wound on the crown of the

(c) *Rex v. Powles*, 4 C. & P. 571 (19 E. C. L. R.). The case was decided on the 9 Geo. 4, c. 31, the words "any poison or other destructive thing," in that Act are also in the 24 & 25 Vict. c. 100, ss. 11, 14.

(d) *Reg. v. Cruse*, 2 Moo. C. C. R. 53; s. c., 8 C. & P. 541 (34 E. C. L. R.). It was necessary to take the objection by demurrer, or to get the point reserved, as if it had been taken on demurrer, for after verdict the objection would not have availed, as the 7 Geo. 4, c. 64, s. 21, makes an indictment good after verdict, "if it describe the offence in the words of the statute." See as to this, *Reg. v. Martin*, 8 A. & E. 481 (35 E. C. L. R.); 3 N. & P. 472. The means of inflicting the injury are stated in this indictment, but it should seem that it was not necessary to state them. See *Rex v. Briggs*, *infra*, note (f).

(e) *Shea v. Reg.*, 3 Cox C. C. 141. The Court said that the same point had been held in *Fogarty v. Reg.*, 2 Cox C. C. 105; but the report does not mention any such point. There a count stated that the prisoner wilfully, maliciously, unlawfully, and feloniously, by certain means therein set out, caused to M. D. a certain bodily injury, dangerous to life, "to wit, by then and there shooting, &c. [setting out the means] at the person of the said M. D.," and it was objected that the acts alleged as the means whereby the wound was inflicted were not averred to have been done feloniously; but the Court overruled the objection.

¹ An assault with intent to kill must be charged to have been made with a deadly weapon: *Ainsworth v. State*, 5 How. 242. An indictment for an assault with intent to kill and murder should not only charge the intent to have been malicious and unlawful, but the *felonious* intent and the extent of the crime intended to be perpetrated should be distinctly set forth: *Curtis v. People*, 1 Scam. 285.

head. The medical witnesses were of opinion that the wound, from its position, could have not been caused by a fall from horseback, and that it was occasioned either by a blow from a stick, or a kick of a heavy shoe, when the prosecutor was on the ground. The jury found the prisoners guilty, but said they could not tell whether the wound was caused by a blow of the stick, or a kick with the shoe. It was objected that a wound given by the foot, with a shoe on it, was not within the Act; and, if it was, the mode of wounding was not properly described in the indictment, which stated it to have been done with the feet only. But upon a case reserved, the Judges unanimously held that the means by which the wound was inflicted need not have been stated; that it was mere surplusage to state them; and that the statement did not confine the crown to the means stated, but might be rejected as surplusage, and that whether the wound was from a blow with a stick, or a kick from a shoe, the indictment was equally supported. *(f)*

Where an indictment simply alleged that the prisoner attempted to discharge a loaded gun, and it was objected that it was bad for not describing the materials with which it was loaded; Platt, B., held that it was sufficient. *(g)* And where an indictment alleged that the prisoner "by feloniously drawing the trigger of a certain pistol loaded with gunpowder and a leaden bullet, then and there feloniously did attempt to discharge the said pistol" at J. H., with intent to murder him; it was objected that the words "the said pistol" did not incorporate the previous description: Rolfe, B., "The indictment is sufficient. It avers that the prisoner, by pulling the trigger of the pistol, attempted to discharge the said pistol, and surely that must mean that he attempted to discharge its contents." *(h)*

An indictment for maliciously shooting may, in one set of counts, lay the shooting at one person, with intent to murder that person, and in another set of counts, the shooting at another person, with intent to murder such other person. One set of counts of an indictment alleged, that the prisoner shot at Hill, with intent to murder, &c. Hill, another set of counts that he shot at Lee with intent to murder, &c. Lee. It was objected that the indictment must be quashed, as it charged two distinct felonies. Littledale, J.: "It seems to me that these counts may well be *joined. It is all one act, though differently charged. It is like the case of forgery, where different intents are laid; here there is one [*1012 act of shooting charged, with several different intents." *(i)* And where such counts are so joined, the prosecutor will not be compelled to elect on which he will proceed. The prisoner fired a gun in the direction of a man and his wife, and one count charged the intent to be to kill the wife, and the other to kill the husband, it was held that it was not a case in which the prosecutor ought to be put to his election, inasmuch as it was one and the same transaction, upon which both the counts were framed. *(k)* An indictment under the 1 Vict. c. 85, for maliciously cutting and wounding, might contain counts framed on sec. 2, with intent to murder, and also counts framed on sec. 4, with intent to maim, disable, and do grievous bodily harm. *(l)*

Where the first count charged the prisoner with attempting to administer to Margaret Murphy oxalic acid with intent to murder her; the second count charged the prisoner with mixing oxalic acid in tea, which Margaret Murphy had prepared to be drunk by her, and that the prisoner thereby attempted to administer the oxalic acid to Margaret Murphy with intent to murder her; the third count varied the means, but was otherwise like the second; the fourth count charged the prisoner with attempting to administer to "a certain other person, to wit, Margaret Murphy, poison, with intent to commit the crime of murder;" the fifth count charged the prisoner with putting poison into the teapot, and thereby attempting to administer poison to James Murphy, with intent to poison him; the sixth count charged the

(f) Rex v. Briggs, R. & M. C. C. R. 318. In Erle's case, 2 Lew. 133, Coleridge, J., also decided that an indictment upon the 1 Vict. c. 85, need not state the instrument used, and see Holloway v. Reg., *ante*, p. 605.

(g) Reg. v. Cox, 3 Cox C. C. 58.

(h) Reg. v. Baker, 1 C. & K. 255 (47 E. C. L. R.).

(i) Rex v. Holt, 7 C. & P. 518 (32 E. C. L. R.).

(k) Butter's case, 1 Lew. 86, Parke, J.

(l) Reg. v. Strange, 8 C. & P. 172 (34 E. C. L. R.), Lord Denman, C. J., and Park, J. A. J.

prisoner with attempting to administer poison to James Murphy, with intent to commit the crime of murder; it was urged that this indictment should be quashed, as it charged the commission of several distinct felonies; and that, though the act which endangered life might be only one, yet the separate intents alleged, rendered the charge in this indictment one of three distinct felonies. It was answered that it might be that the prisoner had put poison in a teapot where two persons were going to breakfast, and that there might be no evidence of previous malice against either; a failure of justice might ensue if the counts could not be joined; and it was every day's practice to charge an act with several different intents in the same indictment. Gurney, B., having read the depositions, ordered the case to stand over till the next assizes, when the prosecutor might decide whether he would stand upon the present indictment, or prefer another indictment or indictments (*m*)

By the 14 & 15 Vict. c. 19, s. 5, "If upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding, but are not satisfied that *the defendant is guilty of the felony charged in such indictment, then [*1013 and in every such case the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon the defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding."

Where some counts charged the defendant with an assault on S. G., and with having thereby unlawfully and maliciously inflicted grievous bodily harm upon him, and another count was for a common assault, it appeared that the defendant handed the prosecutor a letter, and asked him to read it, which he declined to do; the defendant then struck the prosecutor with his fists two violent blows on the mouth, another on the temple, and a fourth on the back of the ear; three of his front teeth, and other teeth farther up were loosened; his gums were lacerated, and the mouth was swollen. The pain which was suffered immediately afterwards was insufferable; one of the front teeth and the back teeth had since partially fastened, but the two front teeth had not, and the prosecutor must lose them. The prosecutor had suffered much otherwise for a long time. The jury were told that the injuries inflicted fell within the definition of "grievous bodily harm," and that if they believed the witnesses, there was evidence to support the first counts; and that the question of whether the defendant intended to inflict grievous bodily harm did not arise, but that the simple point for their consideration was, "did the defendant unlawfully assault the prosecutor, and thereby inflict upon him grievous bodily harm?" The verdict was, "We find the defendant guilty of an aggravated assault, but without premeditation; it was done under the influence of passion." It was then contended that this was a verdict of guilty upon the count for the common assault only; but a verdict of guilty was directed to be entered on the other counts, and, upon a case reserved, it was urged that the jury might have intended not to find the prisoner guilty of intending bodily harm, and that intention was a necessary ingredient in the offence, and the word "maliciously" meant something more than "intentionally;" but it was held that the direction was correct. The language used by the jury must be construed by looking at the subject-matter of the charge, and what was left to the jury; and this assault was intentional in the eye of the law, though committed without premeditation and under the influence of passion. (*n*)

Upon an indictment against three for maliciously wounding with intent to do grievous bodily harm, the jury may convict two of the felony charged, and the third (under the 14 & 15 Vict. c. 19, s. 5), of unlawfully wounding. (*o*)

Where one count charged the defendant with maliciously inflicting grievous bodily harm; and another with assaulting, beating, wounding, and ill-treating, and

(*m*) *Reg. v. Murphy*, 1 Cox C. C. 108. Not one of the preceding cases was cited, and there seems to be no doubt that the indictment was perfectly correct, as it is obvious that it only charged one act with different intents, which universal practice and all the authorities sanction.

(*n*) *Reg. v. Sparrow*, Bell C. C. 298.

(*o*) *Reg. v. Cunningham*, Bell C. C. 72.

thereby occasioning actual bodily harm; and the jury found the defendant guilty *1014] of a common assault; it was held that this conviction was good upon the second count.^(p) And so where one count was for inflicting grievous bodily harm, another for unlawfully wounding, and the third for an assault occasioning actual bodily harm, and the jury returned a verdict of guilty of a common assault, it was held that the verdict was perfectly legal, and that the Court was bound to receive it.^(q)

And upon an indictment for any offence mentioned in this chapter, the jury, under the 14 & 15 Vict. c. 100, s. 9. may convict of an attempt to commit such offence, and thereupon the prisoner may be punished as if he had been convicted on an indictment for such attempt.^(r)

Sec. III.—Of attempting to Choke, and using Drugs in order to commit Offences.

By the 24 & 25 Vict. c. 100, s. 21, "*Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor.*"^(s)

The 26 & 27 Vict. c. 44, recites the 24 & 25 Vict. c. 96, s. 43, and the preceding clause, and enacts, that "Where any person is convicted of a crime under either of the said sections, the Court before whom he is convicted may, in addition to the punishment awarded by the said sections or any part thereof, direct that the offender, if a male, be once, twice or thrice privately whipped, subject to the following provisions:

- "1. That in the case of an offender whose age does not exceed sixteen years, the number of strokes at each such whipping do not exceed twenty-five, and the instrument used shall be a birch rod:
- "2. That in the case of any other male offender the number of strokes do not exceed fifty at each such whipping:
- "3. That in each case the Court in its sentence shall specify the number of strokes to be inflicted and the instrument to be used:

Provided that in no case shall such whipping take place after the expiration of six months from the passing of the sentence; provided *also, that every such *1015] whipping to be inflicted on any person sentenced to penal servitude shall be inflicted on him before he shall be removed to a convict prison with a view to his undergoing his sentence of penal servitude."

By the 24 & 25 Vict. c. 100, s. 22, "*Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to or attempt to cause to be administered to or taken by any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor.*"^(t)

^(p) Reg. v. Oliver, Bell C. C. 287.

^(q) Reg. v. Yeadon, 1 L. & C. 81.

^(r) See the section, *ante*, p. 1.

^(s) As to principals in the second degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, see *ante*, p. 900. As to sureties, see *ante*, p. 900. The Act extends to Ireland, but not to Scotland. As to offences at sea, see *ante*, p. 762.

^(t) This clause is taken from the 14 & 15 Vict. c. 19, s. 3. The words in *italics* in the beginning of this clause were introduced for the same reason as those in sec. 14. See the note to that section, *ante*, p. 973. As to principals in the second degree, accessories, hard labor, &c., see the last note.

Sec. IV.—Of ill-treating Apprentices and Servants, and abandoning Children.

By the 24 & 25 Vict. c. 100, s. 26, "Whosoever, being legally liable, either as a master or mistress, to provide for any apprentice or servant necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully and maliciously *do or cause to be done any bodily harm* to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years—or to be imprisoned for any term not exceeding two years, with or without hard labor."(*u*)

Sec. 73. "Where any complaint shall be made of any offence against section twenty-six of this Act, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or **place*, or, where [*1016 there are no guardians, by the overseers of the poor of the place, in which the offence shall be *charged* to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians or any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of *any* court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and where there is a board of guardians, the clerk or some other officer of the union or place, and, where there is no board of guardians, one of the overseers of the poor may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute."(*v*)

Sec. 27. "Whosoever shall unlawfully abandon or expose any child, being under the age of two years, whereby the life of such child, shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."(*w*)

Sec. V.—Of Offences committed with Gunpowder, &c.

By the 24 & 25 Vict. c. 100, c. 28, "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."(*x*)

(*u*) This clause is taken from the 14 & 15 Vict. c. 11, s. 1. The words in *italics* are substituted for the word "assault." As to hard labor, &c., see *ante*, p. 900. As to counsellors and aiders, see sec. 67, *ante*, p. 881. As to fine and sureties, see *ante*, p. 900. As to offences at sea, see *ante*, p. 762. The Act extends to Ireland, but not to Scotland.

(*v*) This clause is taken from the 14 & 15 Vict. c. 11, ss. 6, 7. The word "poor" is omitted in the words "any bodily injury inflicted upon any poor person."

(*w*) This clause is new. It is intended to provide for cases where children are abandoned or exposed under such circumstances that their lives or health may be, or be likely to be, endangered. See *Reg. v. Hogan*, 2 Den. C. C. R. 277, *ante*, p. 90; *Reg. v. Cooper*, 1 Den. C. C. 459; 2 C. & K. 876 (61 E. C. L. R.), *ante*, p. 90; *Reg. v. Philpot*, 1 Dears. C. C. 179, *ante*, p. 81; *Reg. v. Gray*, 1 Dears. & B. 303, *ante*, p. 1008, which show the necessity for this enactment. As to counsellors, aiders, hard labor, &c., see note (*u*), *supra*.

(*x*) This clause is taken from the 9 & 10 Vict. c. 25, s. 3. As to principals in the second

*1017] Sec. 29. "Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, *or send or deliver to or cause to be taken or received by any person any explosive substance or any other dangerous or noxious thing, *or put or lay at any place*, or cast or throw at or upon or otherwise apply to any person, any corrosive fluid or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, *whether any bodily injury be effected or not*, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping." (y)

Sec. 30. "Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, *ship*, or vessel any gunpowder or other explosive substance, with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping." (z)

Sec. 64. "Whosoever shall knowingly have in his possession, or make or manufacture any gunpowder, explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument, or thing, with intent by means thereof to commit, or for the purpose of enabling any other person to commit, *any of the felonies* in this Act mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping." (a)

Sec. 65. "Any justice of the peace of any county or place in which any such gunpowder, or other explosive, dangerous, or noxious substance *or thing, or any such machine, engine, instrument, or thing*, is suspected to be made, kept, or carried for the purpose of being used in committing *any of the felonies* in this Act mentioned, upon reasonable cause assigned upon oath by any person, may issue a warrant under *1018] his hand and seal for searching in the day-time any house, *mill, magazine, storehouse, warehouse, *shop, cellar, yard, wharf*, or other place, or any *carriage, wagon, cart, ship, boat, or vessel*, in which the same is suspected to be made, kept, or carried for such purpose as hereinbefore mentioned; and every person acting in the execution of any such warrant shall have, for seizing, removing to proper places, and detaining all such gunpowder, explosive, dangerous, or noxious substances, *machines, engines, instruments, or things*, found upon such search, which he shall have good cause to suspect to be intended to be used in committing any such offence, and the barrels, packages, cases, and *other receptacles* in which the same shall be, the same powers and *protections* which are given to persons searching for unlawful quantities of gunpowder under the warrant of a justice by the Act passed in the Session holden in the 23 & 24 Vict. c. 139."

degree and accessories, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to whipping, see *ante*, p. 900. As to sureties, see *ante*, p. 900. As to offences at sea, see *ante*, p. 762. The Act extends to Ireland, but not to Scotland.

(y) This clause is taken from the 9 & 10 Vict. c. 25, s. 4, and 7 Will. 4, and 1 Vict. c. 85, s. 5. Under those Acts, if any person had placed an infernal machine in any place where he believed another would tread on it, and thereby cause it to explode, he would not have been guilty of an offence. The words "put or lay at any place" were introduced to meet all such cases. As to the words "whether any bodily injury," &c., see the note to sec. 14, *ante*, p. 973. As to principals in the second degree, accessories, hard labor, &c., see the last note.

(z) This clause is taken from the 9 & 10 Vict. c. 25, s. 6. As to hard labor, &c., see note (x), *ante*, p. 1016.

(a) This clause is taken from the 9 & 10 Vict. c. 25, s. 8, and extended to all the felonies against this Act. As to hard labor, &c., see note (x), *ante*, p. 1016.

As it may in some cases be expedient to add a count on the following clause to an indictment on one of the preceding clauses, it is here inserted.

By the 24 & 25 Vict. c. 97, s. 9, "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."(b)

*CHAPTER THE TENTH.

[*1019

OF COMMON AND AGGRAVATED ASSAULTS.

Sec. I.—Of Common Assaults.

AN assault is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at another with a stick or other weapon, or without a weapon, though the party striking misses his aim. So drawing a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitchfork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to an assault.(a)¹

(b) As to principals in the second degree and accessories, see *ante*, p. 5. As to hard labor, solitary confinement, whipping, and sureties, see *ante*, pp. 4, 5. The Act extends to Ireland, but not to Scotland. As to attempts to destroy buildings with gunpowder, see sec. 10, Vol. II.

(a) 1 Hawk. P. C. c. 62, s. 1; Bac. Abr. tit. "*Assault and Battery*" (A.); 3 Blac. Com. 120; Burn. Just. tit. "*Assault and Battery*" 1; 1 East P. C. c. 8, s. 1, p. 406; Bull. N. P. 15; Selw. N. P. tit. "*Assault and Battery*" 1.

¹ An assault is an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such injury, accompanied with circumstances denoting an intent, coupled with a present ability, to use violence against the person. It is not essential to constitute an assault that there should be a *direct attempt* at violence: *Hays v. People*, 1 Hill 321. There must be force or threats, or demonstration of force towards the party, to constitute an assault. Thus where A., having the right to immediate possession of a house, entered the same, and forcibly took away the windows of the room in which B. was sick in bed, without evidence that A. knew that B. was in the house, does not constitute an assault: *Meador v. Stone et al.*, 7 Metcalf 147. No doubt an assault may be committed on one in a house, who is not seen or known to be there; as if one were wantonly to fire a loaded gun, and the ball should pass through a house where persons were, it might be an assault on all of them: *Ibid.* 151. When the evidence disclosed that the defendant presented a gun within shooting distance of and against the prosecutor, who was then armed with a knife and about to attack the defendant, this was no assault if there was no attempt to use the gun, or intention to use it, unless first assailed with the knife: *State v. Blackwell*, 9 Ala. 79. To ride a horse so near to one as to endanger his person, and create a belief in his mind that it is the intention of the rider to ride over him, constitutes an assault: *State v. Sims*, 3 Strobb. 137. Where one presents a pistol at another and threatens to shoot, and finally lowers the pistol and it is not loaded, the man is guilty of an assault, and he is bound to show that the pistol is not loaded; but whether that fact would excuse him or not, without also proving that the other person knew it was not loaded, *quære*: *State v. Cherry*, 11 Ired. 475.

On the trial of an indictment for an assault and battery, when there was a question which party was the aggressor, it was held, that the fact that the defendant went to the place where the other party was, and called him out for the purpose of having a difficulty

But it appears to be now quite settled, though many ancient opinions were to the contrary, that no words whatsoever, be they ever so provoking, can amount to an assault.^(b) And the words used at the time may so explain the intention of the party as to qualify his act, and prevent it from being deemed an assault; as where A. laid his hand upon his sword, and said, "If it were not the assize-time, I would not take such language from you," it was holden not to be an assault, on the ground that he did not design to do the other party any corporal hurt at that time, and that a man's intention must operate with his act in constituting an assault.^(c)

It had been laid down by a very learned Judge, notwithstanding a contrary opinion in an earlier case.^(d) that if a person present a pistol, purporting to be a loaded pistol, so near as to produce danger to life if the pistol had gone off, it is an assault in point of law, although in fact the pistol be unloaded. The learned Judge said, "My idea is, that it is an assault to present a pistol at all, whether loaded or not. If you threw the powder out of the pan, or took the percussion cap off, and said to the party this is an empty pistol, then that would be no assault, for there the party must see that it was not possible that he should be injured; but if *1020] *a person presents a pistol which has the appearance of being loaded, and puts the party into fear and alarm, that is what it is the object of the law to prevent."^(e)

However, where in an action for an assault and presenting a loaded pistol at the plaintiff, it appeared that the defendant cocked a pistol, and presented it at the plaintiff's head, and said, if he was not quiet he would blow his brains out; but there was no evidence that the pistol was loaded, Lord Abinger, C. B., held that if the pistol was not loaded it would be no assault.^(f) And Tindal, C. J., has ruled in the same way.^(g)

(b) 1 Hawk. P. C. c. 62, s. 1; Bac. Abr. tit. "Assault and Battery" (A).

(c) *Turberville v. Savage*, 1 Mod. 3; s. c., 2 Keb. 545.

(d) Anonymous, cor. Erskine, J., mentioned by Ludlow, Serjt., in *Reg. v. St. George*, 9 C. & P. 492 (38 E. C. L. R.).

(e) *Reg. v. St. George*, 9 C. & P. 483 (38 E. C. L. R.), Parke, B.; for the facts of this case, see *ante*, p. 982.

(f) *Blake v. Barnard*, 9 C. & P. 626 (38 E. C. L. R.). It seems that a very reasonable distinction might be made in cases of this kind. If a person presents a gun at another, knowing it not to be loaded, there can be no intent to injure in any event, and therefore he ought not to be criminally responsible; but if the person, at whom such an unloaded gun was presented, did anything in self-defence, his justification, whether in a civil or criminal proceeding, ought to be just the same as if the gun were loaded; for the act of the party presenting the gun led to the natural consequences that the party at whom it was presented should defend himself, and the party presenting the gun ought not to be permitted to show the facts to be otherwise than he had himself held them out to be.

(g) *Reg. v. James*, 1 C. & K. 530 (47 E. C. L. R.), and see *Reg. v. Baker*, 1 C. & K. 254 (47 E. C. L. R.), where Rolfe, B., seems also to have held the same opinion.

with him, did not of itself render him guilty of the assault and battery, unless he carried his intention into effect: *Yoes v. State*, 4 Engl. 42. If a person present a pistol at another, purporting to be loaded, so near as to have been dangerous to life, if the pistol being loaded had gone off, this is an assault in law, though the pistol were not in fact loaded: *State v. Smith*, 3 Humph. 457. An offer to strike by one person rushing upon another, will be an assault, though the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he will instantly receive a blow unless he strikes in self-defence: *State v. Davis*, 1 Ired. 125. Threats and menacing gestures, if unaccompanied by a present intention to do a corporal injury, do not amount to an assault: *Smith v. State*, 39 Miss. 521. A mere threat is not an assault: *State v. Mooney*, Phill. (Law) 434; *Balkam v. State*, 40 Ala. 671. But stopping and preventing a person by means of threats from passing along the public highway, is an illegal imprisonment and an assault: *Bloomer v. State*, 3 Sneed 66. It is indispensable that violence be either offered, menaced, or designed: *People v. Bransby*, 32 N. Y. 525. Malice is not an ingredient: *United States v. Lunt*, Sprague 311. The intent to injure is the gist of the offence: *Rickets v. State*, 1 Sneed 606. See also *Warren v. State*, 33 Texas 517; *State v. Malcolm*, 8 Clarke 413; *Comm. v. Hurley*, 99 Mass. 433; *Tarver v. State*, 43 Ala. 354; *State v. Rawles*, 65 N. C. 334; *State v. Vannoy*, *Ibid.* 532; *State v. Hampton*, 63 N. C. 13; *State v. Church*, *Ibid.* 15.

Pointing a loaded gun at half cock at a person is an assault; for there is a present ability of doing the act threatened, as the gun can be cocked in an instant.^(h)¹

It is not every threat, where there is no actual personal violence, that constitutes an assault; there must in all cases, be the means of carrying the threat into effect. If, therefore, a party be advancing in a threatening attitude, *e. g.*, with his fist clenched, to strike another, so that his blow would almost immediately have reached such person, and be then stopped, it is an assault in law, if his intent were to strike such person, though he was not near enough at the time to have struck him.⁽ⁱ⁾²

Where the plaintiff was in the defendant's workshop and refused to leave it, and the defendant and his workmen surrounded him, and tucking up their sleeves and aprons, threatened to break his neck, if he did not go out, and fearing that the men would strike him if he did not do so, the plaintiff went out; it was held that this was an assault; for there was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution.^(k)

The plaintiff was walking on a footpath by a road side, and the defendant, who was on horseback, rode after him at a quick pace; the plaintiff then ran away into his own garden, and the defendant rode up to the gate, and shook his whip at the plaintiff, who was about three yards off; it was held, that if the defendant rode after the plaintiff, so as to compel him to run into his garden for shelter to avoid being beaten, it was an assault.^(l)

A *battery* is more than an *attempt* to do a corporal hurt to another; but any injury whatsoever, be it ever so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, [*1021 is a battery in the eye of the law.^(m) For the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner.⁽ⁿ⁾ It should be observed that every battery includes an assault.^(o)³

To cut a man's clothes whilst on his person is an assault, although there is no intention to inflict any bodily injury, and in the ordinary case of a blow on the back there is clearly an assault, though the blow is received by the coat on the person.^(p)

Where a policeman was stationed at a door to prevent a person from entering, it was held that, if he was entirely passive, like a door or a wall put to prevent that

(h) *Osborn v. Veitch*, 1 F. & F. 317, Willes, J.

(i) *Stephens v. Myers*, 4 C. & P. 349 (19 E. C. L. R.), Tindal, C. J.

(k) *Read v. Coker*, 13 C. B. 850 (76 E. C. L. R.).

(l) *Mortin v. Shoppee*, 3 C. & P. 373 (14 E. C. L. R.), Lord Tenterden, C. J.

(m) *Bac. Abr. tit. "Assault and Battery"* (B.); 1 *Hawk. P. C. c. 62, s. 2.*

(n) 4 *Blac. Com.* 120.

(o) *Termes de la ley, "Battery,"* 1 *Hawk. P. C. c. 62, s. 1*; *Bac. Abr. tit. "Assault and Battery"* (A.).

(p) *Rex v. Day*, 1 *Cox C. C.* 207, *Parke, B., ante, p. 986.*

¹ To constitute an assault there must be the commencement of an act which, if not prevented, would produce a battery; and therefore the drawing of a pistol, without presenting or cocking it is not an assault: *Lawson v. State*, 30 *Ala.* 14. Presenting a gun in an angry and excited manner at another is an assault, whether the gun was in fact loaded or not, if the person at whom it is presented is ignorant whether it is loaded: *Beach v. Hancock*, 7 *Foster* 223. The pointing of a gun at a person who does not know but that it is loaded or has no reason to believe that it is not is an assault: *State v. Sheppard*, 10 *Iowa* 126. For other cases of assaults with gun or pistol see *Keefe v. State*, 19 *Ark.* 190; *State v. Epperson*, 27 *Mo.* 255; *Higginbotham v. State*, 23 *Texas* 574; *Comm. v. McLaughlin*, 5 *Allen* 507; *State v. Blackwell*, 9 *Ala.* 79; *State v. Smith*, 3 *Humph.* 457.

² An intent with acts which if not interrupted will be followed by personal injury, is sufficient, although the assailant may not be at any time within striking distance: *People v. Yslas*, 27 *Cal.* 630; *State v. Davis*, 1 *Ind.* 125. To ride a horse so near to one as to endanger his person, and create a belief in his mind that it is the intention of the rider to ride over him, constitutes an assault: *State v. Sims*, 3 *Strobb.* 137.

³ *State v. Baker*, 65 *N. C.* 332; *Johnson v. State*, 17 *Texas* 515.

person from entering the room, and simply obstructing the entrance of that person, no assault was committed. *(q)*

The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, &c. against the carriage of another person, and thereby causing bodily injury to the persons travelling in it. *(r)* And it seems that it is not necessary that the assault should be immediate; as where a defendant threw a lighted squib into a market-place, which, being tossed from hand to hand by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery. *(s)* And the same has been holden where a person pushed a drunken man against another, and thereby hurt him; *(t)* but if such person intended doing a right act, as to assist the drunken man, or to prevent him from going along the street without help, and in so doing a hurt ensued, he would not be answerable. *(u)*

Where a defendant put some cantharides into some coffee, in order that a female might take it, and she did take it, and was made ill by it, it was held to be an assault. *(v)* But this case has been overruled. *(w)*

There may be an assault also by exposing a person to the inclemency of the weather. Thus, in a case where an indictment against a mistress for not providing sufficient food and sustenance for a female servant, whereby the servant became sick *1022] and emaciated, was ruled to be bad, because it did not allege that the servant was of tender years, and under the dominion and control *of her mistress; it was suggested that the indictment also charged that the defendant exposed the servant to the inclemency of the weather; and it was holden that such exposure was an act in the nature of an assault, for which the defendant might be liable, whatever was the age of the servant *(x)*

Where a mother left her child, ten days old, at the bottom of a dry ditch, by which there was a path, and a lane separated from the ditch by a hedge; Parke, B., is reported to have said that "there were no marks of violence on the child, and it does not appear in the result that the child actually experienced any inconvenience, as it was providentially found soon after it was exposed, and therefore, although it is said in some of the books that an exposure to the inclemency of the weather may amount to an assault, yet, if that be so at all, it can only be when the person suffers a hurt or injury of some kind or other from the exposure." *(y)* But where the defendants told the mother of a child of which she had been delivered that it was to be taken to a nursery or institution to be brought up, and they put the child in a bag and hung it upon some park-pales at the side of a footpath, and it was likely that the putting a child of so tender an age into a bag and hanging the bag on the pales would cause its death; Tindal, C. J., held that the defendants were guilty of an assault; for the mother gave consent on the pretext that the child was to be taken to some institution, and as that pretext was false, it was no consent at all. *(z)*

(q) *Innes v. Wylie*, 1 C. & K. 257 (47 E. C. L. R.), Lord Denman, C. J.

(r) See the precedents for assaults of this kind: *Cro. Circ. Comp.* 82; *Chit. Crim. L.* 823, 824, 825; 2 *Starkie* 388, 389 (3 E. C. L. R.).

(s) *Scott v. Shepherd*, 2 *Blac. Rep.* 892, by three Judges; *Blackstone*, J., *contra*, 3 *Wils.* 402, s. c.

(t) *Short v. Lovejoy, cor. Lee*, C. J., 1752; *Bull. Ni. Pri.* 16.

(u) *Ib. Ibid.*

(v) *Reg. v. Button*, 8 C. & P. 660 (34 E. C. L. R.). *Arabin*, Serjt., after consulting the Recorder. But *qu.* whether this be correct, as there was no force either directly or indirectly used by the defendant, and the act which caused the injury was the act of the party taking the coffee. C. S. G.

(w) *Reg. v. Dilworth*, 2 M. & Rob. 531; *Reg. v. Walkden*, 1 Cox C. C. 282; *Reg. v. Hanson*, 2 C. & K. 912 (61 E. C. L. R.).

(z) *Rex v. Ridley, cor. Lawrence*, J., *Salop Lent Ass.* 1811; 2 *Campb.* 650, 653. The counsel for the prosecution admitted that they could not prove this charge in the indictment to any extent; and the defendant was accordingly acquitted. That negligence and harsh usage may be a means of committing murder, see *ante*, p. 677.

(y) *Reg. v. Renshaw*, 2 Cox C. C. 285, Parke, B., *ante*, p. 91.

(z) *Reg. v. March*, 1 C. & K. 496 (47 E. C. L. R.). The very learned C. J. cautiously avoided saying that it would not have been an assault if the mother had consented to all that had been done; and as it is clear that a mother may be guilty of a battery on a child

But if one has an idiot brother, who is bedridden in his house, and he keeps him in a dark room, without sufficient warmth or clothing, this is not an assault or imprisonment, as it is an omission without a duty, which will not create an indictable offence.(a) Where parish officers, by force and against her consent, cut off the hair of a young woman who was an inmate of a workhouse, it was held an assault.(b)

If a master take indecent liberties with a female scholar without her consent, he is liable to be punished for an assault, though she did not resist. A master took very indecent liberties with a female scholar of the age of thirteen, by putting her hand into his breeches, pulling up her petticoats, and putting his private parts to hers: she did not resist, but it was against her will. The jury*found [*1023 him guilty of an assault with intent to commit a rape, and also of a common assault; and the Judges thought the finding as to the latter clearly right.(c) And making a female patient strip naked, under pretence that the defendant, a medical practitioner, cannot otherwise judge of her illness, if he himself takes off her clothes, is an assault. A girl of sixteen was taken by her parents to the defendant, a German quack, on account of fits, by which she was afflicted; he said he would cure her, and bid her come again the next morning; she went accordingly the next morning by herself, and he told her she must strip naked; she said she would not. He said she must, or he could not do any good. She began to untie her dress, and he stripped off all her clothes; she did nothing; he pulled off everything; she told him she did not like to be stripped in that manner. When she was naked, he rubbed her with a liquid. The case was left to the jury to consider whether the defendant believed that stripping the girl would assist his judgment, or whether he did not strip her wantonly, without thinking it necessary; and they were told that the making her strip and pulling off her clothes might, under the latter circumstances, justify a verdict for an assault. The jury found the defendant guilty; and, upon a case reserved, it was held that the conviction was right.(d)

Where a prize or other fight takes place, and a number of persons are assembled to witness it, if they have gone thither for the purpose of seeing the combatants strike each other, and were present when they did so, they are all in point of law guilty of an assault; and there is no distinction between those who concur in the act and those who fight;(e) and it is not at all material which party struck the first blow, for if several are in concert, encouraging one another and co-operating, they are all equally guilty, though one only committed the actual assault.(f)

Where an act is done with the consent of a party it is not an assault; for in order to support a charge of assault such an assault must be proved as could not be justified if an action were brought for it, and leave and license pleaded;¹ attempting, therefore, to have connection with a girl between the ages of ten and twelve, or under ten years of age, if done with the girl's consent, is not an assault.(g)

by actual striking, *quære* whether, when she does or consents to an unlawful handling or disposition of her child, she is not guilty of battery; for what is a battery but an unlawful touching of the person of another? *Reg. v. Renshaw*, therefore, seems open to doubt on this ground; and also on the further ground that it seems to make the question, whether the act of the prisoner was a battery or not, depend on the result of that act; whereas, it is conceived that that act was either a battery or not a battery at the moment it was committed. It is confidently submitted that the instant a mother deposits a child with intent to abandon it, as that is an unlawful act, which she can neither justify nor excuse, she is guilty of a battery.

(a) *Rex v. Smith*, 2 C. & P. 449 (12 E. C. L. R.), Burrough, J.

(b) *Forde v. Skinner*, 4 C. & P. 239, (19 E. C. L. R.), Bayley, J.

(c) *Rex v. Nichol*, MS., Bayley, J., and R. & R. 130; *Reg. v. M'Garvaron*, 3 C. & K. 320, Williams, J., s. p.

(d) *Rex v. Rosinski*, MS., Bayley, J., and R. & M. C. C. 19; s. c., 1 Lew. 11; and see *Reg. v. Case*, 1 Den. C. C. 580, *ante*, p. 912.

(e) *Rex v. Perkins*, 4 C. & P. 537 (19 E. C. L. R.), Patteson, J.; *Reg. v. Hunt*, 1 Cox C. C. 177; s. p., *ante*, p. 380.

(f) Anonymous, 1 Lewin 17, per Bayley, J.; *Reg. v. Lewis*, 1 C. & K. 419 (47 E. C. L. R.), Coleridge, J., s. p.

(g) *Reg. v. Meredith*, 8 C. & P. 589 (34 E. E. L. R.), Lord Abinger, C. B.; *Reg. v. Banks*, *Ibid.* 574, Patteson, J.; *Reg. v. Martin*, 9 C. & P. 213 (38 E. C. L. R.); 2 Moo. C. C. R. 123;

¹ *Champer v. State*, 14 Ohio (N. S.) 437; *Smith v. State*, 12 *Ibid.* 466.

But if resistance be prevented by fraud it is an assault. If a man, therefore, have connection with a married woman, under pretence of being her husband, he is guilty of an assault (*h*)

An *unlawful imprisonment* is also an assault; for it is a wrong done to the person *1024] of a man, for which, besides the private satisfaction *given to the individual by action, the law also demands public vengeance, as it is a breach of the King's peace, a loss which the state sustains by the confinement of one of its members, and an infringement of the good order of society. (*i*) To constitute the injury of false imprisonment, there must be an unlawful detention of the person.¹ With respect to the detention, it may be laid down that every confinement of the person, whether it be in a common prison or in a private house, or by a forcible detaining in the public streets, will be sufficient. (*k*) And such detention will be unlawful unless there be some sufficient authority for it, arising either from some process from the courts of justice, or from some warrant of a legal officer, having power to commit under his hand and seal, and expressing the cause of such commitment; or arising from some other special cause sanctioned, for the necessity of the thing, either by common law or by Act of Parliament. (*l*) And the detention will be unlawful, though the warrant or process upon which it is made be regular, in case they are executed at an unlawful time, as on a Sunday; or in a place privileged from arrests, as in the verge of the King's Court. (*m*) Especial provision is made concerning the arrest of foreign ambassadors, or other foreign public ministers, and their domestics, or domestic servants, by the statute 7 Anne, c. 12, which makes any process against them, or their goods and chattels, altogether void; and provides, that the persons prosecuting, soliciting, or executing, such process, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment, as the Lord Chancellor and the two Chief Justices, or any two of them, shall think fit. But no trader within the description of the bankrupt laws, who shall be in the service of any ambassador or public minister, is to be privileged or protected by this Act; nor is any one to be punished for arresting an ambassador's servant, unless the name of such servant be registered

Reg. v. Cockburn, 3 Cox C. C. 543; Reg. v. Mehegan, 7 Cox C. C. 145; Reg. v. Read, 1 Den. C. C. 377. See these cases, *ante*, p. 933, *et seq.*

(*h*) Reg. v. Williams, 8 C. & P. 286 (34 E. C. L. R.); Reg. v. Saunders, *Ibid.* 265. See these cases, *ante*, p. 909.

(*i*) 1 Hawk. P. C. c. 60, s. 7; 4 Blac. Com. 218. And see precedents of indictments for assaults and false imprisonment: Cro. Circ. Comp. 79; 2 Stark. 385, 386; 3 Chit. Crim. L. 835, *et seq.* As to such false imprisonment as amounts to kidnapping, &c., see *ante*, p. 962, *et seq.*

(*k*) 2 Inst. 589; Com. Dig. tit. "Imprisonment" (G.); 3 Blac. Com. 127. In *Bird v. Jones*, 7 Q. B. 742 (53 E. C. L. R.), the majority of the Court held that where the plaintiff in attempting to go in a particular direction was prevented from going in any direction but one, not being that in which he endeavored to pass, it was not an imprisonment, and this, whether the plaintiff had or had not a right to pass in the first mentioned direction. "A prison may have its boundary large or narrow, visible and tangible, or, though real, still in the conception only; it may be movable or fixed; but a boundary it must have; and that boundary the party imprisoned must be prevented from passing: he must be prevented from leaving that place, within the ambit of which the party imprisoning him would confine him, except by prison breach." Per Coleridge, J., *Ibid.* "In general, if one man compels another to stay in any given place against his will, he imprisons that other just as much as if he locked him up in a room; and it is not necessary in order to constitute an imprisonment that a man's person should be touched. The compelling a man to go in a given direction against his will may amount to imprisonment." "Imprisonment is a total restraint of the person for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him;" Per Patteson, J., *Ibid.* See also *Warner v. Riddiford*, 4 C. B. (N. S.) 180 (93 E. C. L. R.).

(*l*) 3 Blac. Com. 127.

(*m*) *Id.* *Ibid.*; 29 Car. 2, c. 7. And see further as to unlawful imprisonments: Com. Dig. tit. "Imprisonment" (H.); Bac. Ab. tit. "Trespass" (D.) 3; 2 Selw. N. P. tit. "Imprisonment."

¹ No actual force is necessary to constitute a false imprisonment. If a man is restrained of his personal liberty by fear of a personal difficulty, that amounts to a false imprisonment: *Smith v. State*, 7 Humph. 43.

in the office of one of the principal secretaries of state, *and by him transmitted to the sheriffs of London and Middlesex, or their undersheriffs or deputies.(n) [*1025

It has been supposed that every imprisonment includes a battery:(o) but this doctrine was denied in a recent case, where it was said by the Court that it was absurd to contend that every imprisonment included a battery.(p)

Whether the act shall amount to an assault must, in every case, be collected from the intention. Thus, in an action for an assault, where it appeared that the defendant and another person were fighting, when the plaintiff came up and took hold of the defendant by the collar, in order to separate the combatants, upon which the defendant beat the plaintiff, it was objected to the counsel for the plaintiff, who offered to enter into this evidence, that it ought to have been specially stated in the replication to the plea of *son assault demesne*: but the objection was overruled, on the ground that the evidence was not offered by way of justification, but for the purpose of showing that there was not any assault, and that it was the *quo animo* which constituted an assault, which was matter to be left to the jury.(q) So to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is said to be no battery.(r) So if one lays his hand gently, and not in a hostile manner, on another, in order to attract his attention, it is not an assault.(s) And if the injury committed were accidental and undesigned, it will not amount to a battery. Thus, if one soldier hurts another by discharging a gun in exercise, it will not be a battery.(t) And it is no battery if, by a sudden fright, a horse runs away with his rider, and runs against a man.(u) So where upon an indictment for throwing down skins into a man's yard, being a public way, by which a person's eye was beaten out, it appeared by the evidence that the wind blew the skin out of the way, and that the injury was caused by this circumstance, the defendants were acquitted.(v) It seems also that if two, by consent, play at cudgels, and one happen to hurt the other, it would not amount to a battery, as their intent was lawful and commendable, in promoting courage and activity.(w)

*If one of two persons, who are fighting, strike at the other, and hit a third person unintentionally, this is a battery, and cannot be justified on [*1026 the ground that it was accidental.(x)

(n) See as to the occasion of passing this Act, 1 Blac. Com. 254, 255, 256; and as to the construction of it, the cases collected in 2 Evans's Cl. Stat., Part IV., Cl. iii., No. 21.

(o) Bull. N. P. c. 4, p. 22; and the opinion was adopted by Lord Kenyon, in *Oxley v. Flower* and another, 2 Selw. N. P. tit. "Imprisonment," l.

(p) *Emmett v. Lyne*, 1 New Rep. 255.

(q) *Griffin v. Parsons*, Gloucester Lent. Ass. 1754; Selw. N. P. tit. "Assault and Battery," 26, note (1), 7 Edit.

(r) 1 Hawk. P. C. c. 62, s. 2; Bac. Ab. tit. "Assault and Battery" (B.).

(s) *Coward v. Baddeley*, 4 H. & N. 478.

(t) *Weaver v. Ward*, Hob. 134; 2 Roll. Ab. 548; Bac. Abr. tit. "Assault and Battery" (B.). But if the Act were done without sufficient caution, the soldier would be liable to an action at the suit of the party injured; for no man will be excused from a trespass, unless it be shown to have been caused by inevitable necessity, and entirely without his fault: *Dickenson v. Watson*, Sir T. Jones 205; *Underwood v. Hewson*, 1 Str. 595; 2 Blac. R. 896; Selw. N. P. tit. "Assault and Battery," 27.

(u) *Gibbons v. Pepper*, 4 Mod. 405. But if the horse's running against the man were occasioned by a third person whipping him, such third person would be the trespasser: Bac. Ab. tit. "Assault and Battery" (B.). And, upon the principles which have been before mentioned, such an act in a third person, causing death to any one, may, under certain circumstances, amount to felony: *Ante*, p. 849.

(v) *Rex v. Gill* and another, 1 Str. 190.

(w) Bac. Ab. tit. "Assault and Battery" (B.), referring to Dalt. c. 22; Bro. Coron. 229. But in the notes to Bac. Ab. *ubi supra*, the case of *Boulter v. Clarke*, Abingdon Ass. cor. Parker, C. B., Bull. N. P. 16, is referred to, in which it was ruled that it was no defence to allege that the plaintiff and defendant fought together by consent, the fighting itself being unlawful; and the case of *Matthew v. Ollerton*, Comb. 218, is also referred to as an authority, that if one license another to beat him, such license is no defence, because it is against the peace. And see *ante*, p. 854, *et seq.*, as to the criminality of some games or sports.

(z) *James v. Campbell*, 5 C. & P. 372 (24 E. C. L. R.), *Bosanquet, J.* As the blow, if

In some cases force used against the person of another may be justified, and will not amount to an assault and battery. Thus, if an officer having a warrant against one who will not suffer himself to be arrested, beat or wound him, in the attempt to take him; or if a parent, in a reasonable manner, chastise his child; or a master his servant, being actually in his service at the time; or a schoolmaster his scholar; or a gaoler his prisoner; or if one confine a friend who is mad, and bind and beat him, &c., in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; no assault or battery will be committed by such acts.^(y) So if A. beat B. (without wounding him, or throwing at him a dangerous weapon), who is wrongfully endeavoring, with violence, to dispossess him of his lands, or of the goods, either of himself or of any other person, which have been delivered to him to be kept, and will not desist upon A.'s laying his hands gently upon him, and disturbing him; or if a man beat, wound, or maim one who is making an assault upon his own person, or that of his wife, parent, child, or master;^z or if a man fight with, or beat, one who attempts to kill any stranger; in these cases also it seems that the party may justify the assault and battery.^(z) It has been holden that a master may not justify an assault in defence of his servant, because he might have an action for the loss of his service:^(a) but a different opinion has been entertained on this point;^(b) and in one case Lord Mansfield said, "I cannot say that a master interposing, when his servant is assaulted, is not justifiable under the circumstances of the case; as well as a servant interposing for his master; it rests on the relation between master and servant."^(c) It is said that a servant may not justify beating another in defence of his master's son, though he were *commanded to do *1027] so by the master, because he is not a servant to the son; and that, for the like reason, a tenant may not beat another in defence of his landlord.^(d) A wife may justify an assault in defence of her husband^(e) An upper servant cannot justify beating an under servant for disobedience of orders.^(f)

There is no doubt that *son assault demesne* is a good defence to an indictment.^(g) If, therefore, the plaintiff first lifted up his staff, and offered to strike the defendant, it is a sufficient assault to justify the defendant striking the plaintiff, and he

it had struck the party at whom it was aimed, would have been a battery, so it was though it struck another person; just in the same way as if a blow intended for A. hit and kill B., it will be murder or manslaughter, according as it would have been murder or manslaughter if the blow had hit A. and killed him. C. S. G. In *Hall v. Fearnley*, 3 Q. B. 919 (43 E. C. L. R.), it was held that inevitable accident arising from superior agency is a defence under the general issue; but that a defence which admits that the accident resulted from an act of the defendant must be pleaded. In an action for assault where the defendant had thrown a stick and hit the plaintiff, but it did not appear that he threw the stick with the intention of hitting the plaintiff, Rolfe, B., is reported to have held that this was not sufficient to constitute an assault, as it did not appear for what purpose the stick was thrown; and it was therefore fair to conclude that it was thrown for a proper purpose, and that the striking of the plaintiff was merely accidental: *Alderson v. Waistell*, 1 C. & K. 358 (47 E. C. L. R.). But this ruling may well be doubted, at all events as far as relates to a civil suit. See *ante*, p. 1025, note (t).

(y) 1 Hawk. P. C. c. 60, s. 23; Bac. Ab. tit. "Assault and Battery" (C).

(z) 1 Hawk. P. C. c. 60, s. 23, and the numerous authorities there cited; Bac. Ab. tit. "Assault and Battery" (C.).

(a) *Leward v. Baseley*, 1 Ld. Raym. 62; 1 Salk. 407; Bull. N. P. 18.

(b) 1 Hawk. P. C. c. 60, s. 24.

(c) *Tickel v. Read*, Loft. 215.

(d) 1 Hawk. P. C. c. 69, s. 24.

(e) *Leward v. Baseley*, 1 Ld. Raym. 62.

(f) *Reg. v. Huntley*, 3 C. & K. 142, Platt, B.

(g) 1 Hawk. P. C. c. 62, s. 3.

¹ See as to correction of children: *Johnston v. State*, 2 Humph. 283; *State v. Harris*, 63 N. C. 1. A master has no right to correct his hired servant: *Comm. v. Bird*, 1 Ashm. 267. As to schoolmaster, see *Comm. v. Randall*, 4 Gray 36.

² *Orton v. State*, 4 Greene 140; *Slaten v. State*, 30 Miss. 619; *Parker v. State*, 31 Texas 132. A husband has a right to use compulsion, if necessary, to enable him to regain the possession of his wife from one in whose society he finds her, and who he has good reason to believe either has committed or is about to commit adultery with her: *State v. Crater*, 6 Ired. 164.

need not stay till the plaintiff has actually struck him.^(h) If one man strikes another a blow, that other has a right to defend himself, and to strike a blow in his defence, but he has no right to revenge himself; and if when all danger is past he strikes a blow not necessary for his defence, he commits an assault and battery.⁽ⁱ⁾ It is not, however, every trifling assault that will justify a grievous and immediate mayhem, such as cutting off a leg or hand, or biting off a joint of a man's finger, unless it happened accidentally, without any cruel or malignant intention, or after the blood was heated in the scuffle, but it must appear that the assault was in some degree proportionable to the mayhem.^(k) If a party raise up a hand against another, within a distance capable of the latter being struck, the other may strike in his own defence, to prevent him, but he must not use a greater degree of force than is necessary.^(l) For if the violence used be more than was necessary to repel the assault, the party may be convicted of an assault.^(m)

It has been holden that a defendant may justify even a *mayhem*, if done by him as an officer in the army, for disobeying orders; and that he may give in evidence the sentence of a council at war, upon a petition against him by the plaintiff; and that if, by the sentence, the petition is dismissed, it will be conclusive evidence in favor of the defendant.⁽ⁿ⁾

In cases where officers have authority to arrest, their laying hands upon persons in order to do so is no battery in law. So if a justice make a warrant to J. S. to arrest J. D., and J. N. comes in aid of J. S., and gently puts his hands on the

(h) Bull. N. P. 18.

(i) Reg. v. Driscoll, C. & M. 214, Coleridge, J. Lord Coke (Co. Litt. 162 a) cites from Bracton, *vim vi repellere licet, modo fiat moderamine inculpatæ tutelæ, non ad sumendam vindictam, sed ad propulsandam injuriam*.

(k) 1 East P. C. c. 7, s. 9, p. 402.

(l) Per Parke, B., Anonymous, 2 Lew. 48.

(m) Reg. v. Mabel, 9 C. & P. 474 (38 E. C. L. R.), Parke, B.; Rex v. Whalley, 7 C. & P. 245 (34 E. C. L. R.), Williams, J. See *post*, p. 1029.

(n) Lane v. Degberg, 11 Wm. 3, per Treby, C. J.; Bull. N. P. 19.

¹ A person who seeks a fight or provokes another to strike him cannot justify a blow on the ground of self-defence: *State v. Bryson*, 1 Wms. (Law) 86. It is not a man's belief simply that he will be struck that will justify him in striking first, but his belief founded on reasonable grounds of apprehension: *Ibid*. It is not sufficient to constitute an assault, that a man of ordinary firmness should believe that he was about to be stricken; but if it can be collected from the circumstances, that notwithstanding appearances to the contrary, there was not a present purpose to do an injury, there is no assault: *State v. Crow*, 1 Ired. 376. When the defendant, at the time he raised his whip and shook it at the prosecutor, though within striking distance, made use of the words "Were you not an old man, I would knock you down," this does not import a present purpose to strike, and does not in law amount to an assault: *State v. Crow*, 1 Ired. 376. When A., being within striking distance, raises a weapon for the purpose of striking B., and at the same time declares that if B. will perform a certain act he will not strike him, and B. does perform the required act, in consequence of which no blow is given, this is an assault in A.: *State v. Morgan*, 3 Ired. 186.

² Proof that the prisoner struck the first blow will not justify an enormous battery: *State v. Quin*, 3 Brev. 515. Where a woman asked a man, as he was riding along on horseback, why he had been talking about her, and threw a stone and then a stick at him, and he got off and took up a stick and hit her on the head, he was held to be guilty of an assault and battery. One committing an assault is only justifiable when it is committed in self-defence: *State v. Gibson*, 10 Ired. 214. Though a man may put another out of his house, who persists in remaining, yet he may not inflict a violent battery. A person having business to transact with another, has a right to enter his house; and if he remains after being ordered to depart, he may be put out of the house, the owner making use of no more violence than is necessary for the accomplishment of that object, and showing that this was his object. But if the beating be cruel and excessive, not calculated either from its extent or manner to produce the pretended object of getting the party out, but on the contrary rather to prevent him from going, such conduct cannot be justified upon any principle of law. While the law permits men to defend their persons, or preserve the immunities of their dwellings, it is careful to restrain the indulgence of an ungovernable and revengeful spirit: *State v. Lazarus*, 1 South Carolina 34.

See *Gallagher v. State*, 3 Minn. 270; *Comm. v. Ford*, 5 Gray 475; *Colton v. State*, 4 Texas 260.

shoulders of J. D., and says, "this is the man," this is no battery.^(o) There may be cases in which a person may justify laying hands upon another in order to serve him with civil process.^(p)

But in all such cases the force used must be only so great as is necessary for the purpose of effecting the object in view, and if there be an excess of violence the officer will be guilty of an assault. If, therefore, a constable is preventing a breach of the peace, and any person stands in the way with intent to prevent him from so doing, *the constable is justified in taking such person into custody, but not in striking him.^(q) So where one of the Marshals of the city of London, whose duty it was on the day of a public meeting in Guildhall, to see that a passage was kept for the transit of the carriages of the members of the corporation and others, directed a person in the front of the crowd to stand back, and on being told by him that he could not for those behind him, struck him immediately on the face, saying, that he would make him, it was held that a more moderate degree of pressure ought to have been exercised, and some little time given to remove the party in a more peaceable way, and that consequently the Marshal had been guilty of too violent an exertion of his authority.^(r)

An officer is entitled to the possession of the warrant under which he acts, and if he deliver it to the party against whom it is issued, and he refuse to re-deliver it, the officer may use so much force as is necessary to get possession of it again. An officer having a warrant to search for an illegal still in the defendant's house, the defendant asked to see the warrant, and it was given him, and he then refused to return it, upon which the officer endeavored by force to retake it, and a scuffle ensued, it was held that the officer was justified in using so much violence as was necessary to retake the warrant, and no more.^(s)¹

Where a magistrate is making a preliminary inquiry for the purpose of ascertaining whether there is sufficient ground to commit a party for trial, no person has a right to be present, and consequently the magistrate may justify laying hands upon a person, who refuses to leave the room where the inquiry is being made, in order to turn him out.^(t) So where a coroner is holding an inquest, which is a preliminary investigation only, he may justify turning any person out of the room where the inquest is held.^(u) But where the proceedings before magistrates are of a judicial nature, as in the case of summary convictions, all persons have a right to be present, and, therefore, a magistrate cannot justify laying hands upon a person to turn him out of the room.^(v) Formerly on the hearing of an information, the magistrates had the discretionary power to regulate the proceedings of their own Courts, and might decide who should appear as advocates, and whether, when the parties were before them, they would hear any one but them; if, therefore, an attorney insisted upon acting as an attorney in such a case, where it was not the practice of the magistrates to permit any person to appear as an advocate, they might justify laying hands upon him to turn him out of the room.^(w) But the

(o) *Wilson v. Dodd*, 2 Roll. Ab. 546.

(p) *Harrison v. Hodgson*, 10 B. & C. 445 (21 E. C. L. R.). See 2 Roll. Abr. 546.

(q) *Levy v. Edwards*, 1 C. & P. 40 (12 E. C. L. R.), Burrough, J.

(r) *Imason v. Cope*, 5 C. & P. 193 (24 E. C. L. R.), Tindal, C. J.

(s) *Rex v. Milton, M. & M.* 107, Lord Tenterden, C. J.; s. c., 3 C. & P. 31 (14 E. C. L. R.).

(t) *Cox v. Coleridge*, 1 B. & C. 37 (8 E. C. L. R.).

(u) *Garnett v. Ferrand*, 6 B. & C. 611 (13 E. C. L. R.).

(v) *Daubney v. Cooper*, 10 B. & C. 237 (21 E. C. L. R.).

(w) *Collier v. Hicks*, 2 B. & Ad. 663 (22 E. C. L. R.).

¹ Even although an officer attempting to execute process, be unauthorized and therefore a trespasser, yet he is not bound to submit to unreasonable and unnecessary violence and may defend himself against the same without being guilty of an assault: *People v. Galick, Hill & Denio* 229. Though an officer, in seizing property, may be a trespasser, if acting in good faith, he must be regarded as in the execution of his office so far as to be entitled to protection against the violence of the owner of the property: *Faris v. State*, 3 Ohio (N. S.) 159. And see also *State v. Richardson*, 38 N. H. 208; *State v. Webster*, 39 Ibid. 96; *Comm. v. Presby*, 14 Gray 65; *Galvin v. State*, 6 Cald. 283. The officer refusing to read his warrant does not justify resistance: *Comm. v. Cooley*, 6 Gray 350; *Kernan v. State*, 11 Ind. 471.

case would be otherwise since the 11 & 12 Vict. c. 43, s. 12, which gives the parties in such cases the right to the assistance of counsel or attorney.(x)

It should be observed, with respect to an assault by a man on a party endeavoring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law, the *defendant cannot justify a battery without [*1029 a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such case to oppose force to force: therefore, if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence.(y)¹ If a person enters another's house with force and violence, the owner of the house may justify turning him out (using no more force than is necessary), without a previous request to depart: but if the person enters quietly, the other party cannot justify turning him out without a previous request.(z) For "there is a manifest distinction between endeavoring to turn a man out of a house or close, into which he has previously entered quietly, and resisting a forcible

(x) See the remarks on this Act in *Lewis v. Levy*, E. B. & E. 537 (96 E. C. L. R.).

(y) *Green v. Goddard*, 2 Salk. 641. In a case of this kind, however, it should seem that the violence must be considerable, and continuing, in order to justify the application of force by the owner, without some previous request to depart; at least, if the force applied be more than would be justified under a *molliter manus imposuit*; for in a case of assault and battery, where the defendant pleaded *non assault demeane*, and the plaintiff replied that he was possessed of a certain close, and that the defendant broke the gate and chased his horses in the close, and that he, for the defending his possession, *molliter insultum fecit* upon the defendant, the replication was adjudged to be bad; and that it should have been *molliter manus imposuit*, as the plaintiff could not justify an assault in defence of his possession: *Leward v. Baseley*, 1 Lord Raym. 62.

(z) *Tullay v. Reed*, 1 C. & P. 6 (12 E. C. L. R.), Park, J. A. J. And see *Meade's case*, 1 Lew. 184, *ante*, p. 891; *Wild's case*, 2 Lew. 214, *ante*, p. 892.

¹ *Corey v. People*, 45 Barb. 262; *People v. Pool*, 27 Cal. 572; *Baldwin v. Hayden et al.*, 6 Conn. 453. It is held in one case that all necessary force may be used short of an actual striking: *Watrous v. Steel*, 4 Verm. 629. And in another case, that though an assault and battery may be justified in defence of possession, yet a wounding cannot; though it may be if the intruder commit an assault upon the possessor or his family, when the latter undertakes to remove him: *Shain v. Markham*, 4 J. J. Marsh. 578. Though a man may put another out of his house, who persists in remaining, yet he may not inflict a violent battery: *State v. Lazarus*, 1 Mill's Const. 12. On the trial of a defendant for an assault and battery, where there was contradictory evidence as to the degree of force used towards the defendant by the complainant, on the defendant's refusal to remove from the complainant's premises, after being requested to do so, the judge refused the prayer of the defendant to instruct the jury that if the complainant committed a battery on the defendant, it was not a proper kind of force to remove the defendant, and that the complainant thereby committed the first assault. But the judge instructed the jury that the complainant had a right, after requesting the defendant to remove and his refusal, to use proper and reasonable force to remove him, and that the jury must determine, from the testimony, how much and what kind of force the complainant used towards the defendant; and that if, in their opinion, he used more force than was necessary, or if the force was not appropriate and adapted to effect the purpose of removing the defendant, then they should consider the complainant as having committed the first assault; but if the jury considered the force thus used, as necessary and proper, and also appropriate and adapted to effect the purpose of removing the defendant, then the complainant would be justified and would not have committed the first assault: *held*, that the judge rightly refused the instructions requested, and that the instructions which he gave were conformable to the rules of law: *Com. v. Clark*, 2 Met. 23. On the trial of an indictment for an assault and battery, alleged to have been committed by firing a pistol bullet at the prosecutor, evidence having been introduced, on the part of the government, tending to prove the commission of the offence as charged, the defendant introduced evidence tending to prove that at the time of the supposed assault the prosecutor was at the front door of the defendant's house committing an offensive nuisance; that the defendant ordered him to go away, which he refused to do; that the defendant thereupon beat the prosecutor with the handle of a broom until the same was broken, when the defendant thrust at him with one of the pieces; and the defendant then went back into his house and returned with a pistol, but did not discharge the same: the jury having been instructed "that the facts proved were no justification of the assault and battery," it was held that the instruction was erroneous; and that the facts should have been submitted to the jury with instructions as to what would and what would not amount to a justification: *Comm. v. Goodwin*, 3 Cush. 154.

attempt to enter; in the first case a request is necessary; in the latter not.”(a) So, if one come forcibly and take away another’s goods, the owner may oppose him at once, for there is no time to make a request.(b) And the owner of goods (or his servant, acting by his command) which are wrongfully in the possession of another, may, after requesting him to deliver them up, justify an assault in order to repossess himself of them.(c) It seems also that a person who has a right of way or other easement may justify using so much force as may be necessary to enable him to exercise that right, or to prevent another from interrupting it.(d) But, in general, unless there be violence in the trespass, a party should not, either in defence of his person, or his real or personal property, begin by striking the trespasser, but should request him to depart or desist; and, if that is refused, should gently lay his hands upon him in the first instance, and not proceed with greater force than is made necessary by resistance.(e) Thus, where a churchwarden justified taking off the hat of a person who wore it in church, at the time of divine service, the plea stated, that he first requested the plaintiff to be uncovered, and that the plaintiff refused.(f) And in all cases where the force used is justified, as not amounting to an assault, under the particular circumstance of the case, it must appear that it was not greater than was reasonably necessary to accomplish the lawful purpose intended to be effected.(g) Therefore, though an offer to strike the defendant, first made by the prosecutor, is a *sufficient assault by him to justify the defendant in striking, without waiting till the prosecutor had actually struck him first; yet even a prior assault will not justify a battery, if such battery be extreme; and it will be matter of evidence, whether the retaliation by the defendant were excessive, and out of all proportion to the necessity or provocation received.(h)

The party injured may proceed against the defendant by action and indictment for the same assault; and the Court in which the action is brought will not compel him to make his election to pursue either the one or the other; for the fine to the King, upon the criminal prosecution, and the damages to the party in the civil action, are perfectly distinct in their natures,(i) but the Court of Queen’s Bench have refused to sentence a party convicted of an assault, while an action was pending for the same assault.(k)¹

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence.(l) But the case has been subsequently treated as one which was not well considered; and the Court said, “Cannot the King call a man to account for a breach of the peace, because he broke two heads instead of one?”(m)²

(a) Polkinghorn v. Wright, 8 Q. B. 197 (55 E. C. L. R.).

(b) Green v. Goddard, 2 Salk. 641.

(c) Blades v. Higgs, 10 C. B. (N. S.) 713 (10¹ E. C. L. R.).

(d) See the judgment of Patteson, J., in Bird v. Jones, 7 Q. B. 742 (53 E. C. L. R.); 2 Roll. Abr. *Trespass*, p. 547 (E.), pl. 1 & 2, which rests on 3 Hen. 4, 9, and 11 Hen. 6, 23.

(e) Weaver v. Bush, 8 T. R. 78; 1 Selw. N. P. tit. “*Assault and Battery*,” 39, 40.

(f) Hawe v. Planner, 1 Saund. 13. (g) 1 East P. C. c. 8, s. 1, p. 406.

(h) Bull. N. P. 18; 1 East P. C. c. 8, s. 1, p. 406. See *ante*, p. 1027.

(i) Jones v. Clay, 1 Bos. & Pul. 191; 1 Selw. N. P. tit. “*Assault and Battery*,” 27, note (2); 1 Hawk. P. C. c. 62, s. 4; Bac. Abr. tit. “*Assault and Battery*” (D).

(k) Rex v. Mahon, 4 A. & E. 575 (31 E. C. L. R.), and see *Ex parte* —, Gent, *Ibid.* note, and Reg. v. Gwilt, 11 A. & E. 587 (39 E. C. L. R.).

(l) Rex v. Clendon, 2 Lord Raym. 1572; 2 Str. 870.

(m) Per Cur. in Rex v. Benfield and Saunders, 2 Burr. 984.

¹ The prosecutor will not be compelled to elect, where a prosecution and a civil action have both been instituted for the same assault; nor will the court order the attorney-general to enter a *nolle prosequi*: State v. Frost, 1 Brev. 385; State v. Blyth, 1 Bay. 166.

² There may be a count for an assault on two persons: Kenney v. State, 5 R. I. 385; State v. McClintock, 8 Clarke 203. An indiscriminate assault upon several is an assault on each: State v. Merritt, Phill. (Law) 134. Two persons may commit an assault and battery each on the other at the same time, but each would be guilty of a several offence: State v. Lonon, 19 Ark. 577. If a man shoot at two persons, intending to kill one, but entirely regardless which, he may be convicted in one indictment charging a joint assault on both: Comm. v. McLaughlin, 12 Cush. 615.

Where a count charged that the defendant made an assault upon "one Henry Bennett," and "him the said William Bennett did beat," and other wrongs to the said William Bennett did," the Court of Queen's Bench held that the count was good.(n)

As an assault is merely a misdemeanor, it is competent to the prosecutor to insert several counts in the same indictment for different assaults; and it has long been the constant practice to receive evidence of several assaults upon the same indictment;(o) for in offences inferior to felony the practice of quashing the indictment, or calling upon the prosecutor to elect on which charge he will proceed, does not exist.(p)

Where an indictment consisted of two counts, one for riot, the other for an assault, and the grand jury only found it a true bill as to the count for an assault, and indorsed *ignoramus* on the count for a riot, a motion was made on the part of the prosecutor to quash it, on the ground that the grand jury should have found the whole to have been a true bill, or have rejected the indictment altogether; but the Court held, that as there were two distinct counts, the finding a true bill as to one count only, and rejecting the other, left the indictment, as to the count which the jury had affirmed, just as if there had originally been only that one count.(q)

Whatever is a legal justification or excuse for an assault or imprisonment, such as *son assault demesne*, the arrest of a felon, &c., may, upon an indictment, [*1031 be given in evidence under the general issue.(r)

On an indictment against two defendants for committing an assault, the prosecutor proved an assault committed by one, with which the other had nothing to do, and it was urged that the latter was entitled to be acquitted, as an assault answering the description of that in the indictment had been proved, and, as there was only one count, more than one assault could not be proved; and it was held that the latter must be acquitted. It was then objected for the other defendant, that as the count was for a joint assault, this defendant could not be convicted of an assault by him alone, and that he only came prepared to answer that joint assault; and it was held that this defendant must be acquitted. If the indictment had charged that the defendants assaulted the prosecutor, the result might have been different; but here one specific assault is mentioned, and if they cannot be convicted of that, they must be acquitted.(s) And where on an indictment containing one count for an assault against two persons, an assault by one was proved, in which the other was not at all implicated, it was held that one assault to which the indictment was applicable having been proved, evidence of other assaults could not be gone into.(t)

As every battery includes an assault.(u) it follows, that on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery it is sufficient.(v)

Wherever a count for a misdemeanor contains a charge of assault accompanied with circumstances of greater or less aggravation, the jury may find the defendant

(n) Reg. v. Crespin, 11 Q. B. 913 (63 E. C. L. R.).

(o) 1 Chitt. C. L. 254; Reg. v. Davies, 5 Cox C. C. 328, ante, p. 928.

(p) Ibid.

(q) Rex v. Fieldhouse, Cowp. 325.

(r) 1 Hawk. P. C. c. 62, s. 3; Bac. Abr. tit. "Assault and Battery:" 1 East P. C. c. 8, s. 1, p. 406, and c. 9, s. 1, p. 428.

(s) Reg. v. Traughton, 1 Cox C. C. 197, Bullock, Comr., after consulting the Recorder. The latter ruling is clearly wrong; for it never yet was doubted that on a joint charge against two for any offence not requiring the participation of several, as conspiracy, &c., either might be convicted, though there was no evidence against the other; and the first point was decided on the ground that the assault proved did apply to the charge in the indictment. So that the two rulings are inconsistent with each other.

(t) Reg. v. Gordon, 1 Cox C. C. 259, Bullock, Comr., after consulting the Recorder. This ruling is directly contrary to the second ruling in the last case. The point is not a question of law: it is merely a question for the discretion of the Court, and as any number of assaults may be tried under one indictment containing a count for each, there seems no good reason for confining the evidence on one count to the first assault that may happen to be proved: *Stante v. Prickett*, 1 Camp. 437, was cited in support of the objection.

(u) Ante, p. 1021.

(v) 1 Hawk. P. C. c. 62, s. 1.

guilty of a common assault, and acquit him of the circumstances of aggravation.^(w)

This offence was punishable as a misdemeanor; and the punishment usually inflicted was fine, imprisonment, and the finding of sureties to keep the peace.^(x)

But now, by the 24 & 25 Vict. c. 100, s. 47, "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without *1032] hard labor; and whosoever shall be convicted upon an indictment *for a common assault shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding one year, with or without hard labor."^(y)

Sec. 74. "Where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the Court think fit, in addition to any sentence which the Court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the Court shall by affidavit or other inquiry and examination ascertain to be reasonable; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the Court shall award, not exceeding three months in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence."^(z)

Sec. 75. "The Court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of the goods and chattels of the offender, and paid to the prosecutor, and that the surplus, if any, arising from such sale, shall be paid to the owner; and in case such sum shall be so levied the imprisonment awarded until payment of such sum shall thereupon cease."

Sec. 77. "The Court before which any misdemeanor indictable under the provisions of this Act shall be prosecuted or tried may allow the costs of the prosecution in the same manner as in cases of felony; and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony."^(a)

^(w) Reg. v. Oliver, Bell C. C. 287; Reg. v. Yeadon, 1 L. & C. 81, *ante*, p. 1014. See *post*, Evidence, Vol. 2, p. 5, that it is sufficient to prove so much of the charge as constitutes an offence punishable by law.

^(x) 4 Blac. Com. 217; 1 East P. C. c. 8, s. 1, p. 406, and c. 9, s. 1, p. 428.

^(y) The first part of this clause is taken from the 14 & 15 Vict. c. 100, s. 29. As to hard labor, see *ante*, p. 900. As to fine and sureties, see *ante*, p. 900.

^(z) This and the following clause are new in England; they are taken from the 10 Geo. 4, c. 34, ss. 33, 34 (1). It had long been the practice in England in such cases for the Courts after a conviction for an assault, to allow compromises to be made between the parties, which in some cases were legal: Beeley v. Wingfield, 11 East 46; Keir v. Leeman, 6 Q. B. 308 (51 E. C. L. R.); 9 Q. B. 371 (58 E. C. L. R.), *ante*, p. 195. Such compromises were usually made by the defendant paying a sum of money to the prosecutor to indemnify him for his expenses; but where there was an obstinate defendant, it frequently happened that no compromise could be effected, and the Court was sometimes placed in an invidious position. These clauses place it in the power of the Court to do full justice, without regard to the wishes or consent of either party. In every case the Court will have to exercise its discretion as to granting costs either under this section or under sec. 77; and, just as it has been the common practice where the Court has thought of imposing a fine, the Court will make such inquiries as may enable it to judge whether the defendant be able to pay the costs; nor is there ever any practical difficulty in ascertaining that fact.

^(a) This clause is old as far as relates to the costs of misdemeanors against the 14 & 15 Vict. c. 19; 14 & 15 Vict. c. 11; 12 & 13 Vict. c. 76. It is new as to any misdemeanor created by this Act. The words of the clause originally were "any indictable misdemeanor against this Act;" but the Committee of the House of Commons altered them to "any misdemeanor indictable under the provisions of this Act," in order to exclude common assaults where no actual bodily harm had been inflicted; and this seems to be the only case in which costs cannot be given under this Act; for wherever it is necessary to insert in any indictment the particular words of any clause in this Act in order to warrant the punishment given by that clause, the misdemeanor is plainly "indictable under the provisions of this Act:" thus, under sec. 47, in order to warrant the punishment for an assault occasioning actual bodily harm the indictment must allege such bodily harm, and therefore in that case the Court may allow the costs.

*The 14 & 15 Vict. c. 55, s. 3, recites the 9 Geo. 4, c. 31, s. 27, by which, where any person shall assault or beat any other person, two justices of the peace, upon the complaint of the party aggrieved, might hear and determine the offence; and sec. 29, by which, in case the justices find the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is from any other circumstance a fit subject for prosecution by indictment, they shall deal with the case as they would have done before the 9 Geo. 4, c. 31, and enacts that "in every case of assault so brought before such justices for summary decision, in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognizances to prosecute and give evidence at the assizes or sessions of the peace, every such Court is hereby authorized and empowered at its discretion to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such Court under such recognizances, together with compensation for their trouble and loss of time, in the same manner as Courts are authorized and empowered to order the same in cases of felony." [*1033]

In order to obtain costs under this section, it must be proved that the case was taken before two justices for summary adjudication; but a summons calling on the defendant to appear before justices of the peace to answer a complaint for an assault against the form of the statute, and to be further dealt with according to law, is sufficient to that purpose. (b)

By the 24 & 25 Vict. c. 100, s. 42, "Where any person shall unlawfully assault or beat any other person, two justices of the peace, upon complaint *by or on behalf* of the party aggrieved, may hear and determine such offence, and the offender shall, upon conviction thereof before them, at the discretion of the justices, either be committed to the common gaol or house of correction, there to be imprisoned *with or* without hard labor for any term not exceeding two months, or else shall forfeit and pay such fine as shall appear to them to be meet, not exceeding, together with costs (if ordered), the sum of five pounds; and if such fine as shall be so awarded, together with the costs (if ordered), shall not be paid, either immediately after the conviction or within such period as the said justices shall at the time of the conviction appoint, they may commit the offender to the common gaol or house of correction, there to be imprisoned, *with or* without hard labor, for any term not exceeding two months, unless such fine and costs be sooner paid." (c)

*Sec. 43. "When any person shall be charged before two justices of the peace with an assault *or battery* upon any male child whose age shall not in the opinion of such justices exceed fourteen years, or upon any female, either upon the complaint of the party aggrieved or otherwise, the said justices, if the assault *or battery* is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assaults and batteries, may proceed to hear and determine the same in a summary [*1034]

(b) Reg. v. McGavaron, 3 C. & K. 320, Williams, J. It may, perhaps, be doubted whether the 14 & 15 Vict. c. 55, s. 3, be not impliedly repealed by the repeal of the 9 Geo. 4, c. 31; but, if that be the case, it seems very immaterial; for it is hardly conceivable that a case can occur which would have fallen within that provision, and in which the costs may not be granted under the 24 & 25 Vict. c. 100, s. 73, or s. 75.

(c) This clause is framed from the 9 Geo. 4, c. 31, s. 27. Under that section the complaint could only be made by the party aggrieved: Reg. v. Deny, 2 L. M. & P. 230. This clause, in order to enable parents and others to complain on the part of an injured child, permits the complaint to be made by any one on its behalf, and so it might under the 14 & 15 Vict. c. 92, s. 2 (1.), which is assimilated in this clause with the 9 Geo. 4, c. 31, s. 27. But where a complaint has been made the justices may proceed, though the parties have made a compromise: Reg. v. Wiltshire, 8 Law T. 242. But see the 25 & 26 Vict. c. 50, s. 9, which was passed for the very purpose of enabling justices in Ireland to proceed, even where the party assaulted declined to complain. By the 9 Geo. 4, c. 31, s. 27, the justices had only power to fine in the first instance; by the 14 & 15 Vict. c. 92, s. 2, they might either fine or commit for two months; and under this clause they may either fine or commit. This clause also gives the justices power to commit to hard labor either in the first instance, or on default of payment of a fine. All summary proceedings under this clause should be taken under the 11 & 12 Vict. c. 43, where the offence is committed in England, except in London and the Metropolitan Police district, and in Ireland under the 14 & 15 Vict. c. 93; see sec. 76 of the Act.

way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labor, for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of twenty pounds, and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid, and, if the justices shall so think fit, *in any of the said cases*, shall be bound to keep the peace and be of good behavior for any period not exceeding six months from the expiration of such sentence."*(d)*

Sec. 44. "If the justices upon the hearing of any such case of assault or battery upon the merits, *where the complaint was preferred by or on the behalf of the party aggrieved*, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith^(e) make out a certificate^(f) under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."*(g)*

*Sec. 45. "If any person, against whom any such complaint *as in either* *1035] *of the last three preceding sections mentioned shall have been preferred by or on the behalf of the party aggrieved*, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labor awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."*(h)*

(d) This clause is taken from the 16 & 17 Vict. c. 30, s. 1, and extended to Ireland.

(e) In *Reg. v. Robinson*, 12 A. & E. 672 (40 E. C. L. R.), it was held that the certificate must be given before the justices separated; but this was doubted in *Thompson v. Gibson*, 8 M. & W. 281. And it is now held that the act of granting the certificate is not judicial or discretionary, but ministerial only, and therefore "forthwith" does not mean forthwith upon the dismissal of the complaint, but forthwith upon the demand of it by the person entitled to it: *Costar v. Hetherington*, 1 E. & E. 802 (102 E. C. L. R.); *Hancock v. Somes*, 1 E. & E. 795.

(f) The certificate must state on which of the three grounds the complaint was dismissed: *Skuse v. Davis*, 10 A. & E. 635 (37 E. C. L. R.); and must be specially pleaded in an action: *Harding v. King*, 6 C. & P. 427 (25 E. C. L. R.).

(g) This clause is limited to the case where a complaint is made by or on behalf of the party aggrieved. The 9 Geo. 4, c. 31, s. 27, only applied to a case where the complaint was made by the party aggrieved, and unless this clause had been limited as it is, any person who had committed an aggravated assault might have got some friend to make a complaint and get the case heard by the justices, on insufficient evidence, and might, by virtue of ss. 44 and 45, have deprived the party aggrieved of any remedy by action or indictment. Under the 9 Geo. 4, c. 31, s. 27, where a party aggrieved made a complaint, and obtained a summons and served it on the defendant, but, before the day for hearing, gave notice, both to the defendant not to attend, and to the magistrate's clerk that he should not attend, but the defendant attended, and claimed to have the information dismissed, and a certificate of dismissal granted, notwithstanding the prosecutor's absence, it was held that the justices were warranted in granting such certificate, and that it was a bar to an action for the assault: *Tunncliffe v. Tedd*, 5 C. B. 553 (57 E. C. L. R.); *Vaughton v. Bradshaw*, 9 C. B. (N. S.) 103 (99 E. C. L. R.). Under the present clause these cases are no authority; for in order to obtain a certificate under it the case must be heard "upon the merits;" that is, the decision of the justices must be after having heard the evidence. The 14 & 15 Vict. c. 93, s. 21 (I.), required the justices to state in the certificate that the dismissal was on the merits, or that the assault was of a trifling or justifiable nature.

(h) This clause is taken from the 9 Geo. 4, c. 31, s. 28; and see the 14 & 15 Vict. c. 93, s. 21. See the note to the last section. Several decisions occurred under the former clause, whilst the 1 Vict. c. 85, s. 11, which authorized a conviction of an assault on an indictment for felony, was in force, as to the cases in which a plea of *autrefois* acquit and convict might be sustained, and these will be found, together with remarks upon them, in *Greaves' Crim. Acts*, p. 71, 2d edition; but as that clause was repealed by the 14 & 15 Vict. c. 100, s. 10, there cannot now be a conviction of an assault upon any indictment for felony, and it seems clear that *autrefois* acquit or convict by the common law cannot be pleaded in any case, unless the prisoner might be convicted on the former indictment, either of the whole or at least part of the criminal charge contained in it. In *Reg. v. Elrington*, 5 Law T. R. 284, the first count was for assaulting and doing grievous bodily

Sec. 46. "Provided, that in case the justices shall find⁽ⁱ⁾ the assault or battery complained of to have been accompanied by any attempt to commit felony, or shall be of opinion that the same is, from any other circumstance, a fit subject for a prosecution by indictment, they shall abstain from any adjudication thereupon. and shall deal with the case in all respects in the same manner as if they had no authority finally to hear and determine the same: Provided also, that nothing herein contained shall authorize any justices to hear and determine any case of assault or battery in which any question shall arise as to the title^(k) to any lands, tenements, or hereditaments, or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency, or any execution under the process of any court of justice."^(l)

*Sec. II.—Of Aggravated Assaults.

[*1036

ATTEMPTS to murder, or to do some great bodily harm,^(m) and assaults with intent to ravish,⁽ⁿ⁾ or to commit an unnatural crime,^(o) have been already noticed. Also assaults occurring in the obstruction of officers executing process,^(p) in effecting a rescue,^(q) in the obstruction of revenue officers,^(r) and in the hindering the exportation or circulation of corn,^(s) have been mentioned in the course of the Work. The aggravated assaults which remain to be noticed in this place, are principally such as have been made a subject of particular legislative provision; and the peculiar aggravation appears to arise, either from the place in which, or the person upon whom, the assault is committed, or else from the great criminality of the purpose or object intended to be effected.¹

The 5 & 6 Edw. 6, c. 4, relates to disturbances in churches and churchyards; and the second section enacts, "that if any person or persons shall smite, or lay violent hands upon any other, either in any church or churchyard," every person so offending shall be deemed excommunicate.^(t)

Some points upon the construction of this statute have been mentioned in a

harm to the prosecutor; the second for assaulting and doing actual bodily harm to him, and the last for a common assault; and the Court of Queen's Bench held that pleas of a dismissal of a complaint for the same assault under the 9 Geo. 4, c. 31, s. 27, were a bar to the indictment, on the ground that the two first counts only charged the same assault with certain aggravations, and the last only charged the same assault. This was an indictment for misdemeanor, and the decision clearly right.

(i) Where the defendant had been convicted of a common assault, though it was alleged that the evidence showed a felonious assault, and a *certiorari* was moved for on the ground that the justices had no jurisdiction, the Court of Queen's Bench held that the justices had found that the assault was not "accompanied by any attempt to commit felony," which they had jurisdiction to determine, Lord Tenterden relying especially on the words "in case the justices shall find the assault or battery to have been accompanied by any attempt to commit felony," in the 9 Geo. 4, c. 31, s. 29; *Anonymous*, 1 B. & Ad. 382 (20 E. C. L. R.); s. c. as *Rex v. Virgil*, 1 Lewin 16. See *In re Thompson*, 6 H. & N. 193, where the information was for unlawfully assaulting and abusing a woman: *Ex parte Thompson*, 3 Law T. 294, and *Wilkinson v. Dutton*, 3 B. & S. 821; 8 Law T. 276, where it was held that the justices might convict of an assault, though the charge amounted to a rape.

(k) See *Latham v. Spalding*, 2 L. M. & P. 378.

(l) This clause is taken from the 9 Geo. 4, c. 31, s. 29; and see the 14 & 15 Vict. c. 92, s. 2 (1).

(m) *Ante*, chap. ix. p. 967.

(n) *Ante*, p. 927.

(o) *Ante*, p. 937.

(p) *Ante*, p. 569, *et seq.*

(q) *Ante*, p. 597, *et seq.*

(r) *Ante*, p. 172, *et seq.*

(s) *Ante*, p. 183, *et seq.*

(t) The 9 Geo. 4, c. 31, repealed so much of this Act as related "to the punishment of persons convicted of striking with any weapon, or drawing any weapon with intent to strike as therein mentioned." So that sec. 2 seems not to be repealed. C. S. G.

¹ As to aggravated assaults and those accompanied with an intent to kill, see *Norton v. State*, 14 Texas 387; *Weaver v. State*, 24 Texas 387; *State v. Hartigan*, 32 Verm. 607; *State v. Swails*, 8 Ind. 524; *State v. Neal*, 37 Maine 468; *State v. Waters*, *Ibid.* 54; *King v. State*, 21 Geo. 220; *Ogletree v. State*, 28 Ala. 693; *State v. McClure*, 25 Mo. 338; *Walker v. State*, 8 Ind. 290; *Hopkinson v. People*, 18 Ill. 264; *State v. Bevan*, 5 Harring. 508; *People v. Davis*, 4 Parker C. R. 61; *O'Leary v. People*, *Ibid.* 187; *Morgan v. State*, 33 Ala. 413; *State v. Malcolm*, 8 Clark 413.

former part of this Work; where it was stated, that cathedral churches and churchyards are within it; that it will be no excuse for a person who strikes another in a church, &c., to show that the other assaulted him; and that the churchwardens and perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands upon those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute.(u)

Contempts against the *King's palaces* have always been looked upon as high misprisions; and, by the ancient law before the Conquest, fighting in the King's palaces, or before the King's judges, was punished with death.(v) The 33 Hen. 8, c. 12, provided severe punishment for all malicious strikings by which blood was shed within any of the King's palaces or houses, or any other house, at such time as the royal person happened to be there abiding; but these provisions were repealed by the 9 Geo. 4, c. 31, s. 1.

*1037] *Striking in the King's superior courts of justice in Westminster Hall, or in any other place, while the Courts are sitting, whether the Court of Chancery, Exchequer, King's Bench, or Common Pleas, or before Justices of assize, or Oyer and Terminer, is made still more penal than even in the King's palace; perhaps for the reason that, those Courts being anciently held in the King's palace, and before the King himself, striking there included the former contempt against the King's palace and something more, namely, the disturbance of public justice.(w) So that, though striking in the King's palace was not punished with the loss of the offender's hand, unless some blood were drawn, nor even then with the loss of lands and goods, the drawing of a weapon only upon a judge or justice in such Courts, though the party strike not, is a great misprison, punishable by the loss of the right hand, perpetual imprisonment, and forfeiture of the party's lands during life, and of his goods and chattels.(x) And a party is liable to a similar punishment, if, in the same Courts, and within their view, he strike a juror or any other person, either with a weapon, or with hand, shoulder, elbow, or foot; but he is not liable to such punishment if he make an assault only, and do not strike.(y) And one who is guilty of this offence cannot excuse himself by showing that the person so struck by him gave the first offence.(z)

In a modern case, the three first counts of the information set forth a special commission for the trial of Arthur O'Connor and others for high treason; and that, pending the sessions, after the acquittal of O'Connor, and before any order or direction had been made by the Court for his discharge, the defendants, in open court, &c., made a great riot, and riotously attempted to rescue him out of the custody of the sheriff, to whose custody he had been assigned by the justices and commissioners; and, the better to effect such rescue and escape, did, at the said sessions, in open court, and in the presence of the said justices and commissioners, riotously, &c., make an assault on one J. R., and beat, bruise, wound, and ill-treat the said J. R., and thereby impede and obstruct the said justices, &c. There were two other counts in the information; the one for riotously interrupting and obstructing the justices in the holding of the session, and the other for a common riot.(a) Two of the defendants having been found guilty generally, considerable doubt was intimated by Lord Kenyon, whether the Court were not bound to pass the judgment of amputation, &c., for the offence, as laid in the three first counts; and the matter stood over for consideration. But before the defendants were again brought up to receive judgment, the Attorney-General said, that he had received the royal command and warrant under the sign manual, whereby he was authorized to enter a *noli prosequi*, as to those parts of the information on which any doubt had arisen,

(u) *Ante*, p. 415.

(v) 4 Blac. Com. 124.

(w) 3 Inst. 140; 4 Blac. Com. 125.

(x) Staundf. 38; 3 Inst. 140, 141; 1 Hawk. P. C. c. 21, s. 3; 4 Blac. Com. 125; 1 East P. C. c. 8, s. 3, p. 408.

(y) *Ibid.*

(z) 1 Hawk. P. C. c. 12, s. 4.

(a) See the precedent of this information, 2 Crit. Crim. L. 208, *et seq.*

or might arise, whether the judgment *thereon were discretionary in the Court, and pray judgment only on such charges as left the judgment in their discretion; and, accordingly, a *noli prosequi* was entered on the three first counts; and on the others the Court gave judgment against the defendants, of fine, imprisonment, and sureties.(b)

A person who rescues a prisoner from any of the Courts which have been mentioned, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life; for this offence is, in its nature, similar to the other; but as it differs in this, that no blow is actually given, the amputation of the hand is excused.(c) And for the like reason, an affray or riot near the said Courts, but out of their actual view, is punishable by fine and imprisonment during pleasure, but not with the loss of the hand.(d)

Though an assault in any of the King's inferior courts of justice would not subject the offender to lose his hand;(e) yet, upon an indictment for such an assault, the circumstances under which it was committed would, doubtless, be considered as a matter of great aggravation. And any affray or contemptuous behavior in those courts, is punishable with a fine, by the Judges there sitting.(f)

It is said that, in order to warrant the higher judgment, the offence must be charged to have been committed in the presence of the King, or of the Justices.(g) And it seems also that in order to warrant such judgment, the indictment ought expressly to charge a stroke; though it does not appear whether any technical word be necessary to be used for that purpose.(h)

Amongst the principal of those assaults, the aggravated nature of which may be said to arise from the great criminality of the object intended to be effected, is an assault upon a person with a felonious intent to commit a robbery, and nearly allied to this is a demand of property effected by menaces or force, and with the intent of stealing such property. These offences were in the former editions dealt with in this place, but they are now placed in the Chapter on Robbery, as well because that appears to be their fitter place, as because, on a trial for robbery, the accused may now be convicted of an assault with intent to rob.

The 11 & 12 Will. 3, c. 7, s. 9, enacts that, "if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods, committed to his *trust," he shall be adjudged to be a pirate, felon, and robber; and being convicted, shall suffer death and loss of lands, goods, &c., as pirates, felons, and robbers upon the seas, ought to suffer.(i)

The provision relating to assaults upon clergymen and obstructing them in the performance of their duties has already been inserted.(k)

By the 24 & 25 Vict. c. 100, s. 37, "Whosoever shall assault and strike or wound any magistrate, officer, or other person whatsoever lawfully authorized, in or on account of the exercise of his duty in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for any

(b) *Rex v. Lord Thanet and others*, B. R. Trin. 39 Geo. 3; 1 East P. C. c. 8, s. 3, pp. 408, 409, 410. In *Rex v. Davis*, Dy. 188 a, 188 b, and the notes thereto, are various instances of the judgment having been executed to the full extent. One of them is remarkable for the speedy justice which appears to have been administered. "Richardson, Chief Justice of C. B., at the assizes at Salisbury, in the summer of 1631, was assaulted by a prisoner condemned there for felony, who, after his condemnation, threw a brickbat at the said Judge, which narrowly missed; and for this an indictment was immediately drawn by Noy against the prisoner, and his right hand cut off and fixed to the gibbet upon which he was himself immediately hanged in the presence of the Court."

(c) 1 Hawk. P. C. c. 21, s. 5; 4 Blac. Com. 125.

(d) 1 Hawk. P. C. c. 21, s. 6; 4 Blac. Com. 125. *Ante*, p. 408.

(e) 3 Inst. 141; 1 Hawk. P. C. c. 21, s. 10.

(f) 4 Blac. Com. 126; 1 Hawk. P. C. c. 21, s. 10.

(g) 1 East P. C. c. 8, s. 3, p. 410; 1 Hawk. P. C. c. 21, s. 3.

(h) 1 East P. C. c. 8, s. 3, p. 408, referring to 1 Sid. 211.

(i) See this statute more at large, *ante*, p. 145.

(k) *Ante*, p. 418.

term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor.”(l)

Sec. 38. “Whosoever shall assault any person with intent to commit felony, or shall assault, *resist, or wilfully obstruct* any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor.”(m)

Sec. 39. “Whosoever shall beat, or use any violence or *threat of violence* to any person, with intent to deter or hinder him from buying, selling, or *otherwise disposing of, or to compel him to buy, sell, or otherwise dispose of*, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall beat or use any such violence or *threat* to any person having the care or charge of any wheat or other grain, flour, meal, malt, or potatoes, whilst on the way to or from any city, market town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labor in the common gaol or house of correction for any term not exceeding three months: Provided that no person who shall be punished for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever.”(n)

*Sec. 40. “Whosoever shall unlawfully and with force hinder or *prevent* any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or shall beat or use any violence to any such person with intent to hinder or *prevent* him from working at or exercising the same, shall, on conviction thereof before two justices of peace, be liable to be imprisoned and kept to hard labor in the common gaol or house of correction for any term not exceeding three months: Provided that no person who shall be punished for any such offence by reason of this section shall be punished for the same offence by virtue of any other law whatsoever.”(o)

Sec. 41. “Whosoever, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business, or manufacture, or respecting any person concerned or employed therein, shall unlawfully assault any person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor.”(p)

(l) This clause is taken from the 9 Geo. 4, c. 31, s. 24, and 10 Geo. 4, c. 34, s. 30 (I.). As to counsellors and abettors, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to fine and sureties, see *ante*, p. 900. The Act extends to Ireland, but not to Scotland.

(m) This clause is taken from the 9 Geo. 4, c. 31, s. 25, and 10 Geo. 4, c. 34, s. 31 (I.). This clause extends the former enactments to resisting and wilfully obstructing peace officers. Revenue officers were included in the former clause, but are omitted in this, because assaults on them are otherwise provided for. See 16 & 17 Vict. c. 107, s. 251, *ante*, p. 177. As to hard labor, &c., see the last note.

(n) This section assimilates part of the 9 Geo. 4, c. 31, s. 26, and part of the 14 & 15 Vict. c. 92, s. 2. It omits the word “wound” in the former, because a wounding with any of the intents specified in this clause would fall within section 20 of this Act; and it introduces “threat of violence,” and the intent to compel the party to buy, sell, or dispose of the things specified. By sec. 76 of the Act all summary proceedings under this clause should be taken under the 11 & 12 Vict. c. 43, where the offence is committed in England, except in London and the Metropolitan Police district, and in Ireland under the 14 & 15 Vict. c. 93. See *ante*, p. 183, *et seq.*

(o) This clause is taken from the 9 Geo. 4, c. 31, s. 26, and is new in Ireland. The summary proceedings under this clause should be taken in the same manner as under the preceding clause. See the last note.

(p) This clause is taken partly from the 9 Geo. 4, c. 31, s. 25, which had the words “any assault committed in pursuance of any conspiracy to raise the rate of wages;” and the rest from the 10 Geo. 4, c. 34, s. 28 (I.), but that clause required the assault to be committed “with intent to do grievous bodily harm,” and made the punishment seven years’ transportation. As to counsellors and abettors, see sec. 67, *ante*, p. 881. As to hard labor, &c., see *ante*, p. 900. As to fine and sureties, see *ante*, p. 900.

By the 1 & 2 Will. 4. c. 41, s. 1, two or more justices, upon information upon oath, that disturbances are likely to take place, may appoint special constables out of the householders, or other persons (not legally exempt from serving the office of constable,) residing in any parish, township, or place wherein disturbances are likely to occur, or in the neighborhood thereof; and by sec. 5, every special constable, so appointed, shall not only within the parish, township, or place for which he shall have been appointed, but also throughout the entire jurisdiction of the justices appointing him, have, exercise, and enjoy all such powers, authorities, advantages and immunities, and be liable to all such duties and responsibilities as any constable duly appointed now has within his constablewick, by virtue of the common law of this realm, or of any statute or statutes.

A special constable, appointed under this Act, continues such, and has all the authority of an ordinary constable, until his services are either suspended or determined under sec. 9 of the Act, although eight years may have elapsed since his appointment. (g)

The 5 & 6 Will. 4, c. 43, s. 1, makes all persons, willing to act as special constables, capable of being appointed, although they may not be resident in the parish, township or place, or in the neighborhood thereof, and gives such persons all the same powers, &c., when appointed, as the special constables appointed under the 1 & 2 Will. 4, c. 41.

*The Rural Police Act, 2 & 3 Vict. c. 93, s. 8, enacts, that the chief constable, and other persons appointed under the Act, "shall be sworn [*1041 as constables before a justice of the county, and shall have all the powers, privileges, and duties throughout the county, and also in all liberties and franchises, and detached parts of other counties locally situate within such county, and also in any county adjoining to the county for which they are appointed, which any constable duly appointed has within his constablewick, by virtue of the common law, or of any statute made or to be made." (r) And the 3 & 4 Vict. c. 88, s. 16, which provides for the appointment of local constables for parishes, &c., gives such local constables similar powers, &c., but they are not bound to act beyond the parish, &c., for which they are appointed. (s)

The 5 & 6 Vict. c. 109, provides for the appointment and payment of parish constables, and by sec. 15, "the said constables shall have within the whole county, and also within all liberties and franchises and detached parts of other counties situated therein, and also in every county adjoining to the county in which they are appointed, all the powers, privileges, and immunities, and shall be liable to all the duties and responsibilities of a constable within his constablewick, but shall not be bound to act beyond the parish for which they are severally appointed and sworn, without the special warrant of a justice of the peace: Provided always, that in those counties in which any chief constable or superintendent shall have been appointed under the authority of the 2 & 3 Vict. c. 93, or of any Act passed for the amendment thereof, the constable appointed under this Act for any parish within the district for which such chief constable or superintendent shall have been appointed, shall be subject to the authority of such chief constable or superintendent."

The 10 & 11 Vict. c. 89, consolidates certain provisions usually contained in Acts for regulating the police of towns, and by sec. 8, "any justice may swear in any person appointed and employed as a constable under this and the special Act, and the constables so sworn in shall have, within the limits of the special Act, and in any place not more than five miles beyond such limits, the like powers, privileges, and duties, and shall have the same indemnities and protection, and shall be subject to the like penalties and forfeitures, as any constable duly appointed has or is subject to within his constablewick by law."

The 19 & 20 Vict. c. 69, contains provisions to render more effectual the police

(g) Reg. v. Porter, 9 C. & P. 778 (38 E. C. L. R.), Coleridge, J., *ante*, p. 799.

(r) This clause puts the constables appointed under the 2 & 3 Vict. c. 93, in the same position as parish constables: Reg. v. Chelmsford, 5 Q. B. 66 (48 E. C. L. R.).

(s) Many local Acts also authorize the appointment of constables and watchmen, and give them the same powers as ordinary constables. See also the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, ss. 76 and 83.

in counties and boroughs; and by sec. 6, "the constables of every county appointed under the 2 & 3 Vict. c. 93, and 3 & 4 Vict. c. 88, or either of them, or this Act, shall have in every borough situate wholly or in part within such county, or within any county or part of a county in which they have authority, all the powers and privileges, and be liable to all such duties and responsibilities as the constables appointed for such borough have and are liable to within any such county, and shall *1042] obey all *such lawful commands as they may from time to time receive from any of the justices of the peace having jurisdiction within any such borough in which they shall be called on to act as constables, for conducting themselves in the execution of their office."(*t*)

As prosecutions for assaulting constables, and other peace officers, are by no means uncommon, it may be well to introduce in this place some of the authorities, which may be useful in such prosecutions. In the case of all justices of the peace, peace officers, constables, &c., it is sufficient to prove that they acted in those characters, without producing their appointments, and that even in a case of murder,^(u) and this rule extends to constables and watchmen appointed under local Acts.^(v)

Constables and other peace officers, are invested with large powers and extensive authority at common law, for the purpose of preserving the peace, preventing the commission of crimes and misdemeanors, apprehending offenders, and executing the warrants of justices of the peace. Every high and petty constable, within the limits of their hundreds and districts, are conservators of the peace at common law.^(w) It is their duty, therefore, to do all that they can to preserve the peace within their respective constablewicks: and for this purpose, they not only may, but ought to, apprehend any person who shall make an affray or assault upon another in their presence, or who shall threaten to kill, beat, or hurt another, or shall be ready to break the peace in their presence, and may take such persons before a justice of the peace, in order that they may find surety for the peace.^(x) So also by the common law, the sheriff, under-sheriff, constable, or any other peace officer, may and ought to do all that in them lies towards the suppressing of a riot.^(y) And in order the better to enable peace officers to preserve the peace, they have authority to command all other persons to assist them, in endeavoring to appease such disturbances as take place in their presence.^(z)

In all cases of felony, a peace officer has not only authority to apprehend a felon while committing the felony, but also upon pursuit, or information at any time afterwards;^(a) and he may even justify apprehending an innocent person, if he have reasonable ground to suspect that he is guilty of felony, and this although no felony have been committed.^(b) In all cases of misdemeanor, a peace officer may apprehend the party while committing the offence;^(c) and, it should seem, upon fresh and immediate pursuit, in some instances.^(d) But the general rule is, that if a misdemeanor be committed in the absence of a peace officer, he cannot afterwards apprehend the party who committed it.^(e) It has been said, that a constable may take those before a justice, who were arrested by such as were present at an affray, but this may well be doubted.^(f) But a constable may arrest, if a witness *1043] to an *affray gives one of the affrayers in charge to the constable on the spot where it was committed, and whilst there is a reasonable apprehension of its continuance.^(g) So a constable may apprehend a person while attempting to commit a felony;^(h) or, it should seem, even upon fresh pursuit, after he had desisted from the attempt.⁽ⁱ⁾

(*t*) But by the 22 & 23 Vict. c. 32, s. 2, county constables are not to be required to act in any borough.

(*u*) *Post, Evidence*, c. 3, s. 2; Gordon's case, 1 Leach 515.

(*v*) Butler v. Ford, 1 C. & M. 662; 3 Tyrw. 677. See also M'Gahey v. Alston, 2 M. & W. 206.

(*w*) Dalt. c. 1.

(*x*) Dalt. c. 1, and see *ante*, p. 409.

(*y*) *Ante*, p. 401, and note, p. 402.

(*z*) *Ante*, p. 401; Dalt. c. 1.

(*a*) *Ante*, p. 799, *et seq.*

(*b*) Beckwith v. Philby, 6 B. & C. 638, *ante*, p. 801.

(*c*) *Ante*, p. 804.

(*d*) *Ante*, p. 814.

(*e*) *Ante*, p. 410, and p. 805, *et seq.*

(*f*) *Ante*, p. 410.

(*g*) Timothy v. Simpson, 5 Tyrw. 244, *ante*, p. 410.

(*h*) Rex v. Hunt, *ante*, p. 800.

(*i*) Rex v. Howarth, *ante*, p. 816.

If an officer hear a disturbance in a public-house in the night, and the door be open, he may enter.^(k) But he has no authority to turn any one out of a public-house, unless the party had committed some offence punishable by law.^(l) Nor to prevent a guest from going into a room in such house, unless a breach of the peace was likely to occur.^(m) But if a person makes such a disturbance in a public-house as is calculated to alarm the neighborhood, a policeman may apprehend him.⁽ⁿ⁾

It is to be observed, that the authority of a constable, or other peace officer, to act without a warrant, is confined by the common law to the district for which he is an officer, and consequently he cannot legally act as an officer in any other district.^(o)

The constable is the proper officer to the justice of the peace, and bound to execute his warrants; and, therefore, where a statute authorizes a justice of the peace to convict a man of a crime, and to levy the penalty by warrant of distress without saying to whom such warrant shall be directed, or by whom it shall be executed, the constable is the proper officer to execute such warrant;^(p) and inasmuch as the office of constable is wholly ministerial, and no way judicial, it seems that he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself.^(q)

At common law, where a warrant was directed to officers *as individuals*, they might execute it anywhere within the extent of the magistrate's jurisdiction who granted it; but where it was directed to persons, *by the name of their office*, it was confined to the districts in which they were officers.^(r) If, therefore, a warrant was directed to "the constable of the parish of S.," such constable had no authority at common law to execute it out of the parish of S.; and if he attempted so to do, he was a trespasser.^(s) But now, by the 11 & 12 Vict. c. 42, s. 10, and c. 43, s. 3, a constable, in such a case, may execute a warrant out of his precinct at any place within the jurisdiction of the magistrate who granted it.^(t)

If a warrant be good upon the face of it, and for an offence within the jurisdiction of the justice, the falsity of the charge will not prevent the execution of the warrant from being legal.^(u) But if the warrant be bad upon the face of it, as if the name of the person on whom it is to be executed be insufficiently stated, or the *name of the officer who is to execute it be inserted after the warrant is issued, the officer will not be justified in acting under it.^(v) So a constable cannot justify an arrest by virtue of a warrant, which appears on the face of it to be for an offence, whereof a justice of the peace has no jurisdiction, or to bring the party before him at a place out of the county for which he is a justice,^(w) or by virtue of a blank warrant.^(x) A constable in executing a warrant must act in strict conformity with the warrant, otherwise he is a trespasser. He cannot, therefore, justify apprehending Richard H., under a warrant to apprehend John H.^(y) So in executing a search warrant, he cannot justify seizing any goods except the goods specified in the warrant, unless perhaps in a case where they would furnish evidence of the identity of the goods stolen.^(z)

(k) *Rex v. Smith*, 6 C. & P. 136 (25 E. C. L. R.), *Tindal*, C. J.

(l) *Wheeler v. Whiting*, 9 C. & P. 262 (38 E. C. L. R.), *ante*, p. 810.

(m) *Reg. v. Mabel*, 9 C. & P. 474 (38 E. C. L. R.), *ante*, p. 810.

(n) *Howell v. Jackson*, 6 C. & P. 723 (25 E. C. L. R.), *ante*, p. 811.

(o) *Ante*, p. 823.

(p) 2 Hawk. P. C. c. 10, s. 35.

(q) 2 Hawk. P. C. c. 10, s. 36, and cases there cited.

(r) *Ante*, p. 824.

(s) *Rex v. Weir*, 1 B. & C. 288 (8 E. C. L. R.), *ante*, p. 824.

(t) *Ante*, p. 824.

(u) *Ante*, p. 828.

(v) *Ante*, p. 829, *et seq.*

(w) 2 Hawk. P. C. c. 13, s. 10. See the 11 & 12 Vict. c. 42, s. 6, and c. 43, s. 6, as to justices who act for two or more adjoining counties.

(x) *Ante*, p. 832, *et seq.*

(y) *Hoye v. Bush*, *ante*, p. 830.

(z) *Crozier v. Cundey*, 6 B. & C. 232 (13 E. C. L. R.). See *Parton v. Williams*, 3 B. & Ald. 330 (5 E. C. L. R.); *Smith v. Wiltshire*, 2 B. & B. 619; *Theobald v. Crichmore*, 1 B. & Ald. 227, and other cases decided on the 24 Geo. 2, c. 44, which protects officers executing warrants where they act strictly in obedience to the warrant, and where the justice still remains liable.

The right of officers to break open doors or windows in order to make an arrest has already been considered. (a) as has also the necessity of giving due notice of the officer's business, (b) and so have the cases of officers taking opposite sides in an affray. (c)

A constable has no authority to arrest, unless he reasonably believes that a breach of the peace will immediately take place; and if he endeavor to arrest and handcuff a person who is not about to commit a breach of the peace, such person and his companions may lawfully use so much violence as may be necessary to prevent such an illegal arrest; but if they use more violence than is necessary for that purpose, and thereby cause death, they are guilty of manslaughter. (cc)

In all cases where officers are authorized to act, they must exercise their authority in a proper manner, and if they exceed the reasonable bounds of what is required for the due performance of their duties, they become wrong-doers. Thus if a constable arrest a man upon suspicion of felony, he must take him as soon as he reasonably can before a magistrate for examination, and if he keep him in custody for an unreasonable time, as, for instance, three days, before he does so, he becomes a trespasser. (d) So a constable is bound to treat a prisoner, while in his custody, with no greater severity than is necessary to prevent his escape; if, therefore, he handcuff a prisoner where it is not necessary in order to prevent his escape, or where he has not attempted to escape, he is a trespasser. (e) With respect to handcuffing, the law undoubtedly is, that constables are not only justified, but are bound to take all reasonably requisite measures for preventing the escape of those persons they have in custody for the purpose of taking them before the magistrates; but what those reasonable measures are must depend entirely upon the circumstances, upon the temper and conduct of the person in custody, on the nature of the charge, and a variety of other circumstances which must present themselves to the mind of any one. There is no general rule that every one conveyed before the magistrates is to be handcuffed, and any such rule is unjustifiable in law; and in every case of the kind, the question for the jury is whether, looking at all the circumstances of the case, the constable used reasonable precautions, or used unnecessary measures, to secure the safe custody of his prisoner. (f) So with respect to searching a prisoner, there is no doubt that a man when in custody may so conduct himself, by *1045] reason of the *violence of his language or conduct, that a constable may reasonably think it prudent and right to search him in order to ascertain whether he has any weapon with which he might do mischief to the person, or commit a breach of the peace; but no general rule can be applied to all such cases. Even when a man is confined for being drunk and disorderly, it is not always necessary that he should be searched, as the searching of such a person must depend upon all the circumstances of the case. (g) So although a constable may be justified in removing from a church a person who attempts to read a notice in the church, and detaining him until the service is over, he cannot legally detain him afterwards in order to take him before a magistrate. (h)

The following cases have been decided as to assaults upon collectors of taxes and peace officers called in to assist them in the execution of their duties. In order to justify a distress for assessed taxes under the 43 Geo. 3, c. 99, s. 33, it is not necessary that there should have been a personal demand by the collector, or a personal refusal by the party distrained upon. Nor is it essential that the demand, to which the refusal applies, should have specified the precise amount claimed, if the debtor understood what the amount was, and did not object to it. If a count for assaulting a party in possession of goods distrained for assessed taxes states the sum for which they were distrained, and a different sum is proved, this is a fatal variance; but if

(a) *Ante*, p. 841, *et seq.*

(c) *Ante*, p. 812.

(d) *Wright v. Court*, 4 B. & C. 596 (10 E. C. L. R.).

(e) *Ibid.*

(f) *Leigh v. Cole*, 6 Cox C. C. 329, Williams, J.

(g) *Leigh v. Cole*, *supra*.

(h) *Williams v. Glenister*, 2 B. & C. 699 (9 E. C. L. R.), and see *Imason v. Cope*, *ante*, p. 1028; *Levy v. Edwards*, 1 C. & P. 40 (12 E. C. L. R.); *Ibid.*, and *Stocken v. Carter*, 4 C. & P. 477 (19 E. C. L. R.).

(b) *Ante*, p. 835, *et seq.*

(cc) *Reg. v. Lockley*, 4 F. & F. 155.

a count mention no sum the defendant may be convicted, if the party be proved to have been lawfully in possession for any amount. Upon an indictment, the first count of which charged the defendants with assaulting J. S., then being in lawful possession of goods seized for 6*l.* 15*s.* 6*d.*, arrears of assessed taxes, and the second count with a common assault, it appeared that the goods of one Ford had been distrained on his premises for taxes due from him, and J. S. had been left in possession. In order to show that the taxes had been regularly demanded before putting in the distress, it was proved that the collector had gone to Ford's house on the 23d of January, and Ford not being at home, had demanded the taxes of a female who was there, and said that he had called often before, and would distrain on the following day if they were not paid. The woman answered that Ford had been told before of the collector's coming for taxes, but said he could not pay; the collector left a message with the woman, requesting Ford to call on him, which Ford afterwards did, and stated that he was very poor and could not pay; it was objected that this was not sufficient evidence of a demand and refusal within the terms of the 43 Geo. 3, c. 99, s. 33; but Lord Denman, C. J., held that it was not necessary to show a refusal given by the householder himself, or to the collector personally; but that it was sufficient, if the circumstances showed that the householder, from poverty or otherwise, would not pay, and if the party meeting with the refusal was one authorized to act for him; and he left it to the jury to say whether they were satisfied that there had been a refusal; his lordship also held that as the first count *specified a particular amount of arrears, and a different one was proved, [*1046 that count was not maintainable; but upon the second, which mentioned no sum, that there might be a verdict against the defendants, if the prosecutor was lawfully in possession for any amount; and upon a motion for a new trial the Court held that the motion should be refused: by the statute a distress is to be taken only if there shall have been a demand and refusal of the taxes, but nothing is said to apply that provision to particular individuals, or particular sums; it is sufficient if there has been a demand of the taxes, which the party has understood, and he has not objected to the amount, but has refused to pay (i)

A collector of land-tax is not entitled, under the provisions of the 38 Geo. 3, c. 5, s. 17, or under his general authority, to take a constable with him into the house of a person from whom he is demanding payment of the arrears of land-tax. But if he has reasonable ground (from past or present circumstances) to apprehend violence from such person, he may call in constables to assist in keeping the peace, and such constables are justified in staying while the collector remains to be paid, as long as there is reason to expect violence, and if the owner of the house use violence to remove them, he is indictable for assaulting a peace officer in the execution of his duty. Such a collector has a general authority, under the Act, to distrain, and a special warrant is not necessary: and he need not have his warrant or the book of assessments with him at the time he distrains. Clark and Austen were indicted for assaulting Grinder, a peace officer in the execution of his duty, and for a common assault. Tipper, a collector of land-tax, had applied on the 28th of October to Clark for arrears of land-tax due from him, which had been repeatedly demanded before; Clark said, "I suppose if I do not pay it, you are going to distrain?" Tipper replied that he probably should. Clark answered, "If you put your hand upon anything, I will split your skull." Collins, a constable, was with Tipper on this occasion. On the 29th of November following, Tipper went to Clark's house, with Collins, Grinder, and a third constable: he desired the two last to remain outside, and to be on the alert, lest there should be a row; he and Collins entered a room, and again demanded the arrears; as soon as the demand was made Clark quitted the room, and directly afterwards he was heard to fasten the house door; upon this, Collins, by Tipper's order, unfastened the door, and brought in Grinder and the other constable. Clark soon afterwards returned into the room, with bank notes in his hand, accompanied by ten or twelve men, among whom was Austen. Clark asked what Grinder did there; and Collins answered that Grinder was there to aid and assist if required: upon this Clark said, "I will not pay the

(i) *Rex v. Ford*, 2 A. & E. 588 (29 E. C. L. R.).

taxes till the thief-catcher has left the room." Grinder refused to depart, upon which Clark desired Austen to put him out, saying that he would be answerable; Austen then attempted to force Grinder out of the room, and, in doing so, committed the assault in question. Clark afterwards paid the taxes with the notes in his hand. It was left to the jury to say, whether Tipper introduced Grinder for *1047] the purpose of keeping the peace, and if they thought he did so, they *were directed to find a verdict of guilty; the jury found in the affirmative of the question left, and convicted both defendants. Upon a motion for a new trial, it was contended that the collector had no right to take a constable with him; that it ought to have been shown that the collector had a warrant to distrain, or the book of assessments with him; but it was held that it was not necessary that the collector should have either the warrant or the book of assessments with him; and although the statute was applicable only to cases where a house or chest was to be broken open, and therefore the collector had no right to take Collins or any other person with him for the purpose of demanding the money: yet as the collector had good ground, from what had passed at that time and on the previous occasion, to apprehend violence, he was perfectly justified in introducing Grinder and the other constable to keep the peace, and that Grinder was justified in remaining to prevent violence, and consequently was assaulted whilst in the execution of his duty. And although the collector had no right to take Collins into the house on either occasion, yet, as no objection was made to his presence, it did not vary the case.(k)

It seems to be settled, that an arrest unlawfully made by a constable, without a warrant, cannot be made good by a warrant taken out afterwards.(l) Also it has been held, that if a constable, after he has arrested a party by force of a warrant, suffer him to go at large, upon his promise to return at such a time, and find sureties, he cannot afterwards arrest him again by virtue of the same warrant.(m) However, if the party return, and put himself again under the custody of the constable, it seems that it may probably be argued that the constable may lawfully detain him, and bring him before a justice in pursuance of the warrant.(n)

An indictment for assaulting an officer, in the execution of his duty, under a warrant, must clearly show that he is such an officer as is authorized to execute the warrant; and if it do not, the defendant cannot be sentenced upon it for a common assault. A count for assaulting A., in the execution of his office, imprisoning him, and preventing him from arresting a person, as he was commanded, by a writ issued by the Court of Record of a town and county, merely described A. as "one of the serjeants-at-mace of the said town and county," and the judgment was arrested, because it did not appear that A. was a legal officer of the Court out of which the writ issued; for a serjeant-at-mace, *ex vi termini*, means no more than a person who carried a mace for somebody, and the indictment did not show for whom; and taking the whole count together, the jury, in effect, had found that there was an assault and imprisonment, but committed under circumstances which justified the defendant, and therefore there was not sufficient to sustain the judgment, as for a common assault, or for an imprisonment.(o)

The 7 & 8 Geo. 4, c. 53, an Act to consolidate the laws relating to the management and collection of the excise, by sec. 40 *enacts, "That if any person, *1048] armed with any offensive weapon whatsoever, shall with force or violence assault or resist any officer of excise, or any person employed in the revenue or excise, or any person acting in the aid or assistance of such officer or person so employed, who, in the execution of his office or duty, shall search for, take, or seize, or shall endeavor or offer to search for, take, or seize, any goods or commodities forfeited under or by virtue of this Act, or any other Act or Acts of Parliament, relating to the revenue of excise or customs, or who shall search for, take, or seize, or shall endeavor or offer to search for, take or seize any vessel, boat, cart, carriage, or other conveyance, or any horse, cattle, or other thing used in the removal of any such goods or commodities, or who shall

(k) *Rex v. Clark*, 3 Ad. & E. 287 (30 E. C. L. R.).

(l) 2 Hawk. P. C. c. 13, s. 9.

(m) 2 Hawk. P. C. Ibid.

(n) 2 Hawk. P. C. Ibid.

(o) *Rex v. Osmer*, 5 East 304, *ante*, p. 570. There does not appear to have been any count for a common assault in this indictment. C. S. G.

arrest, or endeavor or offer to arrest, any person carrying, removing or concealing the same, or employed or concerned therein, and liable to such arrest, then and in every such case, it shall be lawful for every such officer and person so employed, and person acting in such aid and assistance as aforesaid, who shall be so assaulted or resisted, to oppose force to force, and by the same means and methods by which he is so assaulted or resisted, or by any other means or methods, to oppose such force and violence, and to execute his office or duty, and if any person so assaulting or resisting such officer as aforesaid, or any person so employed, or any person acting in such aid and assistance as aforesaid, shall in so doing be wounded, maimed, or killed, and the said officer or person so employed, or person acting in such aid and assistance as aforesaid, shall be sued or prosecuted for any such wounding, maiming, or killing, it shall be lawful for every such officer, or person so employed, or person acting in such aid and assistance, to plead the general issue, and give this act and the special matter in evidence in his defence; and it shall be lawful for any justice or justices of the peace, or other magistrate or magistrates before whom any such officer or person so employed, or person acting in such aid and assistance as aforesaid, shall be brought for, or on account of, any such wounding, maiming, or killing as aforesaid, and every such justice of the peace and magistrate is hereby directed and required to admit to bail every such officer, and every person so employed, and every person acting in such aid and assistance as aforesaid, any law, usage, or custom to the contrary thereof in anywise notwithstanding.”(p)

By sec. 43, for the better and more impartial trial of any indictment or information for any such violent assault, as aforesaid, “every such offence shall and may be inquired of, examined, tried, and determined in any county in England, if such offence shall have been committed in England or in any of the islands thereof, or in any county in Scotland, if the same shall have been committed in Scotland or in any of the islands thereof, or in any county in Ireland, if the same shall have been committed in Ireland or in any of the islands thereof, in such manner and form as *if the same offence had been committed in such county respectively; (q) [*1049 and that whenever any person shall be convicted of any such violent assault or resistance as aforesaid, it shall be lawful for the Court before which any such offender shall be convicted, or which by law is authorized to pass sentence upon any such offender, to award and order (if such Court shall think fit), sentence of imprisonment, with hard labor, for any term not exceeding the term of three years, either in addition to, or in lieu of, any other punishment or penalty which may by law be inflicted or imposed upon any such offender, and every such offender shall thereupon suffer such sentence in such place, and for such term as aforesaid, as such Court shall think fit to direct.”(r)

By the 5 & 6 Vict. c. 29, s. 21, relating to Pentonville Prison, and by the 6 & 7 Vict. c. 26, s. 19, relating to Millbank Prison, any convict who assaults the governor or any officer or servant employed in either of these prisons, is liable “to be imprisoned for any term not exceeding two years in addition to the term for which, at the time of committing such offence, he was subject to be confined, and shall also be liable to corporal punishment, if the Court shall so order.”

By the 13 & 14 Vict. c. 101, s. 9, “Where any person shall be charged with and convicted of any assault upon any officer of a workhouse or relieving officer in the

(p) By sec. 41, persons against whom indictments or informations have been found or filed for such assaults, are to be bound with two sureties to answer the same, and in default to be committed: by sec. 42, if any offender be in prison for want of bail, a copy of the indictment or information may be delivered to the gaoler with a notice of trial and proceedings had thereon.

(q) This provision would probably be held to extend only to assaults upon officers when in the execution of their duty. If, therefore, upon an indictment containing counts for assaulting an officer in the execution of his duty, and for a common assault, the jury were to acquit on all the counts except on that for the common assault, the judgment would be arrested if the venue were laid in any county except that in which the assault was committed: *Rex v. Cartwright*, 4 T. R. 490, *ante*, p. 182.

(r) Some of the provisions of this Act are repealed by the 4 & 5 Will. 4, c. 51, and the 4 & 5 Vict. c. 20, but not the provisions above set forth. C. S. G.

due execution of his duty, or upon any person acting in aid of such officer, the Court may sentence the offender to the same punishment as is provided by law for an assault upon a peace officer or revenue officer in the due execution of his duty, and shall have the same power as in cases of such last-mentioned assault to order payment of the costs and expenses of the prosecution." And by the 14 & 15 Vict. c. 105, s. 18, the preceding clause is extended to "an assault upon any person included under the word 'officer' in the 4 & 5 Will. 4, c. 76, or upon any other person acting in his aid;" and by sec. 109 of the last-mentioned Act, the term "officer" includes "any clergyman, schoolmaster, person duly licensed to practise as a medical man, vestry clerk, treasurer, collector, assistant overseer, governor, master or mistress of a workhouse, or any other person who shall be employed in any parish or union in carrying this Act or the laws for the relief of the poor into execution, and whether performing one or more of the above-mentioned functions."

We have seen that by the 14 & 15 Vict. c. 19, s. 11,^(s) any person whatsoever may apprehend any person who shall be found committing any indictable offence in the night, and may convey or deliver him to any constable or peace officer in order to his being conveyed, as soon as reasonably may be, before a justice of the peace, *1050] to be dealt with according to law; and by sec. 12, *"if any person liable to be apprehended under the provisions of this Act, shall assault or offer any violence to any person by law authorized to apprehend or detain him, or to any person acting in his aid or assistance, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be imprisoned, with or without hard labor, for any term not exceeding three years."

By the 24 & 25 Vict. c. 100, s. 66, "Any constable or peace officer may take into custody, without a warrant, any person whom he shall find lying or loitering in any highway, yard, or other place during the night, and whom he shall suspect of having committed, or being about to commit, *any felony in this Act mentioned*, and shall take such person *as soon as reasonably may be* before a justice of the peace, to be dealt with according to law."^(t)

If any person were to assault, obstruct, or resist any constable or peace officer whilst apprehending any other person under the preceding section, the person so offending would be punishable under sec. 38.^(u)

*1051]

*CHAPTER THE ELEVENTH.

OF MAIMING, ETC., BY THE FURIOUS DRIVING, ETC., OF COACHMEN.

By the 24 & 25 Vict. c. 100, s. 35, "Whosoever, having the charge of *any carriage or vehicle*, shall, by wanton or furious driving or racing, or other wilful misconduct, *or by wilful neglect*, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor."^(a)

By the 7 & 8 Geo. 4, c. 75, s. 38, every person convicted of working or navigating any wherry, boat, or other vessel licensed to carry persons or passengers on the river Thames, in which any greater number of persons or passengers shall be taken

(s) *Ante*, p. 648.

(t) This clause is taken from the 9 & 10 Vict. c. 25, secs. 13 & 14, and extended to all the felonies under this Act.

(u) *Ante*, p. 1039.

(a) This clause is taken from the 1 Geo. 4, c. 4, which was confined to stage-coaches and public carriages, and to the wanton and furious driving or racing, or wilful misconduct of coachmen and others having the charge of such coaches or carriages. The present section includes all carriages and vehicles, and extends also to wilful neglect. As to the meaning of the term "wilful," see *post*, p. 1059. As to counsellors and abettors, see sec. 67, *ante*, p. 881. As to hard labor, see *ante*, p. 900. As to fine and sureties see *ante*, p. 900. The Act extends to Ireland, but not to Scotland.

or carried than are allowed to be carried therein, in case any one or more of them shall by reason thereof be drowned, besides being liable to be punished for a misdemeanor, is disfranchised and not allowed at any time thereafter to work, row, or navigate any wherry, boat, or other vessel, or to enjoy any of the privileges of a freeman of the company of "The Master, Wardens, and Commonalty of Watermen and Lightermen of the River Thames."

*CHAPTER THE TWELFTH.

[*1052]

OF SETTING SPRING GUNS, ETC.

By the 24 & 25 Vict. c. 100, s. 31, "Whosoever shall set or place, or cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor; and whosoever shall knowingly and wilfully permit any such spring gun, man trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person, to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid: Provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin: Provided also, that nothing in this section shall be deemed to make it unlawful to set or place, or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring gun, man trap, or other engine which shall be set or placed, or caused or continued to be set or placed, in a dwelling house, for the protection thereof."(a)

The setting dog-spears in a wood is not an illegal act at common law, and it was not rendered so by the 7 & 8 Geo. 4, c. 18. Where, therefore, a declaration stated that there was a public footpath through a wood, and that the defendant unlawfully set a dog-spear, being an engine calculated to do grievous bodily harm, as well to the liege subjects as to their dogs, near to the said footway; by means whereof the plaintiff's dog, whilst in pursuit of a rabbit, ran upon the spear and was wounded; and the plea alleged that the spear was set for the purpose of preserving the game; it was held that the plea was good; for the setting of dog-spears is not an illegal act in itself, nor was it rendered such by the 7 & 8 Geo. 4, c. 18, and, although, it was admitted by these pleadings that the spear was calculated to do grievous bodily harm to human beings, still it did not appear to have been set with that intention.(b)

*So where in an action on the 7 & 8 Geo. 4, c. 18, for unlawfully setting an engine calculated to do grievous bodily harm, it appeared that the plaintiff went at night into the defendant's garden and searched among some bushes for a fowl, and while so engaged he came in contact with a wire which caused a loud explosion, whereby the plaintiff was knocked down, and slightly injured in his face and eyes; but there was no evidence to show what was the nature of the engine or of the substance which caused the explosion; it was held that it was not enough that the instrument was one calculated to create alarm, but that it must be calculated to destroy human life, or to inflict grievous bodily harm.(c) [*1053]

(a) This clause is framed from the 7 & 8 Geo. 4, c. 18, with some slight verbal alterations. As to counsellors and abettors, see sec. 67, *ante*, p. 881. As to hard labor, see *ante*, p. 900. As to fine and sureties, see *ante*, p. 900. The Act extends to Ireland, but not to Scotland.

(b) *Jordin v. Crump*, 8 M. & W. 782.

(c) *Wootton v. Dawkins*, 2 C. B. (N. S.) 412 (89 E. C. L. R.).

*1054]

*CHAPTER THE THIRTEENTH.

OF OFFENCES RELATING TO RAILWAYS AND RAILWAY TRAINS.

ALTHOUGH, perhaps, it may be departing from a strictly accurate distribution of offences to collect the clauses creating offences relating to railways and railway trains in one chapter, yet, as such a course appears to be likely to be of more practical utility, it has been adopted.

By the 3 & 4 Vict. c. 97, general provisions are made for the regulation of railways, and by sec. 13, "It shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine driver, guard, porter, or other servant in the employ of such company who shall be found drunk while employed upon the railway, or commit any offence against any of the by-laws, rules, or regulations of such company, or shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the railway belonging to such company, or the works thereof respectively, shall be or might be injured or endangered, or whereby the passage of any of the engines, carriages, or trains shall be or might be obstructed or impeded, and to convey such engine driver, guard, porter, or other servant so offending, or any person counselling, aiding, or assisting in such offence, with all convenient despatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this Act; and every such person so offending, and every person counselling, aiding, or assisting therein as aforesaid, shall, when convicted before such justice as aforesaid (who is hereby authorized and required, upon complaint to him made, upon oath, without information in writing, to take cognizance thereof, and to act summarily in the premises), in the discretion of such justice, be imprisoned, with or without hard labor, for any term not exceeding two calendar months, or, in the like discretion of such justice, shall for every such offence forfeit to Her Majesty any sum not exceeding ten pounds, and in default of payment thereof shall be imprisoned, with or without hard labor as aforesaid, for such period, not exceeding two calendar months, as such justice shall appoint; such commitment to be determined on payment of the amount of the penalty; and every such penalty shall be returned to the next ensuing Court of Quarter Sessions in the usual manner."

Sec. 14. "Provided always, and be it enacted, that (if upon the hearing of any such complaint he shall think fit) it shall be lawful for such justice, instead of deciding upon the matter of complaint summarily, to commit the person or persons *1055] charged *with such offence for trial for the same at the Quarter Sessions for the county or place wherein such offence shall have been committed, and to order that any such person so committed shall be imprisoned and detained in any of Her Majesty's gaols or houses of correction in the said county or place in the meantime, or to take bail for his appearance, with or without sureties, in his discretion; and every such person so offending, and convicted before such Court of Quarter Sessions as aforesaid (which said Court is hereby required to take cognizance of and hear and determine such complaint), shall be liable, in the discretion of such Court, to be imprisoned, with or without hard labor, for any term not exceeding two years."

Sec. 21. "Wherever the word 'railway' is used in this Act it shall be construed to extend to all railways constructed under the powers of any Act of Parliament, and intended for the conveyance of passengers in or upon carriages drawn or impelled by the power of steam or by any other mechanical power; and wherever the word 'company' is used in this Act it shall be construed to extend to and include the proprietors for the time being of any such railway, whether a body corporate or individuals, and their lessees, executors, administrators, and assigns, unless the subject or context be repugnant to such construction."

By the 24 & 25 Vict. c. 100, s. 32, "Whosoever shall *unlawfully* and maliciously

put or throw upon or across any railway any wood, stone or other matter or thing, or shall *unlawfully* and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall *unlawfully* and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall *unlawfully* and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall *unlawfully* and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and if a male under the age of sixteen years, with or without whipping.”(a)

Sec. 33. “Whosoever shall *unlawfully* and maliciously throw, or cause to fall or strike, at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger the safety of any person being in or upon such engine, tender, carriage, or truck, or in or upon any other engine, tender, carriage or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not *less [*1056 than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor.”(b)

Sec. 34. “Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger, or cause to be endangered, the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor.”(c)

By the 24 & 25 Vict. c. 97, s. 35, “Whosoever shall *unlawfully* and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall *unlawfully* and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall *unlawfully* and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall *unlawfully* and maliciously make or show, hide or remove, any signal or light upon or near to any railway, or shall *unlawfully* and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony, and being convicted

(a) This clause is taken from the 14 & 15 Vict. c. 19, s. 6, and the word “unlawfully” is substituted for “wilfully” throughout. As to principals in the second degree, and accessories, see sec. 67, *ante*, p. 881. As to hard labor, see *ante*, p. 900. As to whipping, see *ante*, p. 900. As to sureties, see *ante*, p. 900. The Act extends to Ireland, but not to Scotland.

(b) This clause is taken from the 14 & 15 Vict. c. 19, s. 7. The word “unlawfully” is substituted for “wilfully.” The introduction of the word “at” extends this clause to cases where the missile fails to strike any engine or carriage. The other words in *italics* were introduced to meet cases where a person throws into or upon one carriage of a train, when he intended to injure a person being in another carriage of the same train, and similar cases. In *Reg. v. Court*, 6 Cox C. C. 202, the prisoner was indicted for throwing a stone against a tender with intent to endanger the safety of persons on the tender, and it appeared that the stone fell on the tender, but there was no person on it at the time, and it was held that the section was limited to something thrown upon an engine or carriage having some person therein, and consequently that no offence within the statute was proved, but this case would clearly come within this clause. As to hard labor, &c., see the last note.

(c) This clause is taken from the 3 & 4 Vict. c. 97, s. 15, the words of which were, any person who “shall wilfully do, or cause to be done, anything in such a manner as to obstruct any engine or carriage using any railway, or to endanger the safety of persons conveyed in or upon the same.” The present clause extends to any unlawful act and any wilful omission or neglect. As to counsellors and abettors, see sec. 67, *ante*, p. 881. As to hard labor, see *ante*, p. 900. As to fine and sureties, see *ante*, p. 900.

thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen, with or without whipping.”(d)

Sec. 36. “Whosoever, *by any unlawful act, or by any wilful omission or neglect*, shall obstruct *or cause to be obstructed* any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor.”(e)

*1057] Sec. 37. “Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor: Provided that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall, on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labor, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet.”(f)

Sec. 38. “Whosoever shall unlawfully and maliciously, by any overt act, attempt to commit any of the offences in the last preceding section mentioned, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labor, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds as to the justice shall seem meet.”(g)

See the 26 & 27 Vict. c. 112, “An Act to regulate the Exercise of Powers under Special Acts for the Construction and Maintenance of Telegraphs,” for the general provisions as to such telegraphs.

Upon an indictment on the 3 & 4 Vict. c. 97, s. 15, it appeared that the railway was constructed under an Act of Parliament, and was intended for the conveyance of passengers in carriages drawn by steam, but at the time of the offence the conveyance of passengers for hire had not commenced, and the traffic was confined to the carriage of materials and workmen. A railway truck was placed by the prisoners across the railway so as to obstruct the passage of any carriage and endanger the safety of persons conveyed therein, but its position was discovered, and it was removed before any collision occurred; it was objected that the case was not within

(d) This clause is taken from the 14 & 15 Vict. c. 19, s. 6, and “unlawfully” is substituted for “wilfully” throughout. As to principals in the second degree, and accessories, hard labor, whipping, and sureties, see *ante*, pp. 4, 5.

(e) This clause is taken from the 3 & 4 Vict. c. 97, s. 15. See note (c) *supra*. As to counsellors and abettors, hard labor, fine, and sureties, see *ante*, pp. 4, 5.

(f) This clause is new. It consists of two branches. The first provides against injuries to any battery or other thing used in electric telegraphs. The second provides against the preventing or obstructing communications by such telegraphs: and these offences are made misdemeanors; but as it was foreseen that there may be malicious injuries, which would fall within the first part of this clause, of too trifling a character to deserve so severe a punishment, it was thought fit to empower any justice, who is of opinion that it is not expedient to the ends of justice that the offence should be prosecuted by indictment, summarily to convict the offender. As to counsellors and abettors, hard labor, fine, and sureties, see *ante*, pp. 4, 5. The summary proceedings may be in England under the 11 & 12 Vict. c. 43, and in Ireland under the 14 & 15 Vict. c. 93.

(g) This clause is new, and provides against attempts to commit the offences created by the last section. As to the proceedings on this section see the last note.

the statute—1st, because the railway was not used for the conveyance of passengers for hire; 2dly, because no actual obstruction took place; but, upon a case reserved, it was held that the *case was within the statute. It must be assumed that the railway was completed, and that all that required to be done was to open it for the public traffic. The prisoners did put an obstruction on the line, and they put it in such a position as to endanger the safety of the persons conveyed. The case therefore came within both branches of the section; there was an obstruction put on the line, and it was put so as to endanger the safety of the persons conveyed. It was contended that there could be no obstruction until some train were absolutely obstructed; but such a construction could not be maintained. The object of the Legislature was obviously to prevent any disaster to those using the railway, and to punish those who put obstructions in such a manner as was likely to cause such disaster. The case was, therefore, within the intention of statute; and though, in the ordinary course of things, it would generally be after the railway was fully opened that the public required to be protected, yet an obstruction before that time was within the mischief as well as the words of the statute.(h)

On an indictment on the 3 & 4 Vict. c. 96, s. 15, for throwing a stone upon a railway in such manner as thereby to endanger the safety of one G. C. and of divers other persons being conveyed on the engines and carriages then using the railway, it appeared that the defendant was on a bridge over the railway, and let drop a stone on a train that was passing; the stone was a thin flat stone, about twice the thickness of a biscuit; and the train was travelling at the rate of about fifteen miles an hour. The railway was opened in January 1845, but no Act of Parliament was obtained until the July following. It was objected on the interpretation clause, sec. 21.(hh) that this railway was not constructed under an Act of Parliament; but Alderson, B., held that the effect of that clause was to extend and not to weaken the effect of section 15.(i) And his Lordship told the jury, "there are two propositions for you to consider:—First, did the defendant wilfully cast or drop this stone on the railway? and secondly, did the casting that stone on the railway in the manner in which it was cast endanger the safety of any of the persons travelling on the railway at that time? If you are satisfied on both these points, he is guilty. If the defendant had this stone in his hand at the time when the train was passing, and it dropped accidentally from his hand on the railway, you should acquit him; for that which occurs by accident cannot be said to be wilful. Should you think that the defendant did cast the stone on the railway wilfully, the next question is, was it cast there by him under such circumstances as to endanger the safety of G. C., the guard, the engineer, or any of the passengers or persons in the carriages? Now that would depend very much on the rate at which the train was proceeding at the time, and the weight and the size of the stone dropped. The former is material, because it is the same thing whether I throw a stone at your head or you run your head against the stone. If, therefore, the train were coming along at the rate of fifteen miles an hour, it would strike with that velocity a *stone that meets it. You might drop a stone on a broad-wheeled wagon without doing any harm; but it may be very different where you drop it on a machine going at an enormous rate. Suppose a passenger in this train, going at the rate of fifteen miles an hour, had put his head out of the window, or the guard were to do so, which his duty might render necessary, a blow from a stone of this size and weight certainly might endanger his safety." The jury found that the defendant foolishly dropped the stone on the railway, but not with the intention of doing any injury; Alderson, B.: "The intention of the prisoner in dropping the stone is not the question. It is, 'did he purposely drop the stone on the railway, and would the effect of the stone's being so dropped be to endanger the safety of the persons on the railway.'"(k)

(h) Reg. v. Bradford, Bell C. C. 268.

(hh) *Ante*, p. 1055.

(i) *Ante*, p. 1056, note (c). Alderson, B., said it would have been wiser if a count had been inserted at common law for throwing a stone at a railway carriage, which is an offence at common law.

(k) Reg. v. Bowray, 10 Jurist 211.

Where on an indictment under the 3 & 4 Vict. c. 97, s. 15, it appeared that large quantities of earth and rubbish were found placed across the railway, and the prosecutor's case was that this had been done by the defendant wilfully and in order to obstruct the use of the railway; and the defendant's case was, that the earth and rubbish had been accidentally dropped on the railway; Maule, J., told the jury, that if the rubbish had been dropped on the rails by mere accident, the defendant was not guilty; but "it was by no means necessary, in order to bring the case within this Act, that the defendant should have thrown the rubbish on the rails expressly with the view to upset the train of carriages. If the defendant designedly placed these substances, having a tendency to produce an obstruction, not caring whether they actually impeded the carriages or not, that was a case within the Act." And on the jury asking "what was the meaning of the term '*wilfully*' used in the statute?" the learned Judge added, "he should consider the act to have been *wilfully* done, if the defendant placed the rubbish on the line, knowing that it was a substance likely to produce an obstruction; if, for instance, he had done so in order to throw upon the company's officers the necessary trouble of removing the rubbish." (l)

On an information under a railway Act for throwing stones on the railway and wilfully obstructing the free passage of the railway, it appeared that the acts were done by persons employed by the defendant to repair a wall between the railway and his premises, and that on one occasion, the defendant, being present, told the men to go on, and this was held sufficient evidence to warrant the justices in convicting the defendant. (m)

In a case upon the 3 & 4 Vict. c. 97, s. 15, it was strongly intimated that the neglect of a driver and stoker of an engine to keep a good look-out for signals, according to the rules of the railway company, whereby a collision occurred, and the safety of the passengers was endangered, was not an offence within the 15th section of that Act. (n)

*1060] On an indictment under the 14 & 15 Vict. c. 19, s. 6, for **maliciously* placing a stone upon a railway with intent to obstruct the carriages travelling thereon, it appeared that the prisoners, two boys, were seen to go upon the railway, and whilst one held the lever by which the points were turned, so as to separate two portions of the rails, the other dropped a stone between them, so as to keep them separated; the result would have been, had the act not been detected, that the carriages would have been thrown off the rail. No motive was suggested except that of wanton mischief. The jury were told that it was not necessary that the prisoners should have entertained any feeling of malice against the railway company, or against any person travelling upon it; it was quite enough to support the charge if the act was done mischievously, and with the view to cause an obstruction of a train. (o)

The prisoner was indicted on the 14 & 15 Vict. c. 19, ss. 6, 7, for maliciously throwing a torch at a railway truck with intent in one count to injure it, in another to endanger the safety of persons travelling in the truck; there was, however, no one on the truck, upon which the prisoner let the torch fall; and Channel, B., held that there was no evidence to support the second count. (p)

On an indictment on the 14 & 15 Vict. c. 19, s. 7, for maliciously throwing a stone into a railway carriage with intent to endanger the safety of any person in it,

(l) Reg. v. Holroyd, 2 M. & Rob. 339.

(m) Roberts v. Preston, 9 C. B. (N. S.), 208 (99 E. C. L. R.).

(n) Reg. v. Pardenton, 6 Cox C. C. 247, Creswell and Williams, JJ. But the words of that section were, "every person who shall wilfully do, or cause to be done, any thing," &c. See note (c), *ante*, p. 1056.

(o) Reg. v. Upton, Greaves' Campb. Acts 92; 5 Cox C. C. 298, Wightman, J.

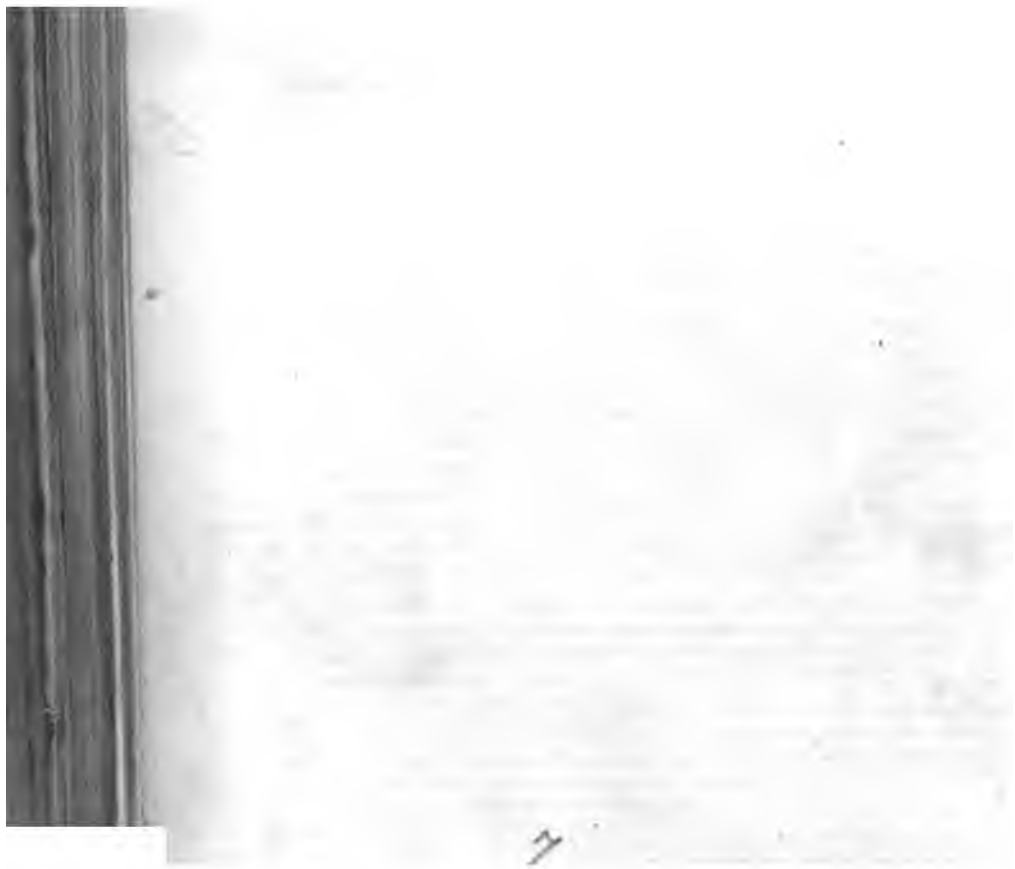
(p) Reg. v. Sanderson, 1 F. & F. 37. See Reg. v. Court, *ante*, p. 1056, note (b). It is reported to have been objected that the words "matter or thing" were *ejusdem generis* with the other words employed, and did not include the case of a combustible, which could only injure a truck by means of fire; for otherwise the 8th section would be nugatory, and that section requires proof of an intent to destroy the carriage by fire. Now, this is an error, for sec. 8 has nothing to do with railway carriages, but only with railway buildings, and it is quite clear that secs. 6, 7 include everything whatsoever that is used with any of the intents therein mentioned.

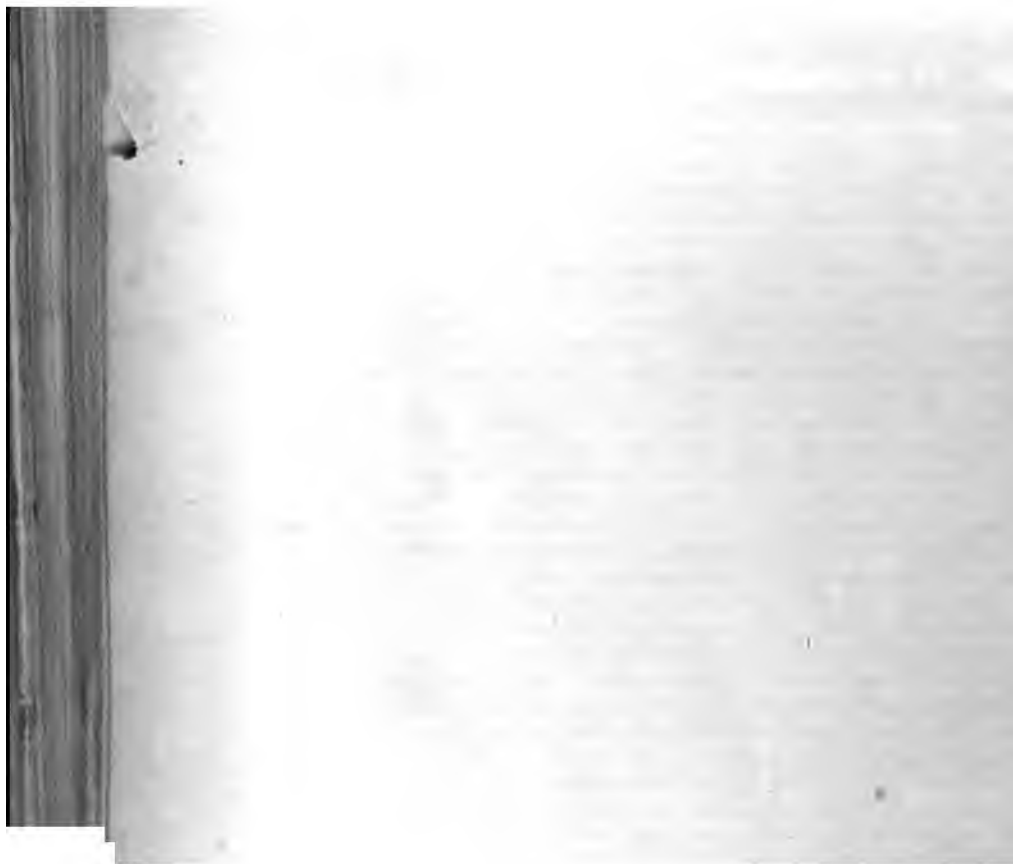
it appeared that there had been considerable popular excitement against a person who was about to travel by the train, and there was a crowd assembled at the time of its departure, and the prisoner had thrown a stone intending to hit him, but without any previous ill-will. It was urged that the statute did not apply; its object was to protect passengers by railways, and not to afford any additional protection against common assaults. Erle, J., after consulting Williams, J., said: "Looking at the preamble of the sections relating to this class of offences, which recites that it is 'expedient to make further provision for the punishment of *aggravated* assaults,' and looking also to the provision of these clauses as indicated by the terms of sec. 6, immediately preceding the section upon which this indictment is framed, I consider that the 'intent to endanger the safety of any person' travelling on the railway, spoken of in both sections, must appear to have been an intent to inflict some grievous bodily harm, and such as would sustain an indictment for assaulting or wounding a person with intent to do some grievous bodily harm; but as that is a question of degree, which it is impossible to define further than in those terms, it must be a question for the jury, upon the facts, whether there has been such an intent;" and his Lordship directed the jury, that "in order to convict the prisoner they must be satisfied that he intended to *inflict on the person at [*1061 whom he aimed some grievous bodily harm." (q)

Where on a trial for assault at the Central Criminal Court, it appeared that the prosecutrix and the defendant left Brighton together by a train which ran to the New Cross station, which is within the jurisdiction of the Central Criminal Court; and the assault was committed between Brighton and the Three Bridges station in the county of Sussex, and the prosecutrix there left the carriage in which she had been previously riding with the defendant, and travelled in another carriage to New Cross; it was held that by the combined operation of the 7 Geo. 4, c. 64, s. 13, and the Central Criminal Court Act, 4 & 5 Will. 4, c. 36, s. 2, the case might be tried at the Central Criminal Court. There was but one journey, and although the carriages were distinct, they all formed but one conveyance, and the fact that the prosecutrix and defendant rode in different carriages after the assault did not affect the question; it was the same as if they had occupied different parts of the same carriage. The words "through which any carriage shall have passed," in the 7 Geo. 4, c. 64, refer to the time of the trial, and not to a time antecedent to the commitment of the offence, and therefore make the offence triable at any place within the limits of the beginning and end of the journey, and do not confine the trial to any county through which the train had passed up to the time of the offence. (r)

(q) *Reg. v. Rooke*, 1 F. & F. 107. This case does not appear to have been argued on the part of the Crown, and, with all deference to the very learned Judges, it clearly proceeded on a mistake. The 14 & 15 Vict. c. 19, contains a number of enactments which have no bearing whatever on each other: the Act was framed to provide for totally different matters, which at that time called for a remedy for each. Secs. 1 & 2 relate to persons found by night with intent to commit felonies. Sec. 3 relates to administering chloroform. Secs. 4 & 5 relate to aggravated assaults. Then secs. 6, 7 & 8 are railway clauses, and it is perfectly clear that, although a person who commits an offence within either sec. 6 or sec. 7, may commit an assault, it is not essential to prove an assault in any case under either sec. 6 or sec. 7; in other words, neither of these sections makes an assault an ingredient in any offence contained in them, and no indictment upon them even does allege an assault. They were most carefully framed for the very purpose of including every case where there was an "intent to injure or endanger the safety of any person;" and those words were selected as much more general than with intent to do grievous bodily harm. It is also a fallacy to suppose that, even if the sections were to be construed together, sec. 4 warrants this decision: for though one branch of it is "inflict any grievous bodily harm," the other is "cut, stab, or wound" without any aggravation; so that a wound, however slight, and given without any intention to inflict grievous bodily harm, is within the section. Every indictment must allege the intent to be to injure or endanger the safety of some person, and it is very confidently submitted that the only proper question to be left to the jury in every such case is, did the defendant do the act with intent to injure or endanger the safety of that person?

(r) *Reg. v. French*, 8 Cox C. C. 252. The Recorder. Sussex was assumed to be out of the jurisdiction of the Central Criminal Court. It was also objected that the 7 Geo. 4, c. 64, did not apply to railway trains, because they were not contemplated when that Act passed, and they did not come within the terms of the act; this objection seems to have been tacitly overruled.









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